

MISSISSIPPI JOINS THE RANKS OF TORT REFORM SUCCESS STORIES

by
David W. Clark

The past several years have seen dramatic changes in Mississippi that will improve the civil justice system. These changes include the electoral defeat of a notoriously pro-plaintiff state Supreme Court justice; decisions from that Court to eliminate or restrain the more unfair practices used against defendants; the election of a pro-tort reform Governor; and significant statutory tort reform from two special sessions of the legislature.

Judicial Changes. In November 2002, the voters soundly defeated a Mississippi Supreme Court justice who had been staunchly pro-plaintiff, and a controversial yet influential presence on the Court. He was defeated by a respected defense lawyer, Jess Dickinson.

In January 2003, the Supreme Court adopted Mississippi Rule of Civil Procedure 35, authorizing independent medical examinations for the first time in state court practice.¹ In May 2003, the Court amended Mississippi Rule of Evidence 702 (to make it identical to Federal Rule of Evidence 702) and tightened the requirements for expert witnesses and opinions, adopting the *Daubert* tests and gate-keeper function for the trial judge, discarding the more lenient *Frye* standard. *Miss. Transportation Com. v. McLemore*, 863 So.2d 31 (Miss. 2003).

In 2004, the state Supreme Court has issued several significant decisions. In three related decisions,² the Court has effectively eliminated the abusive practice, allowed in the state courts over the last several years, of joining hundreds or even thousands of plaintiffs in a single case in a selected county if only one of the plaintiffs lived there. This “mass joinder” procedure had stretched the requirements of Mississippi’s joinder rule³ to allow joinder of even “similar” claims or claims arising from the same “pattern of conduct.” *American Bankers Ins. Co. v. Alexander*, 818 So.2d 1073 (Miss. 2001).

¹The court had omitted Rule 35 when it adopted the text of almost all of the other Federal Rules of Civil Procedure in 1982.

²*Janssen Pharmaceutica, Inc. v. Armond.*, MS Sup. Ct., No. 2003-IA-OO398-SCT, Feb. 19, 2004 ; *Janssen Pharmaceutica, Inc. v. Grant.*, No. 2003-IA-00174-SCT, May 13, 2004 ; *Janssen Pharmaceutica, Inc. v. Bailey*, No. 2002-CA-00736-SCT, May 13, 2004.

³Mississippi’s rule for joinder of parties, MRCP Rule 20, has the same language as FRCP Rule 20, allowing joinder of parties with claims “arising out of the same transaction or occurrence” and having “at least one common question of law or fact.”

David W. Clark is a partner in the Jackson office of Bradley Arant Rose & White LLP. He specializes in commercial litigation. The American Tort Reform Association recently named Mr. Clark a “Legal Reform Champion” for his longtime work to reform Mississippi’s tort laws.

The outlandish verdicts have slowed, if not ceased: while there had been a spate of outrageous verdicts from 1995 through 2001, there were only two verdicts over \$10 million in 2002, and none in 2003 or so far in 2004.

Statutory Changes. In an 83-day special session in late 2002, the legislature passed some positive measures. The legislature adopted even more significant changes in the 2004 special session. The first special session enacted several significant measures: 1) absolute limits (caps) on punitive damage awards, based upon the net worth of the defendant; 2) a limit on non-economic damages in medical malpractice cases; and 3) the repeal of the 15 percent penalty imposed on defendants who had appealed unsuccessfully. The 2004 special legislative session enacted even more significant reforms. The end result is that, for all actions filed on or after September 1, 2004:

1. Venue:
 - a. Each plaintiff (if more than one) must independently establish venue.
 - b. For medical providers, venue will be proper only where the alleged act or omission occurred.
 - c. The trial judge can change venue for the convenience of the parties and witnesses (forum non-conveniens).

2. Non-Economic Damage Limitations:
 - a. There is a \$500,000 per plaintiff limit in medical malpractice cases.
 - b. There is a \$1 million per plaintiff limit for all other cases.

3. Innocent Seller:
 - a. A seller cannot be held liable unless it had control over design, testing, packaging or labeling of a product, or had actual or constructive knowledge of the defect.
 - b. Mississippi code section (from 2002) that allowed a seller to be retained as a defendant even though “innocent” is eliminated.

4. Punitive Damage Caps:
 - a. The 2002 session enacted absolute caps on punitive awards, for cases filed after December 31, 2002.
 - b. The 2004 statute decreased the absolute limits on caps for all but the largest net worth defendants. The caps now range from a low of 2% of net worth for a defendant with a net worth of \$50 million or less, to a top limit of \$20 million for a defendant with net worth of \$1 billion or more.

5. Premises Liability:
 - A property owner is not liable for death or injury to a contractor or its employees if the contractor knew or should have known of the danger.

6. Joint and Several Liability:
 - a. Each defendant is responsible only for the damages it caused (allocated to it by jury).
 - b. Liability will be “several” only (unless defendants consciously and deliberately pursued a common plan or design to commit tortious act).
 - c. There is no reallocation of fault assigned to an immune tort-feasor (one whose liability is limited by law).

7. Jury Service:
 - Adopted certain provisions of the Jury Patriotism Act, designed to limit exemptions from jury service.