

**Michigan Senate Insurance Committee Hearings  
May 22, 2012 at 2:30 pm  
Room 100 Farnum Building,  
123 W. Allegan Street, Lansing MI 48933**

**SB 1116. The New Michigan Standard of Care  
Good Faith, Reasonable Belief and Best interest of the Patient**

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The standard of care, or standard of practice, is a legal concept and the test used in determining whether there has been professional negligence. This test is applied to professional conduct, including, but not limited to: doctors, attorneys, engineers, architects, dentists and chiropractors, to name only a few of the professions. This has been the test in Michigan and the United States for over 100 years.

On February 1, 1981 Michigan codified this common law rule in the Michigan Civil Jury Instructions (M Civ JI). Instead of each judge individually drafting jury instructions from the common law based on their "reasonable and good faith belief" in what the law was, which was too subjective, in order to provide a uniform standard, these instructions were codified and all judges were required to use these standard instructions. The instruction and test for professional negligence is M Civ JI 30.01 Professional Negligence and/or Malpractice (redacted for simplicity):

"Professional negligence" or "malpractice" with respect to the [doctor's] conduct... [is] the failure to do something which a physician of ordinary learning, judgment or skill would do, or... not do, under the same or similar circumstances you find to exist in this case.

This is an objective standard. Whether the physician had good intentions or believed the treatment was in the best interest of the patient has never been a consideration and would be inadmissible as irrelevant.

Within the standard of care there is what is called a "judgment rule". Within the standard of care there is not always just one acceptable treatment in a given situation, but there may be 2, 3, or more acceptable choices. If there are 2 choices (A and B) both of which are within the standard of practice as stated in M Civ JI 30.01, and the physician selects A because in his "judgment" it was thought to be the better alternative, he has not breached the standard of care even though it later turns out that B would have produced a better result.

The physician judgment rule has been an accepted and practiced concept in the law for 100 years. One of the first and classic cases is *Rytkonen v Lojaco*, 269 Mich 270 (1934). There the physician had a choice of securing a chest drainage catheter by using tape, a pin, or both. Dr. Lojaco used the tape, it failed and the tube slipped into the patient's chest resulting in complications and death. All the experts testified they always used a pin as it was safer, and this was the method used at famous medical institutions. Notwithstanding, no one testified that using tape was outside the "standard of care" but one of a couple of acceptable choices. Therefore, as the judgment was within the objective standard of care, there was no professional negligence.

As is sometimes stated, and which is hopefully clear from the above, the judgment rule does not operate independent or outside the standard of care, but can only operate within the standard of care of what is acceptable practice. Almost all medicine is judgment. As physicians often say there is acceptable judgment and unacceptable judgment. If choices A, B, and C are the within the standard of care, choosing B is acceptable judgment, but choosing D is not. There is no method of objectively measuring medical decisions other than by testing the decisions against an objective standard, the standard of care.

SB 1116 would eliminate any medical standard of care for Michigan patient's care. It would be immunity for all Michigan physicians. Unless the physician admitted he/she didn't have a reasonable and good faith belief that the care was in the best interest of the patient, regardless whether the care was abysmal, there would be no way to otherwise prove their state of mind.

The proposed new test for the medical standard of care, SB 1116, eliminates any comparison with what other recognized physicians do in the same situations. It eliminates science and acceptable protocols based on science, and instead focuses solely the physician's state of mind and good intentions when exercising judgment.

A physician is not liable medical malpractice if the conduct at issue constituted the exercise of professional judgment. For purposes of this subsection, a person exercises professional judgment if the person acts with a reasonable and good-faith belief that their conduct is both well founded in medicine and in the best interests of the patient.

What would the new Michigan Civil Jury Instructions on Professional Negligence and/or Malpractice be, or what would be the burden of proof to show the care was unacceptable?

When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, you must find that:

1. The doctor's mental state was such that he/she acted in "bad-faith" and with an "unreasonable belief" or that his/her treatment was known "not to be in the best interest of the patient"; and

2. The doctor's mental state was such that he/she did not have a "reasonable and good-faith belief" that the care was based on "well founded medicine".

No other state in the United States, or the world that applies a standard of care to medicine, uses such a test, and for good reason. This test is not based on science, medicine or what has been found to be the best and most efficacious treatment, but the physician's state of mind and beliefs. Medical standards based on good faith beliefs are not about medicine; it is about a state of mind - beliefs.

