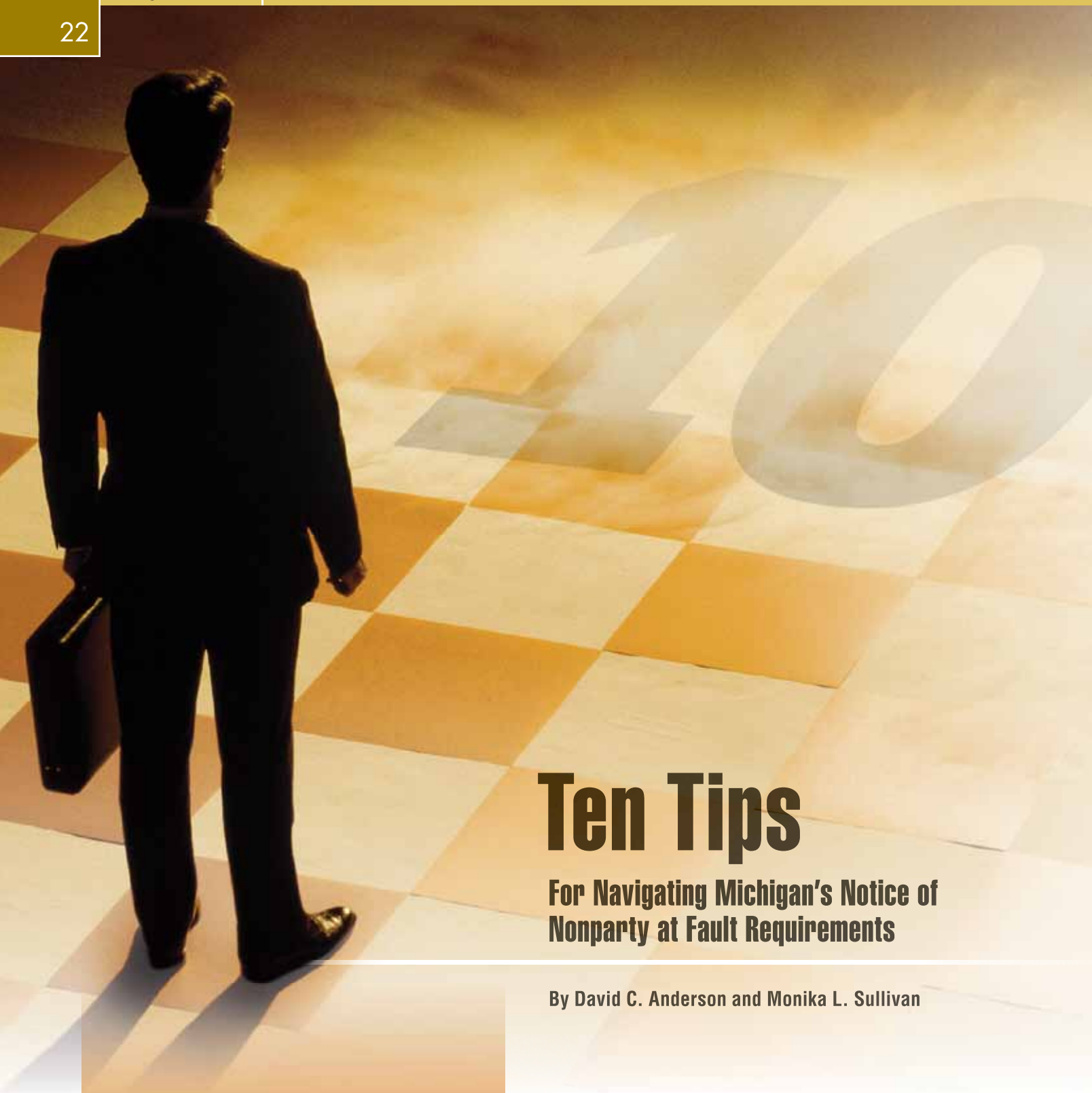

Ten Tips

For Navigating Michigan's Notice of Nonparty at Fault Requirements

By David C. Anderson and Monika L. Sullivan

"It's not whether you win or lose, it's how you place the blame."

—Oscar Wilde

For 16 years, Michigan practitioners have litigated tort claims under fair-share liability rather than joint liability.[1] In response to the legislature's enactment of fair-share liability, the Michigan Supreme Court adopted MCR 2.112(K). It is the mechanism to provide notice of nonparties believed to be at fault for a plaintiff's damages. Michigan's state and federal courts have handed down a number of opinions interpreting fair-share liability and the notice-of-fault court rule. This article provides practice tips to successfully navigate the notice-of-fault requirements.

