



SENATE BILL No. 513

March 23, 1993, Introduced by Senators WARTNER, EMMONS, CISKY, WELBORN and GEAKE and referred to the Committee on Judiciary.

A bill to amend sections 2945, 2946, 2947, 2948, and 2949 of Act No. 236 of the Public Acts of 1961, entitled as amended "Revised judicature act of 1961," being sections 600.2945, 600.2946, 600.2947, 600.2948, and 600.2949 of the Michigan Compiled Laws; and to add sections 2946a, 2946b, and 2949a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Section 1. Sections 2945, 2946, 2947, 2948, and 2949 of Act
2 No. 236 of the Public Acts of 1961, being sections 600.2945,
3 600.2946, 600.2947, 600.2948, and 600.2949 of the Michigan
4 Compiled Laws, are amended and sections 2946a, 2946b, and 2949a
5 are added to read as follows:
6 Sec. 2945. As used in sections 2946 to ~~2949~~ 2949A and
7 section 5805: ~~— "products—~~

1 (A) "BEYOND A REASONABLE DOUBT" MEANS THE MEASURE OR DEGREE
2 OF PROOF THAT WILL PRODUCE IN THE MIND OF THE TRIER OF FACT NO
3 REASONABLE DOUBT AS TO THE TRUTH OF THE ALLEGATION SOUGHT TO BE
4 ESTABLISHED.

5 (B) "CLEAR AND CONVINCING EVIDENCE" MEANS THAT MEASURE OR
6 DEGREE OF PROOF THAT WILL PRODUCE IN THE MIND OF THE TRIER OF
7 FACT A FIRM BELIEF OR CONVICTION AS TO THE TRUTH OF THE ALLEGA-
8 TIONS SOUGHT TO BE ESTABLISHED. THE LEVEL OF PROOF REQUIRED TO
9 ESTABLISH CLEAR AND CONVINCING EVIDENCE IS MORE THAN THAT
10 REQUIRED UNDER PREPONDERANCE OF THE EVIDENCE, BUT LESS THAN THAT
11 REQUIRED FOR PROOF BEYOND A REASONABLE DOUBT.

12 (C) "CONSUMER PRICE INDEX" MEANS THE MOST COMPREHENSIVE
13 INDEX OF CONSUMER PRICES AVAILABLE FOR THIS STATE FROM THE BUREAU
14 OF LABOR STATISTICS OF THE UNITED STATES DEPARTMENT OF LABOR.

15 (D) "DRUG" MEANS A SUBSTANCE RECOGNIZED AS A DRUG IN THE
16 OFFICIAL UNITED STATES PHARMACOPOEIA, OFFICIAL HOMEOPATHIC PHAR-
17 MACOPOEIA OF THE UNITED STATES, OR OFFICIAL NATIONAL FORMULARY,
18 OR A SUPPLEMENT TO THEM; A SUBSTANCE INTENDED FOR USE IN THE
19 DIAGNOSIS, CURE, MITIGATION, TREATMENT, OR PREVENTION OF DISEASE
20 IN HUMAN BEINGS OR ANIMALS; A SUBSTANCE OTHER THAN FOOD INTENDED
21 TO AFFECT THE STRUCTURE OR A FUNCTION OF THE BODY OF HUMAN BEINGS
22 OR ANIMALS; OR A SUBSTANCE INTENDED FOR USE AS A COMPONENT OF AN
23 ARTICLE SPECIFIED IN THIS SUBDIVISION.

24 (E) "IMPLANTED DEVICE" MEANS A MECHANISM, APPARATUS, OR CON-
25 TRIVANCE THAT IS IMPLANTED WITHIN THE BODY OF A HUMAN BEING FOR
26 THE CURE, MITIGATION, TREATMENT, OR PREVENTION OF DISEASE IN A

1 HUMAN BEING, OR TO AFFECT A STRUCTURE OR FUNCTION OF PART OF THE
2 BODY OF A HUMAN BEING.

3 (F) "LIMITED LIFE PRODUCT" MEANS A PRODUCT THAT IS DESIGNED
4 TO BE USED ONLY DURING A SPECIFIC PERIOD OF TIME AFTER MANUFAC-
5 TURE AND UPON THE EXPIRATION OF SUCH PERIOD OF TIME BECOMES USE-
6 LESS, INEFFECTIVE, OR DANGEROUS OR CARRIES A MANUFACTURER'S WARN-
7 ING AGAINST USE OF THE PRODUCT AFTER THE SPECIFIC PERIOD OF
8 TIME.