This test would give a free pass to those like the recent Michigan physician who wrongfully diagnosed hundreds of children with epilepsy. It would be a free pass to all physicians who do not treat within acceptable parameters as long as they were willing to say, "I really believed this was in the best interest of the patient." Good intentions should never be the standard of care, but the standard of care should only be tried and tested medicine. As a wise man once said, "The road to Hell is paved with good intentions."

Those proposing this bizarre standard of practice test have said this is the standard of care for attorneys and what is good for attorneys should be good for physicians. They are wrong, either intentionally to create a standard of practice test that will result in immunity from responsibility for substandard care, or because they do not understand the law. Either way, they are wrong.

Interestingly, proponents of this new no standard of care have been previously told they are wrong and by the very people who insure many of Michigan physicians: ProNational Insurance Company, Professionals Direct Insurance Co., and Insurance Institute of Michigan . Amicus Brief on Appeal to the Michigan Supreme Court, September 27, 2007. *Grace v Bruce Leitman, PC*, Supreme Court Docket No. 131035, referred to further below.

Notwithstanding, they will undoubtedly argue the attorney judgment rule is the standard of practice for attorneys, which it is not, and therefore, the attorney judgment rule should be the physician judgment rule. While this may well be confusing to those who do not use these concepts on a daily basis, there is no substitute to understanding the concepts when the quality and safety of Michigan medicine is at stake. Therefore, repetition of the concepts should be worth repeating.

Attorneys like physicians are held to the same standard of practice as stated in M Civ JI 30.01 Professional Negligence and/or Malpractice. This same instruction is used in cases of legal malpractice, or professional negligence. Within the attorney standard of care, like with physicians, there is a judgment rule.

Because trial work is not science, but tactics of persuasion and trial strategy, there are often more judgment choices within the standard of care. However, in addition to the judgment choice being with the standard of practice, if the decision was made for personal reasons (not good faith) the attorney could still be liable. By way of example: was the decision not to call a witness because the attorney thought his would hurt the

client's case, or because the attorney had not prepped the witness; was he tired and wanted to quit for the day; or had the trial gone on too long and the client had no money to pay his fee. There are factors in the attorney judgment that involve good faith and the client's best interest ahead of the attorney's best interest. However, what most miss in this rule is the judgment decision has to be acceptable within the standard of care, "what an attorney of ordinary learning, judgment and skill would do under the same circumstance", but in addition, the decision must be in the best interest of the client. The reasonable belief and best interest of the client isn't the standard of care, but a test after and in addition to determining the judgment was within the standard of care. Unlike that being proposed, it is not the sole test, but third criteria to weigh after it has been determined that the attorney's judgment complied with the standard of care.

This misreading by some was emphasized in one of the more recent and frequently cited legal malpractice cases.

"[W]here an attorney acts in good faith and honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment." *Simko v Blake*, 448 Mich 648, 658, 532 NW2d 842 (1995). An attorney must act as would an attorney of ordinary learning, judgment, or skill under the same circumstances. An attorney's actions that fall within the attorney judgment rule involve tactical and strategic decisions regarding presentation of evidence, witness to call, argument to make for persuasion.

"To hold that an attorney may not be held liable for the choice of trial tactics and the conduct of a case based on professional judgment is not to say, however, that an attorney may not be held liable for any of his actions in relation to a trial. He is still bound to exercise a reasonable degree of skill and care in all his professional undertakings." *Simko*, 659, quoting *Woodruff v Tomkin*, 616 F2d 924, 930 (C.A.6 1980).

An attorney, like a physician is bound by the standard of care, "ordinary learning, judgment, or skill under the same circumstances." Within this standard of care, there may be many acceptable choices in a particular situation, like using tape, a pin, or both, and any one would be acceptable as long as the attorney's self interests were not the basis for the decision.

ProNational Insurance Company, Professionals Direct Insurance Co., and Insurance Institute of Michigan said the exact same thing in their Amicus Brief on Appeal to the Michigan Supreme Court, September 27, 2007. *Grace v Bruce Leitman, PC*, Supreme Court Docket No. 131035,

The Attorney Judgment Rule does not operate independently of the standard of care. The rule protects the alternative judgments that fall within those parameters. The question here is whether the Attorney Judgment Rule operates

outside the standard of care, "unlike the malpractice standards. It does not do so, because it does not operate independently of the standard of care.