Practice Tip No. 1: The nonparty to be named in the notice of fault must have owed a duty to the plaintiff "before fault can be apportioned and liability allocated under the comparative fault statutes."

The Michigan Supreme Court recently clarified that a nonparty at fault must have owed a duty to the plaintiff before fault can be allocated to that nonparty. In *Romain v Frankenmuth Mut Ins Co*,[2] the Court overruled the statement in *Kopp v Zigich*[3] that "'a plain reading of the comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated.'" The Court instead adopted the ruling of *Jones v Enertel, Inc*,[4] that "a duty must first be proved before the issue of fault or proximate cause can be considered." The Court reasoned that "'[w]ithout owing a duty to the injured party, the "negligent" actor could not have proximately caused the injury and could not be at "fault" for purposes of the comparative fault statutes.'"[5]

As a result of *Romain,* the attorney who names a nonparty should be prepared to defend against the argument that the nonparty owed no duty. To possibly forestall such a no-duty argument, consider including sufficient facts to support the existence of a duty within the notice of fault.

Practice Tip No. 2: The notice-of-fault requirements apply to any tort-based action regardless of whether the plaintiff is seeking damages for personal injury, property damage, or wrongful death.

Initially, there was some confusion regarding the type of tort actions that the notice-of-fault statutes and court rule governed. Each of the notice-of-fault provisions stated that it "applie[d] to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death…."[6] In *Holton v A+ Ins Assocs,*[7] the plaintiffs filed an action against their insurance agent to recover a shortfall in insurance proceeds after a house fire, claiming that the agent negligently failed to procure adequate homeowner's insurance after a remodel. The agent named a roofer as a nonparty at fault, claiming it may have caused the fire. The plaintiffs tried to strike the notice by arguing that the notice-of-fault provisions did not apply to their claim.

The Michigan Court of Appeals clarified that the notice-of-fault requirements were *not* limited to only tort claims "seeking damages for personal injury, property damage, or wrongful death," but also applied to any "tort based action."[8] Although the notice-of-fault requirements applied to the plaintiffs' claim of negligent procurement of insurance, the roofer was not a proper nonparty at fault because the plaintiffs were seeking damages caused by inadequate insurance coverage, not the fire. The agent did not claim that the roofer was involved in the procurement of insurance coverage. Apportionment of fault was therefore not appropriate.[9]

The *Holton* opinion makes clear that the notice-of-fault requirements apply to any tort-based action. When preparing or objecting to a notice of fault, attorneys should be careful to assess the nonparty's potential liability in the context of the actual tort theory being asserted as opposed to merely assessing whether the nonparty contributed to the plaintiff's damages.

Practice Tip No. 3: If you do not know the nonparty's name, use the best identification possible.

The notice-of-fault requirements allow fault to be allocated to unnamed nonparties if the notice provides "the best identification of the nonparty that is possible…."[10] In *Rinke v Potrzebowski,*[11] the Court of Appeals upheld a notice of fault that listed an unnamed driver of a white van. The *Rinke* Court rejected the plaintiff's argument that the notice was insufficient because it did not provide the name of the nonparty. The Court of Appeals explained that the language of MCR 2.112(K)(3)(b) is clear: "The defendant is not required to specifically identify the nonparty, but only to identify the nonparty as best he can." The fact that the plaintiff could not sue an unnamed nonparty did not affect the Court's analysis because the statute allows the trier of fact to allocate fault to a nonparty "'regardless of whether the person was or could have been named as a party to the action.'"[12]

The fact that you do not have sufficient information to either name or locate the nonparty at fault does not prevent you from naming that person in a notice of fault. If you have a way to obtain this information, then you should certainly do so. But if the circumstances do not allow you to determine this information, you are only required to provide the best identification of the nonparty that is possible.

Practice Tip No. 4: A plaintiff's claim against an identified nonparty will not be barred by the statute of limitations if the claim would have been timely at the time the original complaint was filed.

If a notice of nonparty fault is properly and timely filed, MCL 600.2957(2) requires the trial court to allow the plaintiff to file an amended pleading adding the nonparty as a defendant. The plaintiff's complaint against the newly added defendant will not be barred by the statute of limitations if it would have been timely when the plaintiff filed the original complaint. The statute of limitations will not be extended, however, if the notice was not timely or properly filed.[13]

Practice Tip No. 5: If your client was added to a case because of a notice of fault, review the record to make sure that the notice of fault was timely filed.