9 (G) "PREPONDERANCE OF THE EVIDENCE" MEANS THE MEASURE OR
10 DEGREE OF PROOF THAT IS OF GREATER WEIGHT OR MORE CONVINCING IN
11 THE MIND OF THE TRIER OF FACT THAN THE MEASURE OR DEGREE OF PROOF
12 THAT IS OFFERED IN OPPOSITION TO THE TRUTH OF THE ALLEGATION
13 SOUGHT TO BE ESTABLISHED.

14 (H) "PRODUCTION" MEANS MANUFACTURE, CONSTRUCTION, DESIGN,
15 FORMULATION, DEVELOPMENT OF STANDARDS, PERFORMANCE, PREPARATION,
16 PROCESSING, ASSEMBLY, INSPECTION, TESTING, LISTING, CERTIFYING,
17 WARNING, INSTRUCTING, MARKETING, ADVERTISING, PACKAGING, OR
18 LABELING.

19 (I) "PRODUCTS liability action" means an action based on
20 ~~any~~ A legal or equitable theory of liability brought for or on
21 account of death or injury to person or property caused by or
22 resulting from the ~~manufacture, construction, design, formula,~~
23 ~~development of standards, preparation, processing, assembly,~~
24 ~~inspection, testing, listing, certifying, warning, instructing,~~
25 ~~marketing, advertising, packaging, or labeling~~ PRODUCTION of a
26 product or a component of a product.

1 Sec. 2946. (1) ~~It shall be admissible as evidence~~ A
2 PRESUMPTION ARISES in a products liability action that the
3 ~~manufacture, construction, design, formula, development of stan-~~
4 ~~dards, preparation, processing, assembly, inspection, testing,~~
5 ~~listing, certifying, warning, instructing, marketing, advertis-~~
6 ~~ing, packaging, or labeling~~ PRODUCTION OF A PRODUCT OR A COMPO-
7 NENT OF A PRODUCT WAS NOT DEFECTIVE IF THE PRODUCTION was done
8 pursuant to the generally recognized and prevailing nongovernmen-
9 tal standards in existence at the time the product was sold or
10 delivered by the defendant to the initial purchaser or user.
11 THIS PRESUMPTION MAY BE REBUTTED ONLY BY CLEAR AND CONVINCING
12 EVIDENCE.

13 (2) IN A PRODUCTS LIABILITY ACTION BROUGHT AGAINST A MANU-
14 FACTURER OR SELLER FOR HARM ALLEGEDLY CAUSED BY A PRODUCT DESIGN,
15 A MANUFACTURER OR SELLER IS NOT LIABLE IF, AT THE TIME THE PROD-
16 UCT LEFT THE CONTROL OF THE MANUFACTURER, A PRACTICAL AND TECHN-
17 CALLY FEASIBLE ALTERNATIVE DESIGN WAS NOT AVAILABLE THAT WOULD
18 HAVE PREVENTED THE HARM WITHOUT IMPAIRING THE USEFULNESS OR
19 DESIRABILITY OF THE PRODUCT TO USERS. AN ALTERNATIVE DESIGN IS
20 PRACTICAL AND FEASIBLE IF THE TECHNICAL, MEDICAL, AND SCIENTIFIC
21 KNOWLEDGE RELATING TO THE SAFETY OF THE PRODUCT WAS, AT THE TIME
22 THE PRODUCT LEFT THE CONTROL OF THE MANUFACTURER, DEVELOPED,
23 AVAILABLE, AND CAPABLE OF USE IN THE MANUFACTURE OF THE PRODUCT,
24 AND ECONOMICALLY FEASIBLE FOR USE BY THE MANUFACTURER.

