



# MISSISSIPPI

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## **1. Introduction**

Prior to 2004, Mississippi had long been notorious as an “anything goes” jurisdiction. It was considered a jurisdiction in which jury verdicts were unpredictable and often exceeded what most people considered to be just. Furthermore, it was a jurisdiction in which forum shopping was seemingly encouraged by way of a venue statute that was open to interpretation and interpreted “loosely” by many of its courts.

However, the enactment of certain legislation in both 2003 and 2004 had a significant impact on civil litigation in the state. As a result, Mississippi has become a much more business-friendly jurisdiction.

### **SUMMARY OF TORT REFORM LEGISLATION**

## **2. Venue & Joinder**

### **A. Mississippi’s General Venue Statute**

Prior to January 1, 2003, Mississippi’s General Venue Statute provided, in part, as follows:

Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue and, if the defendant is a domestic corporation, in the county in which said corporation is domiciled or in the county where the cause of action may occur or accrue, except where otherwise provided...

Miss. Code Ann. § 11-11-3 (1972).

Additionally, Miss. Code Ann. § 11-11-11 (1972) provided that:

All civil actions for the recovery of damages brought against a nonresident or the representative of a nonresident in the state of Mississippi may be commenced in the county in which the action accrued *or where the plaintiff then resides or is domiciled*, except as otherwise provided by law.

*(emphasis added)*.

Therefore, under the prior venue statutes, a plaintiff could easily establish venue in his county of residence, simply by joining a nonresident defendant. *See, e.g., Senatobia Comm. Hosp. v. Orr*, 607 So. 2d 1224 (Miss. 1992) (resident plaintiff may sue in county of his or her residence when suing both nonresident and resident defendants).

However, beginning in 2002 and continuing through 2004, Mississippi’s legislature significantly altered Mississippi law with respect to venue. Miss. Code Ann. § 11-11-3 currently provides, in part, as follows:

(1)(a)(i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.

(ii) Civil actions alleging a defective product may also be commenced in the county where the plaintiff obtained the product.

(b) If venue in a civil action against a nonresident defendant cannot be asserted under paragraph (a) of this subsection (1), a civil action against a nonresident may be commenced in the county where the plaintiff resides or is domiciled.

(2) In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action.

*See* Laws 2002, 3<sup>rd</sup> Ex. Sess., Ch. 2, § 1, eff. January 1, 2003 (H.B. 2); Laws 2004, 1<sup>st</sup> Ex. Sess., Ch. 1, § 1, eff. September 1, 2004 (H.B. 13). Furthermore, Miss. Code Ann. § 11-11-11 was repealed. *See* Laws 2002, 3<sup>rd</sup> Ex. Sess., Ch. 4, § 1, eff. January 1, 2003 (H.B. 19).

#### **B. Venue as to Medical Providers**

In addition to its reform to Mississippi law with respect to venue generally, the Mississippi Legislature adopted a special venue provision for actions against medical providers, which provides as follows:

(3) Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred.

Miss. Code Ann. § 11-11-3(3).

The special venue provision with respect to medical providers has proven to be even more significant than previously anticipated. This is due to the fact that Miss. Code Ann. § 11-11-3(3) has been held to be preemptive in circumstances where the plaintiff joins claims against a medical provider with claims against non-medical providers. *See, e.g., Adams v. Baptist Memorial Hospital-DeSoto, Inc.*, 965 So. 2d 652 (Miss. 2007) (venue for wrongful death action brought against casino, hospital, and treating physicians was in county where alleged medical malpractice occurred).

### **C. “Bootstrapping” of Venue No Longer Allowed**

Possibly the most significant change in Mississippi’s general venue provision is the adoption of Miss. Code Ann. § 11-11-3(2), “In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action.” Consequently, a plaintiff may no longer “bootstrap” venue that is proper to one plaintiff to another, improperly joined plaintiff. *See, e.g., Creel v. Bridgestone/Firestone North American Tire, LLC*, 950 So. 2d 1024 (Miss. 2007) (citing *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004)).

### **D. Forum Non Conveniens**

The General Venue Statute was amended to codify the recent adoption of Mississippi Rule of Civil Procedure 82(e) regarding transfer of actions based on *forum non conveniens*. The amendment provides that the court, upon proper motion and for the convenience of the parties and witnesses, “shall decline to adjudicate the matter under the doctrine of *forum non conveniens*.” In deciding whether to transfer the action, the court shall consider the following factors: (1) ease of access to sources of proof; (2) availability and cost of compulsory process for attendance of unwilling witnesses; (3) possibility of viewing of the premises, if viewing would be appropriate; (4) unnecessary expense or trouble to the defendant not necessary to the plaintiff’s own right to pursue his remedy; (5) administrative difficulties of the forum courts; (6) existence of local interest in deciding the case close to home; and (7) traditional deference given to a plaintiff’s choice of forum. The amendment allows for the transfer of actions *intrastate* (from one county to another county), as well as, for the dismissal of an action if it would be more appropriately brought in another state. In the latter circumstance, the court will not dismiss an action unless the defendant files with the court a written stipulation that he or she will not assert a statute of limitations defense if the action is re-filed in another state.