The parties to an action cannot waive the good-cause requirement needed to add nonparties to litigation after the 91-day period expires. In *Staff v Marder,*[14] the plaintiff filed a medical malpractice action. The defendant doctor initially filed a motion requesting permission to file a late notice of nonparty fault against another doctor who allegedly treated the plaintiff. At a later settlement conference, defense counsel claimed that there were additional nonparties potentially at fault for the plaintiff's injuries. The plaintiff's counsel stipulated to forego the notice requirements with respect to the additional nonparties and was granted leave to file an amended complaint naming these additional nonparties as defendants. The newly added defendants argued that the plaintiff's claim was untimely and the relation-back doctrine did not apply because the parties did not establish good cause for not timely

filing a notice of fault. The trial court acknowledged that the parties failed to comply with the notice-of-fault requirements but held that the defects were not fatal to the plaintiff's claim.[15] The Court of Appeals held it was error for the trial court to allow the parties to stipulate to disregard the notice requirements of MCR 2.112(K).[16] The defendant doctor could not show good cause for failing to name these persons in the 91-day period provided by MCR 2.112(K)(3)(c). Because the plaintiff failed to comply with the notice requirements and the defendants were added to the complaint when the claim against them was already untimely, the plaintiff's claim was time-barred.[17]

When your client is added to litigation because of a previously filed notice of fault, check to see whether the notice of fault was timely filed or whether the court granted a motion for leave to file a late notice. The parties are not permitted to waive the notice requirements and then use MCL 600.2957(2) to toll the statute of limitations. Moreover, a late notice of fault can be set aside if the defendant failed to establish reasonable diligence in identifying the nonparty.[18]

Practice Tip No. 6: If your notice of fault is untimely or rejected for some other reason, you may still argue that your client was not a proximate cause of the plaintiff's damages.

A defendant does not need to file a notice of fault to argue that it was not a proximate cause of the plaintiff's damages and that someone else was wholly to blame for the plaintiff's injuries. In *Bramble v Hormel Foods Corp,*[19] the plaintiff filed a products-liability action after he bit into a Spam sandwich and fractured his tooth on a "hard object." Not filing a notice of nonparty fault did not prevent the defendant from arguing that what injured the plaintiff was something else on the sandwich. Because the defendant was not contending that multiple parties were at fault, but rather that someone other than the defendant caused the injury, the notice-of-fault requirements did not apply.[20]

Practice Tip No. 7: Notice by one is notice by all.

Once one defendant files a notice of nonparty fault, the notice is good as to all other parties. MCR 2.112(K)(3)(a) provides that "[a] notice filed by one party identifying a particular nonparty serves as notice by all parties as to that nonparty."

Practice Tip No. 8: If one of the defendants is granted summary disposition, the plaintiff's attorneys should consider including that former defendant on the jury verdict form. Otherwise, the plaintiff may lose the right to appeal the grant of summary disposition.

If a plaintiff wants to preserve the right to appeal the dismissal of a co-defendant, the plaintiff should request that the dismissed defendant be listed as a potential nonparty at fault on the jury-verdict form. In *Rodriguez v ASE Indus,*[21] the plaintiff filed a products-liability action against a manufacturer. The manufacturer named a consulting engineering firm as a nonparty at fault. The plaintiff thereafter added the firm as a defendant. The firm was later granted summary disposition and dismissed from the action but was not included on the jury-verdict form. When the plaintiff appealed the grant of summary disposition, the Court of Appeals rejected the plaintiff's argument on the basis of waiver, ruling that the "plaintiff did not object to the verdict form on the basis that

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it did not ask the jury to allocate fault to [the firm]."[22] The court explained that the plaintiff could not "create an appellate parachute for herself by omitting [the firm] from the allocation of fault because it had been dismissed, thus potentially increasing the amount of fault allocated to the remaining defendant, and thereafter argue on appeal that summary disposition in favor of [the firm] was improper."[23]

Practice Tip No. 9: While there is no federal court rule similar to MCR 2.112(K), notices of fault are proper in federal cases in which state-law tort claims are at issue.