Medical judgments are more scientific than legal ones, and they are far more susceptible to statistical analysis. By contrast, most legal judgments are necessarily more artful, and less scientific.

In the final analysis, the Michigan Attorney Judgment Rule gives lawyers no advantage over doctors in malpractice cases. The doctor is protected when his or her choice falls within the range of proper options.

The bottom line: law and medicine both have a standard of practice, "the failure to do something which a physician/attorney of ordinary learning, judgment or skill would do, or... not do, under the same or similar circumstances you find to exist in this case. What the new physician judgment rule attempts to do is eliminate the standard of practice test, and make everything a judgment test, and by claiming it is the test for lawyers, given the attitude of many toward lawyers, it will sell.

If there is any doubt that this proposed rule is anything other than an attempt to piggyback the wrongly perceived attorney judgment rule, a comparison of the "attorney judgment rule" and the proposed "standard of care test" for doctors" tells the whole story – the language is almost identical.

**Attorney Judgment Rule.** Where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment. *Simko v Blake, 448 Mich 648, 658.*

**SB 1116.** A physician is not liable medical malpractice if the conduct at issue constituted the exercise of professional judgment. For purposes of this subsection, a person exercises professional judgment if the person acts with a reasonable and good-faith belief that their conduct is both well founded in medicine and in the best interests of the patient.

When a professional's judgment does not have to comply with the standard of practice, there is no standard of care. The standards long studied and formulated by clinical trials, experience, peer reviewed articles and physician collaboration will mean nothing. The only standard will be, "I honestly tried."

Various courts have held that good faith and honest judgment have no place in medical malpractice cases, and interject confusion and misstates the burden of proof.

"[A] jury charge that would allow the defendant to put before the jury the issue of his good faith or his honest belief that a particular course of treatment was proper

confuses the proper standard of care in a medical malpractice case." *Sasser v Connery*, 565 So2d 50, 53 (1990) (concurring opinion).<sup>1</sup>

Terms such as "honest mistake" and "bona fide error" have no place in "medical malpractice cases. "The terms not only defy rational definition but also tend to muddle the jury's understanding of the burden imposed upon a plaintiff in a malpractice action. If use of the terms were permitted, it would be appropriate to ask: Must a plaintiff prove a "dishonest mistake" or a "bad faith error" in order to recover? The obvious negative answer reveals the vice in the use of the terms." *Sasser*, 54.

Any standard of practice test based on good intentions and the doctors state of mind, or reasonable belief is immunity for one's actions. A clearly negligent physician will be able to say that he acted in good faith, or with an honest belief that he was acting in his client's best interest, and will have no liability for clear errors or omissions. As written, there is no standard of care within which the judgment must fall other than honest belief and good faith – an impossible standard to prove and, virtual or de facto immunity.

One does not need our courts to tell us the result of immunity for conduct, although they have. Whether intended, or not,

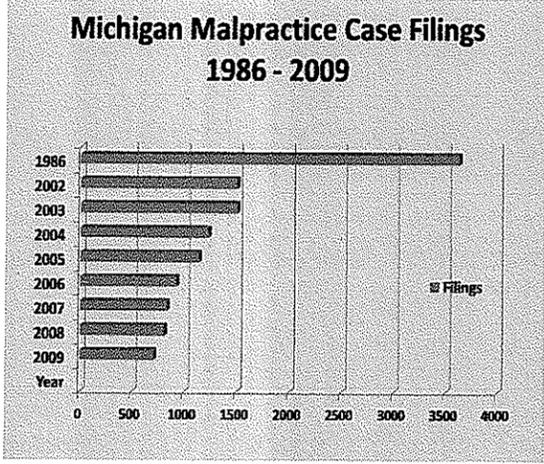
"Immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution." *Pickett v Manistique Public Schools*, 50 Mich App 770, 776 (1973).

There is no need for further limiting health care responsibility for negligent conduct. The 1994 medical liability laws have resulted in a drop in malpractice filings of over 75% since 1986, and 50% since 2002. Indemnity payments are down by over 60% since 1991, 3 years before the last "tort reform". Defense costs is the only number that has gone up as the present laws make the plaintiff's burden of proof so difficult, and the recovery so much lower that defendants are trying far more cases. Eliminating 80% of the claims resulted in only a 15% overall savings in the liability costs between 1991 and 2006. See graphs below.