## **3. Damage Caps**

### **A. Non-Economic Damages**

Effective September 1, 2004, the *Mississippi Code* was revised in order to cap a plaintiff’s recovery of non-economic damages as follows:

- A \$500,000 cap on non-economic damages in actions filed on or after September 1, 2004, for injuries based on medical malpractice or breach of standard of care against a provider of health care, including institutions for the aged or infirm.
- A \$1,000,000 cap on non-economic damages in all other actions filed on or after September 1, 2004.

Miss. Code Ann. § 11-1-60(2) (Supp. 2010).<sup>1</sup>

## **B. Punitive Damages**

Effective September 1, 2004, for all causes of action filed on or after that date, Miss. Code Ann. § 11-1-65(3) was revised in order to reduce the statutory cap on punitive damages as follows:

- A \$5,000,000 cap for a defendant with a net worth of more than \$500,000,000 but not more than \$750,000,000.
- A \$3,750,000 cap for a defendant with a net worth of more than \$100,000,000, but not more than \$500,000,000.
- A \$2,500,000 cap for a defendant with a net worth of more than \$50,000,000, but not more than \$100,000,000.
- Two percent (2%) of a defendant's net worth for a defendant with a net worth of \$50,000,000 or less.

Miss. Code Ann. § 11-1-65 (Rev. 2004).

**NOTE:** The amendments adopt caps on non-economic damages for the first time and lower the caps on punitive damages, as follows:

<b><u>CORPORATION'S WORTH</u></b>	<b><u>OLD LAW</u></b>	<b><u>NEW LAW</u></b>
\$1 Billion +	\$20M	\$20M
\$750M-\$1B	\$15M	\$15M
\$500M-\$750M	\$10M	\$5M
\$100M-\$500M	\$7.5M	\$3.75M
\$50M-\$100M	\$5M	\$2.5M
\$50M or less	4%	2%

## **4. Innocent Seller Exception - (Products Liability Act)**

The Mississippi Products Liability Act was amended to add an innocent seller exception. In an action alleging that a product is defective, the seller of a product shall not be liable unless (1) the seller “exercised substantial control over that aspect of the design, testing, manufacturer, packing or labeling of the product that caused the harm for which recovery of damages is sought”; (2) “the seller altered or modified the product and that alteration or modification was a substantial factor causing the harm”; or (3) “the seller had actual or constructive knowledge of the defective condition of the product at the time he supplied the product.” The amendment goes on to state that it is the “intent of

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<sup>1</sup> Statutory cap on non-economic damages in medical malpractice action applies to all wrongful death beneficiaries (in the aggregate), not each beneficiary-plaintiff independently. *See Estate of Klaus ex rel. Klaus v. Vicksburg Healthcare, LLC*, 972 So. 2d 555 (Miss. 2007).

this section to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product.”

**NOTE:** The legislature “repealed” the prior innocent seller exception contained in Miss. Code § 11-1-64. In addition to addressing the same issues as the prior statute, the amendment adds a new limitation to the innocent seller exception in circumstances where the seller had “actual or constructive knowledge of the defective condition of the product at the time he supplied the product.” The limitation introduces a subjective element into the analysis and has the potential to create questions of fact to be resolved by the jury.

**EFFECTIVE DATE:** All causes of action filed on or after September 1, 2004.

## **5. Allocation of Fault - (Joint Tortfeasors)**

In any civil action based on “fault”<sup>2</sup> the liability for damages caused by two or more persons shall be several only, and not joint and several, and a joint tortfeasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. The trier of fact shall allocate fault to each joint tortfeasor regardless of whether one or more of the joint tortfeasors are immune from liability. Additionally, any liability assigned to a joint tortfeasor who is immune shall **NOT** be reallocated to any other tortfeasors. **LIMITATIONS:** The provision will not apply if the joint tortfeasors acted “consciously and deliberately” in pursuit of a common plan or design to commit a tortuous act, or actively take part in it. Under such circumstances, liability shall be joint and several.

**NOTE:** This is a significant change in the law. Under the old law (Miss. Code § 85-5-7), the liability of joint tortfeasors was joint and several to the extent necessary for the person suffering injury, death or loss to recover 50% of his or her recoverable damages. Additionally, because liability is now several, the right of contribution of a tortfeasor against his/her fellow joint tortfeasors has been removed from the statute.

