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MICHIGAN HIGH COURT RULING OFFERS POSITIVE GUIDANCE ON CHALLENGES TO TORT REFORM LAWS

by

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After a decade of frustration, proponents of state tort reform have lately been making progress throughout America gradually but steadily. One of their most significant courtroom victories of 2004 was in Michigan, where its Supreme Court handed down an important decision upholding a tort reform statute as constitutional. *Phillips v. Mirac, Inc.*, 470 Mich. 415, 685 N.W.2d 174 (2004).

Such a victory is of utmost importance to anyone who has ever considered the following fundamental question: Who should make America's liability, or "tort," law, the legislatures or the courts? This question is significant not only because of its philosophical value as a jurisprudential question, but also for its practical implication. In little over a decade, starting in the early nineties, over sixty state court decisions have used provisions in state constitutions to nullify attempts by state legislatures to reform America's tort law. Never before have state constitutional provisions "been used on so grand a scale to overturn state legislative policy decisions." Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Who Should Make America's Tort Law: Courts Or Legislatures*, Monograph (Wash. Lgl. Fndt.), 1997, at 2. If laws were intended to be made by legislators, rather than judges, why have some judges "on a retroactive basis, created brand new tort claims that have no basis in precedent or state public policy" and then deny legislatures the right to abolish these new causes of action?

Before reviewing the High Court decision from Michigan, it is important to first look at the relevant legal history. When the American colonies first declared their independence, one of the first legislative acts they took was to adopt "reception statutes" which enabled their courts to receive and develop the English Common Law in accordance with the public policy of these states. It must therefore follow that since state legislatures delegated this authority to develop common law doctrines and precedents, the legislature could at any time retrieve this authority. It is established law among all common law jurisdictions that statutory acts supersede common law precedents.

From the time of Independence until the late 1960s, courts have developed the common law in a "slow, incremental fashion." *Id* at 5. However, in the 1970s, spurred by the type of activism

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embraced by the Warren Court, judicial lawmaking became more and more revolutionary in content. Notable examples include the creation of absolute liability and the expansion of the scope of punitive damage.

In response, a number of state legislatures in the 1970s started to “retrieve” their historical right to make tort law. Unfortunately, on certain occasions when legislatures have decided to modify certain portions of their tort laws, the plaintiff bar has challenged these reforms under provisions of state constitutions that were previously thought of, as the President of the Association of Trial Lawyers of America stated, “toothless.” Mark Mandell, *Two More Supreme Courts Strike Down Tort Reforms*, LIABILITY WK., July 19, 1999, at 7. In a mere decade, courts have nullified state tort legislation over sixty times, and in each of these cases plaintiffs’ lawyers relied “solely on obscure state constitutional provisions that have little historical explanation, rather than on well recognized provisions of the United States Constitution.” Victor E. Schwartz, Mark A. Behrens, and Leah Lorber, *Oregon Tort Reform Is Latest Victim Of Judicial Nullification*, LEGAL OPINION LETTER (Wash. Lgl. Fndt.), Aug 6, 1999, at 1. Most of the state court decisions nullifying these statutes “have not given state legislative policy judgments the same level of respect” the United States Supreme Court has paid to the Congress. Schwartz, Behrens & Taylor, *supra*, at 14. Moreover, many of these decisions demonstrate how willing some judges are to substitute their own views of what tort law “ought to be” for that of elected legislators.

A prime example of state constitutionalism run amok is the nullification of the so-called “collateral source rule.” The rule dictates that a plaintiff can be paid by the wrongdoer even if he or she has already received compensation for the specific harm if that compensation came from a source that is not related to the defendant. Such a doctrine is based on the assumption that the defendant, as the wrongdoer, should not benefit from the plaintiff’s providence, reflected in his purchase of insurance. However, in modern times, plaintiffs may benefit from this rule even though the sources of payment they receive do not stem from their own “providence.” When legislatures tried to address this issue, their efforts were immediately nullified by state Supreme Courts that harbored a “we know better than you how to make tort law” sentiment. *Id.*, at 17