25 (3) ~~(2) It shall be admissible in evidence~~ A PRESUMPTION
26 ARISES in a products liability action that the ~~manufacture,~~
27 ~~construction, design, formula, development of standards,~~

~~1 preparation, processing, assembly, inspection, testing, listing,~~
~~2 certifying, warning, instructing, marketing, advertising, packag-~~
~~3 ing, or labeling~~ PRODUCTION OF A PRODUCT OR A COMPONENT OF A
4 PRODUCT WAS NOT DEFECTIVE IF THE PRODUCTION was done pursuant to
5 the federal and state law, rules, or regulations in effect at the
6 time the product was sold or delivered by the defendant to the
7 initial purchaser or user. THIS PRESUMPTION MAY BE REBUTTED ONLY
8 BY CLEAR AND CONVINCING EVIDENCE.

9 (4) IN A PRODUCTS LIABILITY ACTION BROUGHT AGAINST A MANU-
10 FACTURER OR SELLER FOR HARM ALLEGEDLY CAUSED BY THE PRODUCTION OF
11 A PRODUCT OR A COMPONENT OF A PRODUCT, THE MANUFACTURER OR SELLER
12 IS NOT LIABLE IF THE ASPECT OF THE PRODUCTION THAT ALLEGEDLY
13 CAUSED THE HARM WAS SPECIFICALLY ADOPTED BY A FEDERAL LAW OR
14 APPROVED BY OR IN COMPLIANCE WITH STANDARDS PROMULGATED BY AN
15 AGENCY OF THE FEDERAL GOVERNMENT RESPONSIBLE FOR THE SAFETY OF
16 THE PRODUCT BEFORE THE PRODUCT WAS SOLD OR DELIVERED BY THE
17 DEFENDANT TO THE INITIAL PURCHASER OR USER. THIS SUBSECTION DOES
18 NOT APPLY IF THE PLAINTIFF PRESENTS CLEAR AND CONVINCING EVIDENCE
19 THAT THE MANUFACTURER OR SELLER INTENTIONALLY WITHHELD FROM CON-
20 GRESS OR THE AGENCY OF THE FEDERAL GOVERNMENT MATERIAL INFORMA-
21 TION RELATIVE TO THE SAFETY OF THE PRODUCT.

22 (5) ~~(3)~~ Evidence of a change in the philosophy, theory,
23 knowledge, technique, or procedures of or with regard to the
24 ~~manufacture, construction, design, formula, development of stan-~~
25 ~~dards, preparation, processing, assembly, inspection, testing,~~
26 ~~listing, certifying, warning, instructing, marketing,~~
27 ~~advertising, packaging, or labeling~~ PRODUCTION made, learned,

1 placed in use, or discontinued after the ~~event of death or~~
2 ~~injury to person or property shall not be~~ MANUFACTURE OR SALE OF
3 THE PRODUCT IS NOT admissible in a ~~product~~ PRODUCTS liability
4 action. ~~to prove liability.~~

5 SEC. 2946A. (1) IN A PRODUCTS LIABILITY ACTION, A PERSON
6 SHALL NOT GIVE EXPERT TESTIMONY ON THE APPROPRIATE PRODUCTION OF
7 A PRODUCT OR A COMPONENT OF A PRODUCT UNLESS THE PERSON MEETS
8 BOTH OF THE FOLLOWING CRITERIA:

9 (A) SPECIALIZES IN, OR AT THE TIME OF THE OCCURRENCE THAT IS
10 THE BASIS FOR THE ACTION SPECIALIZED IN, THE SUBJECT MATTER IN
11 WHICH HE OR SHE IS TESTIFYING.

12 (B) DEVOTES, OR AT THE TIME OF THE OCCURRENCE THAT IS THE
13 BASIS FOR THE ACTION DEVOTED, A SUBSTANTIAL PORTION OF HIS OR HER
14 PROFESSIONAL TIME TO THE ACTIVE PRACTICE IN THE SUBJECT MATTER IN
15 WHICH HE OR SHE IS TESTIFYING.

16 (2) IN DETERMINING THE QUALIFICATIONS OF AN EXPERT WITNESS
17 IN A PRODUCTS LIABILITY ACTION, THE COURT, AT A MINIMUM, SHALL
18 EVALUATE ALL OF THE FOLLOWING:

19 (A) THE EDUCATIONAL AND PROFESSIONAL TRAINING OF THE EXPERT
20 WITNESS.