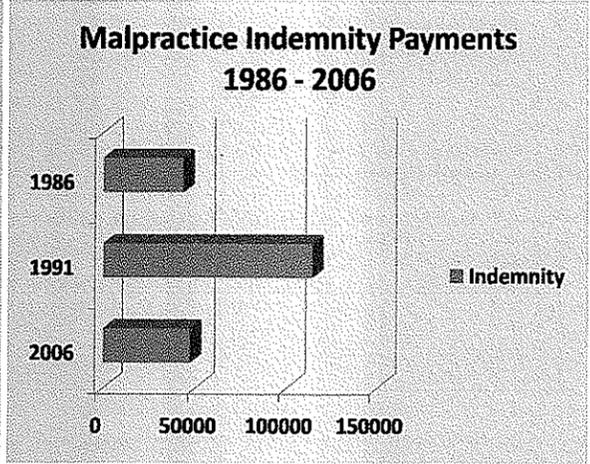
Physician immunity will impair safety efforts such a the Keystone Project, result in a lower quality of care, drive up the bills for injuries due to negligent care, and eventually result in a downward spiral of the quality of care in Michigan.

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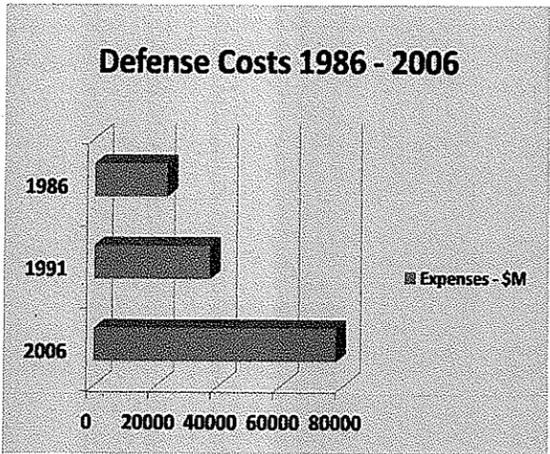
<sup>1</sup> See other citations within this concurrence, which cites to courts in Florida, Oregon, Minnesota, South Dakota, Washington, North Carolina, Virginia, Connecticut, which have specifically rejected or disapproved of the "good faith" or "honest mistake" jury charge in medical malpractice cases, mainly because it is confusing and misstates the applicable standard.



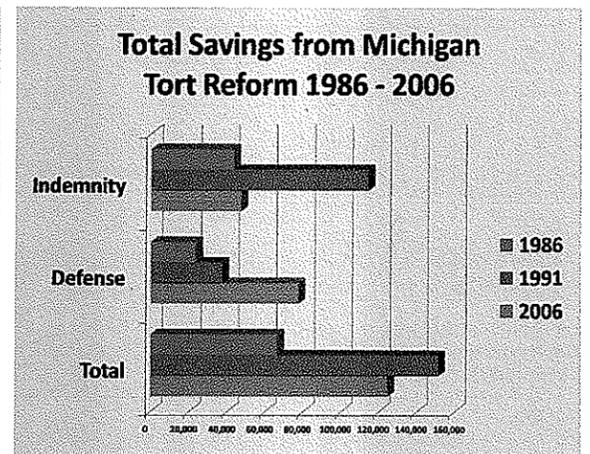
3600 filings in 1986 to 707 in 2009  
An 80% fall off in filings



\$144 M in 1991 to \$47 M in 2006  
Decrease of about 60%  
American College of Surgeons Nov 2011  
Mich one of 4<sup>th</sup> lowest in the nation



2006 to 1991 defense costs rose 109%  
1991 - \$37,223,000  
2006 - \$77,642,000



1991 - \$151,505  
2006 - \$127,783  
Total Savings - \$23,722 (15.6%)  
after eliminating 80% of cases filed

