



Allocation of Fault

By Douglas Allen and Thomas Waggoner

The 1996 Tort Reform Act largely abolished joint and several liability¹ and substituted a system of allocation of fault among parties and nonparties.² However, the act does not provide a procedure for giving notice of an intent to allocate fault to a nonparty. MCR 2.112(K) was adopted to provide an orderly and equitable means of implementing and administering the act's allocation of fault provisions.³

***MCR 2.112(K)
facilitates the implementation
of the Tort Reform Act***

FAST FACTS:

Leave of court is a prerequisite to the addition of an identified nonparty to the suit.

Fault cannot be allocated to a defendant dismissed for lack of a legal duty to the plaintiff.

Fault may be attributed to an unidentifiable nonparty.

History

In March of 1996, the Supreme Court published a proposed new court rule⁴ with procedures for allocating fault to nonparties. The proposed rule contained alternative notice provisions. Alternative A provided that a notice of nonparty fault could either be included in the party's first responsive pleading, or in a separate statement filed and served within 21 days after the filing of a party's first responsive pleading. This alternative also provided that a later filing could be allowed on a motion showing that the facts on which the notice was based were not and could not with reasonable diligence have been known to the moving party more than 21 days before the motion was filed. However, the trial court was given discretion to deny the motion if the late filing of the notice would result in unfair prejudice to the opposing party.

Alternative B simply stated that a notice of nonparty fault "must be filed within 182 days after the party files its responsive pleading."

The rule as adopted (MCR 2.112(K)) splits the difference between the two alternatives and allows 91 days from a first responsive pleading in which to file a notice of nonparty fault. A court may allow a later notice on a motion 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, provided that the late filing of the notice does not result in unfair prejudice to the opposing party.⁵ MCR 2.112(K)(2) provides that the trier of fact shall not assess the fault of a nonparty unless this notice is provided.

Subsection (K)(4) provides that a party served with a notice of nonparty fault "may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty." The court may permit a later amendment by motion.

Conflict with MCL 600.2957

MCL 600.2957(1) requires that in an action based on tort or another theory seeking damages for personal injury, property damage, or wrongful death 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."

Further, MCL 600.2957(2) provides:

Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. 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 statutory scheme does not provide any deadline for the "identification" of a nonparty who may be at fault for the plaintiff's damages. After the identification is made, the parties have 91 days to file a motion for leave to amend their pleadings to add the nonparty to the litigation. The statute directs that the "court shall grant" the requested amendment. Significantly, an action against a newly identified nonparty is not barred by the statute of limitations so long as the original action was filed within the statute. MCR 2.112(K), was adopted, in large measure, to minimize the inequities inherent in a literal reading of these provisions.⁶

For example, under the statutory scheme, a defendant could wait until trial to give notice that it intends to argue that a nonparty to the litigation is wholly or partially at fault for plaintiff's damages. This would work an injustice on a plaintiff unprepared to refute the claim. Further, the plaintiff could move the court for leave to add the nonparty as a defendant. Since the statute directs that the court shall grant leave to the moving party to file and serve the amended pleading, the net effect would be to significantly delay trial and increase the cost of litigation.

Another potential problem relates to statutes of limitation. The rationale behind statutes of limitation is to protect defendants and courts from having to deal with cases in which the search for truth is seriously impaired by the loss of evidence and to prevent plaintiffs from sleeping on their rights.⁷ In the previous scenario, the applicable statute of limitation may have barred suit against the new defendant but for MCL 600.2957(2).

However laudable the intent of MCR 2.112(K), its notice requirements conflict with the legislature's intent to have the trier of fact "consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action." By imposing deadlines for the filing of a notice of nonparty fault, and making the filing a prerequisite to the allocation of fault to a nonparty, in many cases the court rule will prevent a comprehensive allocation.

Recent Developments

There have been several recent court of appeals decisions interpreting MCR 2.112(K) and the allocation of fault provisions of the 1996 Tort Reform Act.

LEAVE OF COURT—A PREREQUISITE TO ADDING A NONPARTY DEFENDANT

In *Williams v Arbor Home, Inc.*,⁸ the court held that there was no conflict between the provisions of MCL 600.2957(2) and MCR 2.112(K)(4) regarding the filing an amended complaint naming a nonparty.