21 (B) THE AREA OF SPECIALIZATION OF THE EXPERT WITNESS.

22 (C) THE LENGTH OF TIME THE EXPERT WITNESS HAS BEEN ENGAGED
23 IN THE ACTIVE PRACTICE IN THE SUBJECT MATTER IN WHICH HE OR SHE
24 IS TESTIFYING.

25 (D) THE RELEVANCY OF THE EXPERT WITNESS'S TESTIMONY.

1 (3) THIS SECTION DOES NOT LIMIT THE POWER OF THE TRIAL COURT
2 TO DISQUALIFY AN EXPERT WITNESS ON GROUNDS OTHER THAN THE
3 QUALIFICATIONS SET FORTH IN THIS SECTION.

4 (4) IN A PRODUCTS LIABILITY ACTION, AN EXPERT WITNESS SHALL
5 NOT TESTIFY ON A CONTINGENCY FEE BASIS. A PERSON WHO VIOLATES
6 THIS SUBSECTION IS GUILTY OF A MISDEMEANOR.

7 SEC. 2946B. (1) IN A PRODUCTS LIABILITY ACTION, A COURT
8 SHALL NOT AWARD DAMAGES FOR NONECONOMIC LOSS THAT EXCEED
9 \$225,000.00 UNLESS 1 OR MORE OF THE FOLLOWING CIRCUMSTANCES
10 EXIST:

11 (A) THERE HAS BEEN A DEATH.

12 (B) THE INJURY INVOLVES THE REPRODUCTIVE SYSTEM OF THE
13 PARTY.

14 (C) THE DISCOVERY OF THE EXISTENCE OF THE CLAIM WAS PRE-
15 VENTED BY THE FRAUDULENT CONDUCT OF THE DEFENDANT.

16 (D) THE PARTY HAS LOST A VITAL BODILY FUNCTION.

17 (2) IN AWARDING DAMAGES IN A PRODUCTS LIABILITY ACTION, THE
18 TRIER OF FACT SHALL ITEMIZE DAMAGES INTO ECONOMIC AND NONECONOMIC
19 DAMAGES.

20 (3) THE STATE TREASURER SHALL ADJUST THE LIMITATION ON NON-
21 ECONOMIC DAMAGES SET FORTH IN SUBSECTION (1) BY AN AMOUNT DETER-
22 MINED BY THE STATE TREASURER AT THE END OF EACH CALENDAR YEAR TO
23 REFLECT THE CUMULATIVE ANNUAL PERCENTAGE CHANGE IN THE CONSUMER
24 PRICE INDEX.

25 Sec. 2947. (1) It ~~shall be admissible as evidence in~~ IS
26 AN ABSOLUTE DEFENSE TO a products liability action that ~~the~~ A
27 PROXIMATE cause of the death OF A PERSON or THE injury to A

1 person or property was an alteration or modification of the
2 product, or its application or use, made by a person other than,
3 and without specific directions from, the defendant.

4 (2) IT IS AN ABSOLUTE DEFENSE TO A PRODUCTS LIABILITY ACTION
5 THAT THE DEATH OF A PERSON OR THE INJURY TO A PERSON OR PROPERTY
6 OCCURRED 15 OR MORE YEARS AFTER THE PRODUCT WAS SOLD OR DELIVERED
7 BY THE DEFENDANT TO THE INITIAL PURCHASER OR USER. THIS SUBSEC-
8 TION DOES NOT APPLY TO A DRUG OR AN IMPLANTED DEVICE.

9 (3) IT IS AN ABSOLUTE DEFENSE TO A PRODUCTS LIABILITY ACTION
10 INVOLVING A LIMITED LIFE PRODUCT THAT THE DEATH OF THE PERSON OR
11 THE INJURY TO THE PERSON OR PROPERTY OCCURRED AFTER AN IDENTIFIED
12 EXPIRATION DATE FOR THE LIMITED LIFE PRODUCT.

