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Notice Of Non-Party Fault Wasn't Required

Defense Can Make Proximate Cause Argument

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A defendant was not required to file a notice of non-party fault where it claimed a third party was the sole proximate cause of a fire, the Michigan Court of Appeals has ruled.

The plaintiffs argued that the defendant was precluded from having its expert testify that the third party was at fault because it failed to provide notice as required by MCR 2.112(K).

But the Court of Appeals disagreed, reversing in part the trial court's ruling.

"MCR 2.112(K) provides plaintiff a shield from mandated allocation of fault without notice. [It] does not provide plaintiff a sword to eviscerate a defense on one of the elements comprising plaintiff's burden of proof," wrote Judge Pat M. Donofrio. "[W]hen the proximate cause defense is the contested issue rather than an allocation of fault to a nonparty, neither the liability of nor an allocation of fault attributable to the nonparty is submitted to the trier of fact for determination."

As such, the defendant was not required to provide notice to the plaintiffs, and the expert should have been allowed to testify, the judge concluded.

The 7-page decision is *Veltman v. Detroit Edison Co.*, Lawyers Weekly No. 07-52102.

JOHN P. JACOBS
Answers a lot of trial lawyers' questions

Clarification?

Detroit lawyer John P. Jacobs, who rep-

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resents the defendant, told Lawyers Weekly this ruling answers a lot of trial lawyers' questions.

"Because of MCR 2.112(K) and MCLA 600.2957(1), there has been a lot of confusion as to whether defense trial counsel must *always* file a notice of non-party fault if he or she wants to contend that the sole, exclusive proximate cause of the claim was elsewhere with another unsued party, entirely," he observed. "*Veltman* makes clear that no such designation is necessary."

Meanwhile, Westland attorney Donald M. Fulkerson, who represents the plaintiffs, told Lawyers Weekly the panel failed to address the plaintiffs' argument that the plain language of MCL 600.6304(2) specifies that non-party fault includes "the extent of the causal relation between the conduct and the damages claimed."

He said the Legislature clearly defined non-party fault to include issues of both liability and causation.

According to Fulkerson, this decision, instead of clarifying the non-party fault rule, permits a defendant to circumvent the 91-day deadline in MCR 2.112(K)(2) by merely couching its late attempt to blame a non-party as an issue of "causation" instead of allocated liability.

"This is not welcome news for plaintiffs who rely on the 91-day rule for certainty in framing the issues in tort claims," he observed.

No Hurry

Plaintiffs Gary and Debra Veltman lost their home in Highland Township after strong winds caused a power line to start a fire. Although the fire department responded, it did not suppress the fire until defendant Detroit Edison sent a crew to shut off the power. This did not happen until more than eight hours after the defendant was initially contacted.

The plaintiffs subsequently sued the defendant seeking damages for the loss of their property not covered by insurance. Their insurance carrier, Citizens Insurance Company, filed a separate subrogation lawsuit against the defendant, seeking recovery of the amount it paid to the plaintiffs under the homeowner's policy.

The two cases were tried jointly before one jury, which determined that the defendant was negligent, and that both the plaintiffs' and Citizens' damages were proximately caused by the defendant's negligence. The jury awarded the plaintiffs $230,500, and awarded Citizens $213,600.

In addition, following a posttrial hearing, the trial court awarded Citizens additional damages of $59,787, in connection with the loss of two vehicles destroyed in the fire.

The Main Event

The most significant issue addressed by Donofrio in this case was whether the trial court erred by precluding expert evidence on the defendant's theory that the fire department's conduct was an intervening (superceding) proximate cause of plaintiffs' damages.

The plaintiffs and their insurer moved to prohibit the expert's testimony because it was relevant only to show the fire department may have been negligent in fighting this fire, and the fire could have been suppressed before defendant's crew arrived to shut off the power. They argued that the defendant failed to provide notice it intended to claim the fire department was also at fault, contrary to MCR 2.112(K).

According to Donofrio, the trial court's reliance on MCR 2.112(K) was misplaced.

"Defendant appropriately acknowledged that it was not claiming nonparty fault for purposes of a percentage allocation of responsibility," he explained. "To so claim in the absence of the requisite notice is a violation of the rule."