It is against this background that the *Phillips* case in Michigan arose. The plaintiff’s daughter died in an automobile accident while she was a passenger in a leased vehicle driven by another person. The plaintiff then initiated a lawsuit against the lessor of the vehicle, Mirac, Inc., on the basis of Michigan Civil Code 257.401(3), a statute that “*establishes* vicarious liability for automobile lessors when permissive users...are negligent and cause automobile accidents injuring others. The Act also *caps* the damages for such lessors at \$20,000 for each injured person to a maximum of \$40,000 for each accident.” After trial, a jury returned a verdict of \$900,000 against Mirac, Inc., grossly exceeding the statutory cap. The trial court then concluded that the “damage caps were unconstitutional on the basis that the statute, in capping damages, violated the right to trial by jury found in...the Michigan Constitution.” *Phillips*, 470 Mich. at 420. This, it reasoned, was because “the right of jury trial includes the right of having a jury not only determine damages, but that the jury’s determination cannot be altered by the Legislature.” *Id.* Furthermore, the trial court ruled that the cap also “violated...equal protection of the laws...[for] it impermissibly causes similarly situated litigants to be treated differently.” *Id.*

The Michigan Court of Appeals reversed. It held that the statute did not violate the right to a jury trial for two reasons. First, it reasoned that since the Legislature can abolish or modify common law and statutory rights and remedies, it necessarily follows that it can limit the damages recoverable for a cause of action. Second, the statute does not remove from the jury the determination of facts and amount of damages. The cap only “limits the legal consequences of the

jury’s finding.” Regarding the equal protection challenge, the appellate court analyzed it under the rational basis test and concluded that “Michigan has a legitimate interest in the continued operation of automobile rental businesses, and protecting those businesses from large damage awards in jury trials bears a rational relationship to that end.”

The question before the Michigan Supreme Court on review was whether MCL 257.401(3), which “caps the amount of a lessor’s liability...violates plaintiff’s rights under the Michigan Constitution to a jury, trial, equal protection, or due process.” 470 Mich. at 422. The Court affirmed the statute’s constitutionality.

The Supreme Court, in answering whether the “constitutional provision [of jury trial] makes what the Legislature attempted to do—cap damages even though a jury found that the damages were greater than the cap—unconstitutional,” *id.* at 424, first determined the scope of the right at issue. In interpreting the language of the Constitution, the Court construed the legal term “jury trial” “in [its] technical legal sense.” *Id.* It adopted the definition set forth by Justice Thomas J. Cooley of the same Court in 1880, that the right to jury trial is “the right as it existed before [the Independence]; the right to a trial by jury as it had become known to the previous jurisprudence of the State.” *Id.* at 9. But what constituted a “jury trial” back then? According to Professor Austin W. Scott, the “only matters properly within the province of the jury are questions of fact.” According to the U.S. Supreme Court, the jury was confined to finding facts and that law was for the courts and, moreover, that falling within the ambit of law was the *assessment of civil penalties*. *Tull v. United States*, 481 U.S. 412 (1987). “The assessment of civil penalties thus cannot be said to involve the ‘substance of a common-law right to a trial by jury,’ nor a ‘fundamental element of a jury trial.’” *Id.* Since by such logic “juries...do not decide the law or the outcome of legal conflicts...[but] what happened, how, and when,” *Charles Reinhart Co v Winiemki*, 444 Mich. 579, 601(1994), “excluded from the jury’s purview are such matters as...burden of proof [etc]...and the legal import of the amount of damages found by the jury.” *Tull, supra*, at 426. Thus, the damage cap does not offend the right of trial by jury, because the amount a plaintiff could actually receive was *never within those things a jury can decide*, and the statute only limits the *legal* consequences of the jury’s finding of the amount of damage. Since the plaintiff in this case had a jury trial and the jury did determine the facts of her case, she was not denied her constitutional right.