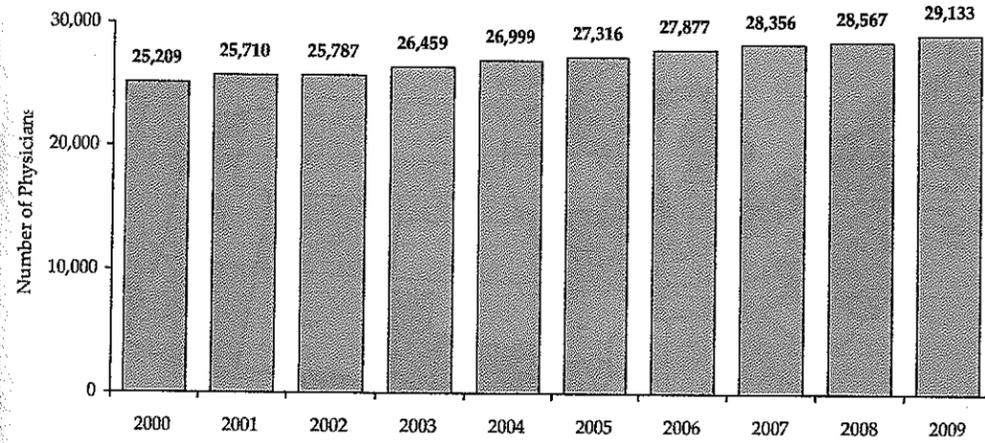
## Comments

1. No other state in the US has a standard for medical care as is being proposed in Michigan. That is because it is not a standard of care. It has nothing to do with medicine, but only insulating physicians from being held responsible for negligent conduct.
2. It is contrary to all concepts of safety, quality care, and cutting the cost of health care bills from medical negligence. Since the IOM report (1999) the problem in medicine is not litigation, but medical errors. Using the most recent studies and the rising cost of medical bills, in 2012 the medical costs alone from negligent care is expected to exceed \$22 billion.<sup>2</sup>
3. If "good faith and belief" becomes the test for quality health care in Michigan, we would attract the lowest denominator of health care providers.
4. No national health care organization, from JCAHO, Medicare, AMA or MHA uses any definition for the standard of care other than a physician of ordinary learning, judgment or skill. Adopting a different and lower standard may well jeopardize hospital accreditation and reimbursement.
5. Some do their own studies and suggest litigation has resulted in fewer physicians per capita in Michigan than other states. Objective analysis demonstrates no connection between litigation and the supply of physicians. Michigan has one of the highest ratios of physicians to citizens in the country. They say there is a shortage of pediatricians, internist and family practice physicians; on this they are correct. However, this is not unique to Michigan. Every state has a shortage of these physicians because there are fewer going into this area of practice as these are the 3 lowest paid practice areas in the profession.

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<sup>2</sup> J. Van Den Bos, K. Rustagi, "The \$17.1 Billion Problem: The Annual Cost Of Measurable Medical Errors", *Health Affairs*, 30, no.4 (2011):596-603

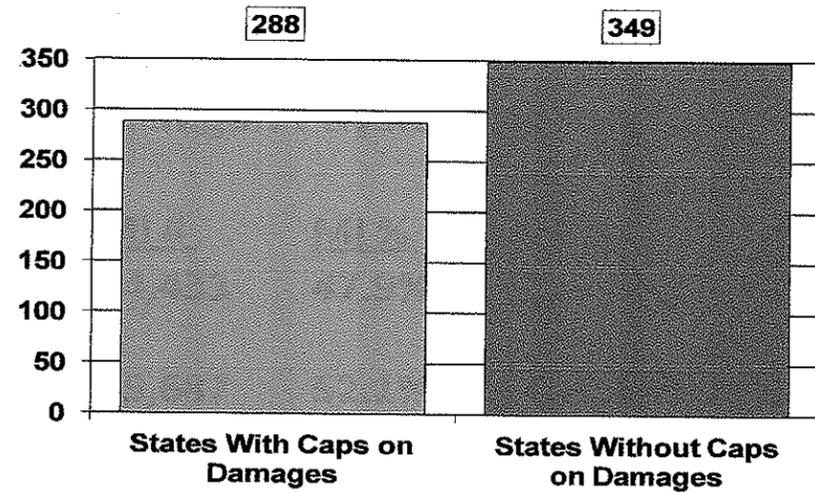
**Number of Physicians in Michigan: 2000 to 2009**



**Physician Characteristics and Distribution in the U.S.  
American Medical Association**

American Medical Association – Michigan Physicians 2000 to 2009 increased by 4000 while the population stayed the same or declined slightly.

**Number of Physicians  
Per 100,000 Population: 2009**



AMA 2009 – Caps do not affect physician per capita ratios.