In this case, the defendant waived its right to take advantage of the non-party fault statutes and rules (MCL 600.2957(1), MCL 600.630, and MCR 2.112(K)).

However, proximate causation is a fundamental concept in tort law and "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," Donofrio explained.

The judge agreed with the defendant that MCL 600.2957(1) precludes the trial court's application of MCR 2.112(K)(2) to bar its expert witness testimony on proximate cause. He also agreed that there is no conflict between MCR 2.112(K)(2) and MCL 600. 2957(1).

"It is the trial court's application of the court rule under these facts that suggests a conflict," he observed.

"MCR 2.112(K) is a rule of procedure," Donofrio explained, noting that the rule was promulgated in response to the Legislature's adoption of MCL 600.2957 and MCL 600.6304.

"MCR 2.112(K) concerns the procedural implementation of the elimination of joint liability, the reapplication of several liability, and the allocation of fault to a nonparty as provided in MCL 600.2957 and MCL 600.6304," he continued. "The purpose of the court rule is to provide notice that liability will be apportioned, provide notice of nonparties subject to allocated liability, and allow for amendment to add parties, thereby promoting judicial efficiency by having all liability issues decided in a single proceeding."

If a party desires to take advantage of the limitations of the cited statutes, notice under the court rule is a prerequisite," Donofrio noted.

The court rule provides, "[a] party against whom a claim is asserted *may* give notice of a claim that a nonparty is wholly or partially at fault." The use of the word "may" in the court rule is permissive, the judge observed. The permissive nature of the rule is consistent with the right of a party to forego fault allocation as provided in MCL 600.6304.

"This is not welcome news for plaintiffs who rely on the 91-day rule for certainty in framing the issues in tort claims."

—Westland attorney Donald M. Fulkerson

"The trial court was distracted by the MCR 2.112(K) argument and failed to appreciate the proffered and elemental defense of the sole and proximate cause," Donofrio concluded. "Proximate cause was a contested issue from the inception of the litigation. [The defendant's expert] was a properly identified and listed witness subject to discovery long before the trial. In disallowing [his] testimony that the fire department was the sole and proximate cause of plaintiffs' damages, the trial court abused its discretion in barring the testimony. A court's vitiation of a proper defense by the exclusion of evidence is such an injustice that requires reversal and remand for a new trial."

Pushing The Envelope

Donofrio also addressed the defendant's argument that a new trial was required because of misconduct by the plaintiffs' attorney.

The defendant cited the following incidents as misconduct by plaintiffs' counsel sufficient to justify a new trial:

- improperly arguing that defendant lied when answering interrogatories about a similar fire at a Plymouth courthouse;
- improperly stating in his opening statement that the jurors should put themselves in plaintiffs' place;
- speaking too loudly during a bench conference, which may have been heard by the jury; and
- improperly commenting about some documents that were wrongly stapled together.

According to Donofrio, these incidents did not rise to a level requiring reversal.

Regarding counsel's comments about the interrogatories, "the evidence supported the challenged remarks and plaintiffs' counsel was justified in arguing that defendant's failure to provide the information about the Plymouth courthouse fire during discovery was probative of defendant's credibility," he observed.

As to the comment on mistakenly stapled documents, "because counsel did not argue defendant engaged in fraud, we do not believe plain error resulted," the judge continued.

On the issue of whether plaintiffs' counsel stepped over the line by noting in his opening statement that the jurors should put themselves in the plaintiffs' place, Donofrio found that, "even without a curative instruction from the court ... these comments were [not] so egregious as to require reversal."

Moreover, the judge said he was satisfied that the lower court concluded the jury was not prejudiced by any comments it may have overheard, and it instructed the jury that the comments and remarks by the attorneys were not evidence.

Finally, Donofrio said a mistrial was not warranted because of an article that appeared in *The Detroit Free Press* on the first day of trial. The article contained statements from plaintiffs' counsel about his theory of the case, along with comments from a spokesperson for the defendant about its theory and position.

"[W]e do not believe the actual content of the article was so prejudicial that if any jury members had read it, it would have prevented them from deciding this case based upon the evidence," he observed. "The article generally mirrored the evidence and theories that were presented at trial."