The Court then turned to the plaintiff’s equal protection challenge. The plaintiff argued that she, unlike plaintiffs in litigation not concerning rental cars, cannot recover what the jury has decided are her damages. The Court responded by pointing out that “when any statute is passed, the Legislature is almost invariably deciding to treat certain individuals differently from others.” 470 Mich. at 431. Nevertheless, the Court decided to review her challenge. Traditionally, there are three levels of scrutiny the Court could have applied: strict scrutiny, intermediate legal or heightened scrutiny, and the rational basis review. In this case, the Court refused to adopt strict scrutiny test, as suggested by the plaintiff, because when identified at the “most specific level,” the right asserted by the plaintiff is no longer the fundamental yet broad “right to jury trial,” but a “claimed right to have a jury’s assessment of damages be unmodifiable as a matter of law.” *Id.* at 431. Since this claimed right is not “implicit in the concept of ordered liberty,” its alleged violation should not be subjected to strict scrutiny, but rather the rational basis test. In her concurring opinion, Justice Weaver added an additional justification: she pointed out that “social or economic legislation...[unlike laws “in which classifications are based on ‘suspect factors’ such as race, ethnicity or national origin”] is generally subject to review under the rational basis test.” *Id.* at 441.

According to the rational basis test, courts would uphold legislation as long as that legislation is rationally related to a legitimate government purpose. This highly deferential standard requires a

challenger to show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute. On the other hand, it does not test the wisdom, need, or appropriateness of the legislation. The damage cap statute passed this test without much difficulty.

What general trend does one see here? It is noteworthy that the Michigan Supreme Court recognized this new trend in tort reform legal battles in its opinion in *Phillips*. It mentioned that “by holding that damage caps legislation is permissible and inoffensive...we join many other states in reaching this conclusion.” Among the state high courts that upheld the tort reform laws in their states: California, Massachusetts, West Virginia, Indiana and Virginia. But is this a steady trend; or do legislators have to face more obstacles? The result is mixed. Not long ago, the Ohio Academy of Trial Lawyers launched an assault on the tort reform laws in that state. It did so by bringing an original action in the Ohio Supreme Court against six common pleas court judges, challenging the constitutionality of certain tort reform laws. The Court ruled that Ohio’s tort reform legislation “usurps judicial power in violation of the Ohio constitutional doctrine of separation of powers...” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451 (1999). The gist of the majority’s decision basically was that it is impermissible for the Legislature to enact legislation similar to that previously found by the Court to be unconstitutional.

This holding certainly reminds one of the central theme of the *Lochner* jurisprudence back in the thirties, when the Justices of the U.S. Supreme Court openly asked “Are we all...at the mercy of legislative majorities?” *Lochner v. New York*, 198 U.S. 45 (1905) and proceeded to provide that question with a negative answer.

Why is it imperative that legislatures resume a more vibrant role in lawmaking? What are the advantages of having legislative lawmaking as opposed to judicial lawmaking?

First, however imperfect, the development of law by legislatures is “a public event with hearings, debates, and compromises.” Schwartz, Behrens & Taylor, *supra*, at 7. Not only is the public informed of the laws’ enactments; they also know that since it is their elected representatives who are voting in the process, they have the final say over what law should be made and what should not. On the other hand, the development of judge-made common law is not made in the public light, and worse still, is retroactive. When judges decide to create a new cause of action, a new duty is imposed on every party that has interest at stake in the decision. Furthermore, they do so retroactively, denying fair notice to the public about these newly created rights and responsibilities. Under such a system, it is very difficult for businesses to function without being seriously hampered, since they are unable to know what the rules really are.

Second, it should also be noted that legislatures in general have better knowledge in the area in which they legislate. They are able to acquire the necessary knowledge by conducting public research and hearings. Judges, on the other hand, must base their judgment on the necessarily one-sided arguments made by the parties’ counsel in a courtroom setting. This inevitably affects their ability to acquire the maximum amount of knowledge in the area with which they are dealing.

It is for these reasons that Michigan High Court’s ruling should be hailed as a major victory by the general public. The Court has provided a sterling example for courts throughout the country on how they should interpret, not make, laws; and how courts should prevent the law from being hijacked by small but legally sophisticated interest groups that seek to change the law in the courtrooms, rather than legislative chambers.