13 (4) IT IS AN ABSOLUTE DEFENSE TO A PRODUCTS LIABILITY ACTION
14 THAT A PROXIMATE CAUSE OF THE DEATH OF OR INJURY TO A PERSON WAS
15 THAT THE PERSON WHO SUFFERED THE INJURY OR DEATH WAS UNDER THE
16 INFLUENCE OF ALCOHOL OR A CONTROLLED SUBSTANCE.

17 Sec. 2948. (1) ~~It shall be admissible as evidence~~ A PRE-
18 SUMPTION ARISES in a products liability action that THE WARNING,
19 INSTRUCTING, OR LABELING OF A PRODUCT OR A COMPONENT OF A PRODUCT
20 WAS ADEQUATE IF, before the ~~event of~~ death or THE injury to A
21 person or property, pamphlets, booklets, labels, or other written
22 warnings were provided ~~which~~ THAT gave notice to ~~foreseeable~~
23 REASONABLY ANTICIPATED users of the material risk of injury,
24 death, or damage connected with the ~~foreseeable~~ REASONABLY
25 ANTICIPATED use of the product or provided instructions as to the
26 ~~foreseeable~~ REASONABLY ANTICIPATED uses, applications, or
27 limitations of the product ~~which~~ THAT the defendant knew or

1 should have known. THIS PRESUMPTION MAY BE REBUTTED ONLY BY
2 CLEAR AND CONVINCING EVIDENCE.

3 (2) NOTWITHSTANDING SUBSECTION (1), A DEFENDANT IS NOT
4 LIABLE FOR FAILURE TO WARN OF MATERIAL RISKS THAT ARE OR SHOULD
5 BE OBVIOUS TO A REASONABLY PRUDENT PRODUCT USER AND MATERIAL
6 RISKS THAT ARE OR SHOULD BE A MATTER OF COMMON KNOWLEDGE TO PER-
7 SONS IN THE SAME OR SIMILAR POSITION AS THE PLAINTIFF IN A PROD-
8 UCTS LIABILITY ACTION.

9 (3) IN A PRODUCTS LIABILITY ACTION BROUGHT AGAINST A MANU-
10 FACTURER OR SELLER FOR HARM ALLEGEDLY CAUSED BY A FAILURE TO PRO-
11 VIDE ADEQUATE WARNINGS OR INSTRUCTIONS, A MANUFACTURER OR SELLER
12 IS NOT LIABLE IF, AT THE TIME THE PRODUCT LEFT THE CONTROL OF THE
13 MANUFACTURER, THE KNOWLEDGE OF THE DANGER THAT CAUSED THE HARM
14 WAS NOT REASONABLY AVAILABLE OR OBTAINABLE IN LIGHT OF EXISTING
15 SCIENTIFIC, TECHNICAL, OR MEDICAL INFORMATION.

16 Sec. 2949. (1) In ~~all products liability actions brought~~
17 ~~to recover damages resulting from death or injury to person or~~
18 ~~property, the fact that the plaintiff may have been guilty of~~
19 ~~contributory negligence shall not bar a recovery by the plaintiff~~
20 ~~or the plaintiff's legal representatives, but damages sustained~~
21 ~~by the plaintiff shall be diminished in proportion to the amount~~
22 ~~of negligence attributed to the plaintiff.~~ A PRODUCTS LIABILITY
23 ACTION INVOLVING FAULT OF MORE THAN 1 PARTY, INCLUDING
24 THIRD-PARTY DEFENDANTS AND PERSONS WHO HAVE BEEN RELEASED FROM
25 LIABILITY PURSUANT TO SECTION 2925D, THE COURT, UNLESS OTHERWISE
26 AGREED BY ALL PARTIES TO THE ACTION, SHALL INSTRUCT THE JURY TO

1 ANSWER SPECIAL INTERROGATORIES OR, IF THERE IS NO JURY, SHALL
2 MAKE FINDINGS AS TO BOTH OF THE FOLLOWING:

3 (A) THE TOTAL AMOUNT OF EACH CLAIMANT'S DAMAGES.

4 (B) THE PERCENTAGE OF THE TOTAL FAULT OF ALL OF THE PARTIES
5 REGARDING EACH CLAIM AS TO EACH CLAIMANT, DEFENDANT, AND
6 THIRD-PARTY DEFENDANT AND OF EACH PERSON WHO HAS BEEN RELEASED
7 FROM LIABILITY PURSUANT TO SECTION 2925D.