The Federal Rules of Civil Procedure do not contain notice-of-fault provisions. But, when state-based tort claims are at issue, the federal courts must apply fair-share liability and will rely on MCR 2.112(K) to apply or interpret Michigan's notice-of-fault requirements. In *Greenwich Ins Co v Hogan*,[24] the plaintiff insurer tried to strike the defendant's notice of fault claiming that MCR 2.112(K) was a state procedural rule inapplicable to federal court proceedings. The federal court accepted that MCR 2.112(K) is a procedural rule but also accepted that it is a necessary component of Michigan's statutory scheme of "fair-share liability." The court ruled that "[t]he failure of this federal court to include the rule's notice provision as part and parcel of Michigan's substantive tort law would result in tort litigation differing materially depending on whether a suit was brought in state court or as a diversity action in federal court."[25] This, in turn, would promote forum shopping and the inequitable administration of the law.[26]

Practice Tip No. 10: Just because you can, doesn't mean you should.

It is easy for attorneys to operate on auto-pilot when naming nonparties or deciding whether to include nonparties in litigation. But the decision whether to try to create an empty-chair defense or to try to fill an empty chair is a strategic one that requires careful consideration. For example, an empty chair that must stay empty, such as when the notice identifies an immune party, can greatly benefit a defendant. Caution is warranted, however, because sometimes that empty chair is a sympathetic party such as the parent of an injured child, which can complicate the defense. In addition, a defendant might name nonparties that it does not actually want to prove are at fault, such as suppliers or customers with whom it desires to maintain a good business relationship. By the same token, sometimes plaintiffs must decide whether to sue persons they may not want to sue, such as relatives, or to allow the chair to sit empty. Thus, the power of the empty chair is not absolute. Attorneys are wise to give careful consideration about whether to create an empty chair, fill it, or leave it empty.

Proper navigation of the twists and turns of the notice-of-fault requirements is crucial to successful litigation. To paraphrase Oscar Wilde, perhaps it really is how you place the blame that determines whether you win or lose. ■

David C. Anderson, a partner at Collins, Einhorn, Farrell & Ulanoff, P.C., defends professional, product, and premises liability matters. In the professional liability arena, he has successfully represented attorneys, accountants, architects, engineers, insurance agents, fine art appraisers, real estate brokers and appraisers, and a variety of other professionals. David also maintains an active general litigation practice, including business disputes, insurance disputes, and personal injury defense. He can be reached at David.Anderson@ceflawyers.com.

Monika L. Sullivan focused her practice on defending professional and general liability claims while working as an associate at Collins, Einhorn, Farrell & Ulanoff, P.C. She now resides in San Diego, California and can be reached at Monikalina1999@yahoo.com.

FOOTNOTES

1. See MCL 600.2957, MCL 600.6304, and MCR 2.112(K).
2. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18; 762 NW2d 911 (2009).
3. *Id.* at 20–21, quoting *Kopp v Zigich*, 268 Mich App 258, 260; 707 NW2d 601 (2005).
4. *Jones v Enertel, Inc*, 254 Mich App 432, 437; 656 NW2d 870 (2002).
5. *Romain*, 483 Mich at 22.
6. MCR 2.112(K)(1); MCL 600.2957(1); MCL 600.6304(1).
7. *Holton v A+ Ins Assocs*, 255 Mich App 318; 661 NW2d 248 (2003).
8. *Id.* at 324–325.
9. *Id.* at 325–326.
10. MCR 2.112(K)(3)(b).
11. *Rinke v Potrzebowski*, 254 Mich App 411; 657 NW2d 169 (2002).
12. *Id.* at 416, quoting MCL 600.6304(1)(b); see also MCL 600.2957(1).
13. See Practice Tip No. 5.
14. *Staff v Marder*, 242 Mich App 521; 619 NW2d 57 (2000).
15. *Id.* at 527.
16. *Id.* at 529–530.
17. *Id.* at 533–534.
18. See *Zavsza v Iafrate*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 18, 2003 (Docket No. 241702).
19. *Bramble v Hormel Foods Corp*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 28, 2000 (Docket No. 216526).
20. See also *Veltman v Detroit Edison Co*, 261 Mich App 685, 694; 683 NW2d 707 (2004) (finding that "it is entirely proper for a defendant in a negligence case to present evidence and argue that liability for an accident lies elsewhere, even on a nonparty" without complying with the notice-of-fault requirements because causation defenses do not allocate fault).
21. *Rodriguez v ASE Indus*, 275 Mich App 8; 738 NW2d 238 (2007).
22. *Id.* at 21.
23. *Id.* at 21–22.
24. *Greenwich Ins Co v Hogan*, 351 F Supp 2d 736 (WD Mich, 2004).
25. *Id.* at 739.
26. *Id.*