

NOTICE OF NON-PARTY OF FAULT REMAINS SHARP TOOL FOR MITIGATING CONSTRUCTION LIABILITY

Construction Law Practice Group

May 1, 2008

Author: David R. Stechow
Direct: (248) 901-4007
dstechow@plunkettcooney.com

Plunkett Cooney's Construction attorneys are asked to explain litigation issues related to Michigan's Compiled Laws (MCL) and Court Rules (MCR) so we wanted to provide Sticks & Bricks readers with the following overview.

With tort reform legislation in 1995, the Michigan Legislature abolished joint liability in most tort actions. Therefore, the liability of any defendant in most cases is several only. Fault is allocated between each defendant and to each properly named non-party on a prorated basis.

MCL 600.2957 and 600.6304, along with MCR 2.112(K) govern allocation of fault. When read together, they provide that fault will be allocated to all parties and non-parties involved in an action as long as notice is given of the potential fault of the non-parties within 91 days of filing the first responsive pleading.

MCL 600.6304(1)(B) provides that in an action based on tort or another legal theory seeking damages for personal injury, property damage or wrongful death, and which involves the fault of more than one person, including third-party defendants and non-parties, the court shall provide the jury with a special verdict form indicating the percentage of total fault of all persons that contributed to the death or injury, regardless of whether that person was or could have been named as a party to the action. MCL 600.2957 also requires similar findings and provides for the addition of non-parties to the lawsuit.

Historically, when resolving a conflict between a statute and a court rule, the court rule prevails if it governs practice and procedure. To determine whether there is a real conflict between a statute and a court rule, both are to be read according to their plain meaning. It is this last difference that has been the most hotly debated and should be of great concern for contractors.

Following are at least five significant variances between MCR 2.112(K) and its statutory foundation, MCL 600.2957 and MCL 600.6304:

(1) The court rule provides that the trier of fact shall not assess the fault of a non-party unless the notice required by the court rule has been given. The statutes do not require notice. They simply provide that the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

(2) The court rule provides that notice may be given only by a party "against whom a claim has been filed." There is no requirement by the statutes.

(3) The court rule requires that notice of the existence of the non-party be filed, absent special circumstances, within 91 days after the party files its first responsive pleadings. Only upon a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, and no unfair prejudice to the opposing party, will the court allow a later filing of the notice. The statutes have no such time limit.

(4) The court rule allows a party "served with a notice" to file, without motion or leave of the court, an amended pleading within 91 days of service of the notice, stating a claim(s) against the non-party. MCL 600.2957 requires the party served with the notice to file a motion with the court seeking leave to amend. The court shall grant leave to the moving party to file and serve an amended pleading if the motion is filed within 91 days after identification of a non-party.

(5) MCL 600.2957(2) provides "a cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action." The court rule is silent as to the relation back of the statute of limitations.

Michigan law has long held that the statute of limitations is regarded as procedural, not substantive. In *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000), the court acknowledged that the court rule and the statute were in conflict regarding the relation back of the statute of limitations. In reaching its decision, the *Staff* court noted that the statute sets forth a general procedure for providing notice of a non-party. MCL 600.2957(2) provides that upon motion of a party within 91 days of identification, the court shall grant leave to file and serve an amended pleading.

The *Staff* court noted that the statute fails to place any time restrictions on the filing of a motion to add a non-party. The court further noted that the practical effect of the failure to place any restrictions in the statute is that parties could add additional parties years after the commencing litigation. A strict construction of the statute would preclude orderly docket management by requiring that the courts "shall" add additional parties without regard to the stage of the court proceeding and expiration of the statute of limitations.

Conversely, the *Staff* court noted that the court rule creates an orderly method for adding new parties that takes into account the need for a reasonable time frame for identification of the parties and the right to be unfairly prejudiced as a result of the parties' failure to act diligently in the pursuit of their claims.

Moreover, the court noted that the rules of procedure governing the filing of answers and affirmative defenses, specifically MCR 2.118(B) and MCR 2.111(F) allow a party to raise the issue of the statute of limitations. According to the *Staff* court, these court rules operate to ensure the orderly handling of a lawsuit and ensure that parties diligently pursue their rights in accordance with established statute of limitations.

In *Bint v Doe*, 274 Mich App 232; 732 NW2d 156 (2007), the Michigan Court of Appeals reached a different result. Again, MCL 600.2957(2) provides that a lawsuit is not barred by the statute of limitations unless the lawsuit would have been barred by the statute of limitations at the time of the filing of the original suit. MCR 2.112(K) contains no language regarding the statute of limitations. Therefore, the *Bint* court held there is no conflict between the court rule and the statute.

Essentially, the court determined that a conflict does not exist merely because the court rule is silent as to an issue addressed in the statute. The court rule and the statute may be reconciled by reading the two together. There is no explicit conflict between the two. The court rule and statute may be harmonized by giving full effect to all provisions, so long as none of the provisions are in conflict.

In light of the *Bint* court's decision, a cause of action can be asserted against a properly named non-party years after the statute of limitations has expired if the claim against the non-party would have been timely when filing the original action. In fact, in *Bint*, the claims against the defendant were determined to be timely, although brought nine years after the subject incident, because the claim against the defendants, had it been asserted in the original action, would have been timely.

It should be noted that a defendant that attempts to mitigate his liability through a comparative fault defense under Michigan law has the burden of alleging and proving that another person's conduct was a proximate cause of the plaintiff's damages. *American Home Mortg. Acceptance, Inc. v Appraisal Place, Inc.*, 476 F Supp 2d 636 (ED Mich, 2006) modification denied 476 F Supp 2d 645.

Another important issue is where a party knows there is a non-party at fault, but is unaware of the non-party's identity. In *Rinke v Potrzebowski*, 254 Mich App 411; 657 NW2d 169 (2003), the court held, "the plain language of the statutes and the court rule permits a defendant to argue a portion of fault should be attributed to an unidentifiable tortfeasor." An example of when this situation may arise is when a contractor is sued in a construction site accident for failure to keep a clean worksite. The defendant contractor knows that another contractor was responsible for maintaining the area in which the incident happened but does not know the identity of that contractor. If the non-party contractor is at fault, the defendant contractor can file a notice of non-party fault even if it is unaware of the identity of the non-party contractor. Therefore, the defendant contractor's liability will be assessed while taking into account the fault of the non-party contractor.

The notice of non-party fault statutes and court rule can be an effective tool to reduce a contractor's potential liability. However, it must be used in accordance with the requirements of MCR 2.112(K), MCL 600.6304, and MCL 600.2957 in order for the jury to be able to allocate fault to a non-party, even if the non-party is unidentifiable.

The Sticks & Bricks Newsletter is distributed by the firm of Plunkett Cooney. Any questions or comments concerning the matters reported may be addressed to Scott H. Sirich or any other

members of the practice group. The brevity of this newsletter prevents comprehensive treatment of all legal issues, and the information contained herein should not be taken as legal advice. Advice for specific matters should be sought directly from legal counsel. Copyright© 2008. All rights reserved PLUNKETT COONEY, P.C.