CARDELLI LANFEAR P.C.

Memo

To: JMP

From: VCG

CC:

Date: 01/04/16

Re: Website Content

Michigan Notice of Non-Party At Fault Requirements

In Michigan, MCL 600.2957(1) provides for assessment of fault against nonparties. The non-party at fault rule, MCR 2.112(K)(3)(c), requires:

> ***The notice must be filed within 91 days after the party files its first responsive pleading***. On motion, the court shall allow a later filing of the notice on 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, provided that the late filing of the notice does not result in unfair prejudice to the opposing party.

For example, if the first responsive pleading is the Answer and Affirmative Defenses, the defendant has 91 days from said date to file a notice of non-party at fault. Moreover, pursuant to MCR 2.112(K)(3)(b),

> The notice shall designate the nonparty and set forth the nonparty's name and last known address, ***or the best identification of the nonparty that is possible***, together with a brief statement of the basis for believing the nonparty is at fault.

Thus, the nonparty does not have to be specifically identified, but rather identified to the best of the moving party's ability. The fact that a plaintiff cannot sue the unnamed nonparty does not affect the allocation of fault. In *Rinke v Potrzebowski*, 254 Mich App 411; 657 NW2d 169 (2002), the Michigan Court of Appeals addressed this very issue:

> Pursuant to the statutes and the express language of the court rule [MCR 2.112(K)], defendant gave timely notice but, as a result of his inability to identify with any specificity the nonparty, plaintiff cannot sue the "nonparty" directly. However, a plaintiff is not required to join a nonparty as a party defendant; the language of both the applicable court rule and statute is discretionary rather than compulsory. If a nonparty is not joined in an action for whatever reason, the trier of fact may nonetheless determine that person's percentage of fault. Under the plain language of the statutes, the inability to identify the nonparty, as here, does not preclude a finding that the unidentified nonparty contributed to the damages. Neither MCR 2.112(K) nor the statutes contain an exception for nonparties who cannot be identified sufficiently to sue them. To the contrary, the plain language of the statutes 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." MCL 600.2957(1); MCL 600.6304(1)(b) . Accordingly, we find that the plain and unambiguous language of the statutes and the court rule permits a defendant to argue that a nonparty is at fault though the nonparty cannot be identified.

Rinke, 254 Mich App at 416-17.

In *Bramble v Hormel Foods Corp*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 28, 2000 (Docket No. 216526), the Michigan Court of Appeals held that MCR 2.112(K) “does not state that a defendant ***must*** name nonparties who are wholly or partially at fault. To the extent that MCR 2.112(K)(2) prevents the trier of fact from assessing the fault of a nonparty where notice has not been given, this does not apply to a circumstance where only one individual was at fault.” *Id.* at *7 (emphasis added) (products-liability action where the plaintiff bit into a Spam sandwich and fractured his tooth on a hard object. The defendant argued that what insured the plaintiff was something else on the sandwich).

Thus, the notice of fault requirements do not apply where a defendant is contending that someone else other than the defendant caused the injury. *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). Accordingly, a notice of fault is not

necessary to argue that the defendant was not a proximate cause of a plaintiff's damages and that someone else was wholly to blame for the plaintiff's injuries.