**EFFECTIVE DATE:** All causes of action filed on or after September 1, 2004.

## **6. Premises Liability**

No owner, occupant, lessee or managing agent of property shall be liable for the “death or injury of an independent contractor or the independent contractor’s employees resulting from danger of which the contractor knew or reasonably should have known.”

**EFFECTIVE DATE:** All causes of action filed on or after September 1, 2004.

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<sup>2</sup> “Fault” is defined as “an act or omission of a person which is the proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn.”

## 7. Jury Service

All qualified persons shall be liable to serve as a juror, unless excused by the court for one of the following causes:

- The juror is ill and on account of this illness is incapable of performing jury service; or
- The juror's attendance would cause undue or extreme physical harm or financial hardship to the prospective juror or a person under his or her supervision.

An excuse of illness must be supported by a certificate of a licensed physician, or a judge of the court for which the individual was called to serve, who shall decide whether to excuse the juror. An excuse of undue or extreme physical harm or financial hardship requires a showing of one or more of the following; (1) the individual would be required to abandon a person under his care; (2) the individual would incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or those under his or her care; or (3) the individual would suffer physical hardship that would result in illness or death. After two years, a person excused from jury services shall become eligible once again for qualification as a juror, unless the person was excused from service permanently.

Any member of the Mississippi National Guard on active duty shall be exempt from jury duty upon written presentation of a current written statement from his superior officer that such jury service will likely interfere with his military duties.

If a person summoned for jury services fails to appear or fails to complete the jury service as directed, he shall be ordered by the court to appear and show cause for his failure to comply. If he fails to show good cause for noncompliance, he is in civil contempt of court and may be fined not more than \$500 or imprisoned not more than three days. In lieu of the fine or imprisonment, the court may order that the person complete a period of community service.

Notwithstanding these provisions, any individual scheduled to appear for jury services has the right to postpone the date of their initial appearance for jury service once every two years. Prior to the grant of postponement, the prospective juror must contact the clerk of court and fix a date certain to appear for jury service not more than six months or two terms of the court after the date on which the prospective juror originally was called to serve.

The Administrative Office of the Court shall promulgate rules to establish a Lengthy Trial Fund to be used to provide full or partial wage replacement to jurors who serve as petit jurors in a civil case for more than ten days.

It shall be unlawful for any employer or other person to (1) persuade or attempt to persuade any juror to avoid jury service; (2) intimidate or threaten any juror in that respect; (3) remove or otherwise subject an employee to adverse employment action as a



result of jury service, if the employee notifies his employer that he or she has been summoned to serve as a juror within a reasonable period of time after receipt of the summons. It shall be unlawful for any employer to require or request an employee to use annual, vacation or sick leave for time spent responding to a summons for jury duty, time spent participating in jury selection, or time spent actually serving on a jury. Any violation shall be deemed an interference with the administration of justice and a contempt of court and punishable as such.

**EFFECTIVE DATE:** Shall take effect and be in force from and after January 1, 2007.

#### **8. Proceedings before Mississippi State Board of Medical Licensure**

Any patient who has both filed a complaint with the Board of Medical Licensure against a licentiate and suffered harm to his person that is alleged in the complaint shall have the right to attend any proceedings that determine substantive rights of a licentiate conducted by the Board for disciplinary purposes regarding the licentiate as to that patient's treatment. Notice of such a hearing before the Board shall be provided to the patient at the same time and in the same manner provided to the licentiate. Whether the patient has suffered harm shall be decided by the Board.

**EFFECTIVE DATE:** This section "shall take effect and be in force from and after September 1, 2004."

#### **9. Right to a Speedy Bench Trial**

If the parties to cause of action agree, any claim filed alleging damages may receive a bench trial which shall be conducted in 270 days or less after the cause of action has been filed. The cause of action shall be a priority item on the court's docket.

**EFFECTIVE DATE:** This section "shall take effect and be in force from and after September 1, 2004."

#### **10. Waiver of Medical Privilege**

"In a medical malpractice action with multiple defendants, the medical privilege shall be considered waived by and between all defendants."

**NOTE:** It appears that this statute is intended to allow co-defendants to exchange medical records without the need to obtain prior approval of the plaintiff or the court. While it is clear that the legislature may redefine the contours of the physician-patient privilege under state law, this provision may run afoul of Federal law, specifically HIPAA. Absent exigent circumstances, the most prudent course is for defendants to attempt to obtain the consent of the plaintiff or the approval of the court prior to exchanging

plaintiff's medical records or information relating to plaintiff's medical history.

**EFFECTIVE DATE:** This section "shall take effect and be in force from and after September 1, 2004."