8 (2) IN DETERMINING THE PERCENTAGES OF FAULT UNDER SUBSECTION
9 (1), THE TRIER OF FACT SHALL CONSIDER BOTH THE NATURE OF THE CON-
10 DUCT OF EACH PARTY AT FAULT AND THE EXTENT OF THE CAUSAL RELATION
11 BETWEEN THE CONDUCT AND THE DAMAGES CLAIMED.

12 (3) THE COURT SHALL DETERMINE THE AWARD OF DAMAGES TO EACH
13 CLAIMANT IN ACCORDANCE WITH THE FINDINGS UNDER SUBSECTION (1),
14 SUBJECT TO ANY REDUCTION UNDER SECTION 2925D OR 6303, AND ENTER
15 JUDGMENT AGAINST EACH PARTY. THE COURT SHALL NOT ENTER JUDGMENT
16 AGAINST A PERSON WHO HAS BEEN RELEASED FROM LIABILITY PURSUANT TO
17 SECTION 2925D. EXCEPT AS PROVIDED IN SUBSECTION (4), THE COURT
18 SHALL NOT REQUIRE A PERSON TO PAY DAMAGES IN AN AMOUNT GREATER
19 THAN HIS OR HER RELATIVE DEGREE OF FAULT.

20 (4) UPON MOTION MADE NOT LATER THAN 1 YEAR AFTER JUDGMENT IS
21 ENTERED, THE COURT SHALL DETERMINE WHETHER ALL OR PART OF A
22 PARTY'S EQUITABLE SHARE OF THE OBLIGATION IS UNCOLLECTIBLE FROM
23 THAT PARTY AND SHALL REALLOCATE ANY UNCOLLECTIBLE AMOUNT AMONG
24 THE OTHER PARTIES, INCLUDING A CLAIMANT AT FAULT, BUT NOT INCLUD-
25 ING A PERSON WHO HAS BEEN RELEASED FROM LIABILITY PURSUANT TO
26 SECTION 2925D, ACCORDING TO THEIR RESPECTIVE PERCENTAGES OF FAULT
27 AS DETERMINED UNDER SUBSECTION (1). THE COURT SHALL NOT REQUIRE

1 A PARTY TO PAY A PERCENTAGE OF AN UNCOLLECTIBLE AMOUNT THAT
2 EXCEEDS THAT PARTY'S PERCENTAGE OF FAULT AS DETERMINED UNDER SUB-
3 SECTION (1). THE PARTY WHOSE LIABILITY IS REALLOCATED CONTINUES
4 TO BE SUBJECT TO CONTRIBUTION AND TO ANY CONTINUING LIABILITY TO
5 THE CLAIMANT ON THE JUDGMENT.

6 (5) ~~-(2)-~~ If the court determines that the claim or defense
7 is frivolous, the court may award costs and reasonable attorney's
8 fees to the prevailing party in a products liability action.

9 SEC. 2949A. IN A PRODUCTS LIABILITY ACTION, IF AN
10 ATTORNEY'S COMPENSATION IS DEPENDENT OR CONTINGENT IN WHOLE OR IN
11 PART UPON THE AMOUNT OF THE RECOVERY IN THE ACTION PURSUANT TO AN
12 EXPRESS OR IMPLIED AGREEMENT, THE ATTORNEY SHALL NOT RECOVER COM-
13 PENSATION UNDER THAT AGREEMENT THAT EXCEEDS THE FOLLOWING:

14 (A) FORTY PERCENT OF THE FIRST \$5,000.00 RECOVERED.

15 (B) THIRTY-FIVE PERCENT OF THE NEXT \$20,000.00 OR LESS
16 RECOVERED ABOVE \$5,000.00.

17 (C) TWENTY-FIVE PERCENT OF THE NEXT \$225,000.00 OR LESS
18 RECOVERED ABOVE \$25,000.00.

19 (D) TWENTY PERCENT OF THE NEXT \$250,000.00 OR LESS RECOVERED
20 ABOVE \$250,000.00.

21 (E) TEN PERCENT OF ANY AMOUNT RECOVERED ABOVE \$500,000.00.