The statute states that “[u]pon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty.” However, MCR 2.112(K)(4) provides that a party served with a notice of nonparty fault “may file an amended pleading stating a claim or claims against the nonparty within 91 days” of service of the notice. In other words, the statute requires a motion and leave of court as a prerequisite to filing an amended complaint, while the court rule does not.

The *Williams* court rejected the plaintiff’s argument that the court rule and statute are in conflict and that the court rule should therefore prevail. Instead, the court adopted the defendant’s argument that the statute merely includes more detail than does the court rule. Reading the statute and court rule together, the court held that a defendant is required to file a motion and obtain leave of court before filing an amended complaint naming a party identified in a notice of nonparty fault.

NO ALLOCATION OF FAULT TO A CO-DEFENDANT DISMISSED FOR LACK OF A LEGAL DUTY

In *Jones v Enertel, Inc.*,⁹ the court of appeals held that the remaining defendant in a personal injury action cannot require the trier of fact to allocate fault to a codefendant dismissed because it owed no duty to the plaintiff.

The plaintiff in *Jones* tripped and fell on an allegedly uneven stretch of sidewalk under the jurisdiction of the city of South Lyon. Enertel had done work on the sidewalk as part of its installation of fiber optic cable. Both defendants moved for summary disposition based on the open and obvious doctrine. The trial court granted Enertel’s motion, but denied the city’s motion because of the city’s statutory duty to maintain the sidewalk. Thereafter, the city filed a notice of nonparty fault, and sought to have the trier of fact allocate fault to Enertel. The trial court granted plaintiff’s motion to set aside a previous order allowing the notice.

In holding that the city was not entitled to have fault allocated to Enertel, the court of appeals held that MCL 600.2957(1) requires liability to be allocated in direct portion to each person’s percentage of fault. Because Enertel owed no duty to plaintiff pursuant to the open and obvious doctrine, it was not at fault for plaintiff’s injuries. Since Enertel was not at fault, there was no basis for an allocation against it.

FAULT MAY BE ALLOCATED TO AN UNIDENTIFIABLE NONPARTY

On the other hand, in *Rinke v Potrzebowski*,¹⁰ the court held that a defendant may argue that a percentage of fault should be attributed to an unidentifiable nonparty.

The defendant in *Rinke* claimed that the driver of a white van stopped to allow him to enter the roadway, and then waved him on, thus precipitating a collision with plaintiff’s vehicle. The driver of the van was never identified. Nonetheless, defendant filed a notice of nonparty fault and sought an allocation of fault against the driver of the van. Plaintiff objected to the notice and it was eventually disallowed by the trial court.

The court of appeals noted that MCR 2.112(K)(3)(b) requires only that a notice of nonparty fault designate the nonparty by setting forth the nonparty’s name and last known address, “or the best identification of the nonparty that is possible.” Since the defendant had provided the best identification of the nonparty possible, the notice complied with the requirements of the court rule and he was therefore entitled to argue that a percentage of fault should be allocated to the driver of the van.

Conclusion

MCR 2.112(K) provides procedures for the implementation and administration of MCL 600.2957 and MCL 600.6304. In doing so, it places significant restrictions on the legislature’s intent that the trier of fact allocate fault to all responsible persons, including nonparties. However, the notice requirements imposed by MCR 2.112(K)(3)(c) serve the legitimate purpose of preventing the delay and additional expense that would result from an unbridled ability to identify and allocate fault to nonparties.

Recent appellate decisions provide guidance on both the substantive and procedural effects of MCR 2.112(K). Under these decisions: (1) Leave of court is a prerequisite to the addition of an identified nonparty to the suit, (2) fault cannot be allocated to a defendant dismissed for lack of a legal duty to the plaintiff, and (3) fault may be attributed to an unidentifiable nonparty. ♦

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Footnotes

1. MCL 600.2956.
2. MCL 600.2957, and MCL 600.6304.
3. *Staff v Johnson*, 242 Mich App 521, 532–533; 619 NW2d 57 (2000).
4. MCR 2.210.
5. MCR 2.112(K)(3)(c).
6. *Staff v Johnson*, supra, pp 531–533.
7. *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995).
8. 254 Mich App 439; 656 NW2d 873 (Docket No. 225693, entered December 17, 2002).
9. 254 Mich App 432; 656 NW2d 870 (Docket No. 234522, entered December 17, 2002).
10. 254 Mich App 411; 657 NW2d 169 (Docket No. 236031, entered December 13, 2002).

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