

Public Policy Position
ADM File No. 2021-35: Proposed Amendment to MCR 7.202

The Negligence Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 1,846 members. The Negligence Law Section is not the State Bar of Michigan and the position expressed herein is that of the Negligence Law Section only and not the State Bar of Michigan. The State Bar of Michigan has decided to take no position on this item.

The Negligence Law Section has a public policy decision-making body with 15 members. On January 25, 2023, the Section adopted its position after a discussion and vote at a scheduled meeting. 13 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 3 members did not vote.

Oppose with Recommended Amendments

Explanation

The negligence law section did not reach a consensus on whether to support the rule change or leave MCR 7.202 and MCR 7.209 in their current form. The council did, however, reach a consensus on a potential compromise if the court rule changes proposed by ADM File No. 2021-35 are adopted. Rather than simply eliminating MCR 2.202(6)(a)(v) and MCR 7.209(E)(7), the council unanimously voted that in the event the Court adopts the changes proposed by ADM File No. 2021-35, the Court should adopt additional rule changes that protect the immunity rights of a governmental entity where applicable while also preventing the risk of abusive litigation tactics that exist under the current rules.

Under the current rules, if a governmental entity is denied immunity by the trial court, it has an immediate right to appeal under MCR 7.202(6)(a)(v) and the filing of an appeal stays all proceedings, even proceedings that do not involve the appealing party, under MCR 7.209(E)(7). These rules were intended to recognize that a governmental entity's right to immunity is not just immunity from paying a money judgment at the conclusion of trial, but immunity from the burdens and costs of the lawsuit and trial, themselves. Although well-intentioned, this rule change was often times abused by a governmental entity that would wait until the very last minute to invoke immunity and once denied, file an immediate appeal that stays all proceedings for at least 18 months, sometimes longer.

In other words, in such a scenario, the appeal and stay rules were not invoked to alleviate the burdens and expenses of trial, but as a way to exact leverage on a litigation adversary through delay. The stay rule also meant that even there were 5 defendants in a case and only 1 of which was a

governmental entity, claims against the other 4 defendants were also put on hold pending the appeal.

The negligence council adopted a compromise rule change that would protect governmental entities from the costs and burdens of a trial where immunity is available while also removing the potential for gamesmanship that is found in the current rules. The compromise would modify the court rule governing an interlocutory application for leave to appeal, MCR 7.205(B)(1). When a party seeks an appeal from a non-final order, MCR 7.205(B)(1) requires that party to establish two things, error committed by the trial court and that the party “would suffer substantial harm by awaiting final judgment before taking an appeal.” The negligence council’s fall back compromise in the event that the Court adopts ADM File No. 2021-35 would be a change to the court rules providing that a governmental entity filing an interlocutory appeal challenging the denial of immunity need not establish the substantial harm prong of MCR 7.205(B)(1) which is automatically established when a party is denied a claim for governmental immunity in the trial court.

This would remove the potential for abuse under the current rules while also making it easier for governmental entities to avoid the costs and burdens of trial because they would not need to prove substantial harm which is automatically established and would only need to show that the lower court erred by denying immunity. Under this compromise, the automatic stay of all trial proceedings would only last until such time that the interlocutory appeal was decided with finality, either by the Court of Appeals or Supreme Court denying interlocutory review over the appeal, or, if the appeal is granted, until such time that the order of the appellate court becomes enforceable under MCR 7.215(F), MCR 7.315(C)(4) and MCR 7.315(D). An application for leave to appeal from a denial of governmental immunity would also be given priority treatment under MCR 7.205(F) and MCR 7.213(C).

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