STATE OF MICHIGAN
SUPREME COURT
On Appeal from Michigan Court of Appeals

PAULETTE STENZEL,

Plaintiff-Appellee,

v.

BEST BUY CO., INC.,

Defendant

and

SAMSUNG ELECTRONICS AMERICA, INC.

Defendant-Appellant.

Supreme Court No. 156262

Court of Appeals Docket No. 328804

Ingham Co. Cir. Ct.
Case No. 14-000527-NO

Lawrence P. Nolan (P25908)
Gary G Villas (P43399)
Nolan, Thomsen &Villas, P.C.
Attorneys for Plaintiff-Appellee
239 S. Main St.
Eaton Rapids, MI 48227
(517) 663-3306
Boardmem15@aol.com

Paul E. Tower (P49151)
Caryn A. Ford (P69590)
Garan Lucow Miller P.C.
Attorneys for Defendant Best Buy Co., Inc.
1155 Brewery Park Blvd., Ste. 200
Detroit, MI 48207
(313) 446-5552
cford@garanlucow.com
ptower@garanlucow.com

Paul L. Nystrom (P57067)
Jill M. Wheaton (P49921)
Dykema Gossett PLLC
Attorneys for Defendant-Appellant Samsung Electronics America, Inc.
39577 Woodward Ave., Ste. 300
Bloomfield Hills, MI 48304
(248) 203-0700
pnystrom@dykema.com
jwheaton@dykema.com

DEFENDANT-APPELLANT SAMSUNG ELECTRONICS AMERICA, INC.'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

THIS APPEAL INVOLVES A RULING THAT PORTIONS OF A STATUTE ARE INVALID.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

OTHER

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.303(B)(1). On December 22, 2016, the Court of Appeals issued a published opinion affirming the grant of summary disposition to Defendant-Appellant Samsung Electronics America, Inc. ("SEA"). (Joint Appendix ("JA") 219a-226a.) On January 17, 2017, the Court of Appeals entered an order vacating Part II(C) of its December 22, 2016 opinion and convening a special panel to resolve a conflict between its decision in this case and *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002). (JA 227a.) On June 27, 2017, the special panel of the Court of Appeals issued a majority opinion and a concurrence, reversing the grant of summary disposition to SEA. (JA 228a-242a.) On August, 8, 2017, SEA timely applied to this Court for leave to appeal. On April 4, 2018, this Court issued an order granting SEA's application.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

After Defendant Best Buy Co., Inc. ("Best Buy") filed a notice of nonparty fault in this personal injury action, identifying SEA, Plaintiff filed a first amended complaint adding SEA as a Defendant. By that time, the statute of limitations for a claim against SEA had long expired. The Circuit Court held that because Plaintiff had not filed a motion for leave to amend her complaint, as required by MCL 600.2957(2), the claim was time barred, and granted summary disposition to SEA. The Court of Appeals affirmed. A special panel was then called, which reversed, and held that: there is a conflict between MCL 600.2957(2) and MCR 2.112(K)(4); the court rule, which does not require the filing of a motion for leave to amend a complaint after the filing of a notice of nonparty fault, controls; and the relation back provision of the statute applied to cause the amended complaint to relate back to the original filing date even though the amended complaint was filed without a motion for leave to amend.

Should this Court reverse the special panel's decision where:

a. The special panel erred in finding a conflict between MCL 600.2957(2) and MCR 2.112(K)(4), and even if there was a conflict, the statue would trump and its provisions would govern;

b. The special panel erred in holding that a plaintiff may amend a complaint upon receipt of a notice of nonparty fault without first filing a motion to amend; and

c. The special panel erred in finding that the relation-back provision in the statute always applies, even if a complaint is amended without filing a motion?

Defendant-Appellant SEA answers:	"Yes"
Plaintiff-Appellee Paulette Stenzel would answer:	"No"
The Circuit Court would answer:	"Yes"
The Court of Appeals would answer:	"No"
This Court should answer:	"Yes"

INTRODUCTION

This case involves statutory interpretation and separation of powers issues in connection with the relationship between a statute and a court rule, specifically, MCL 600.2957(2) and MCR 2.112(K)(4). Both help to implement the comprehensive statutory scheme that replaced joint and several liability with a system for allocating fault among multiple tortfeasors. Both permit a plaintiff—under certain conditions—to amend a complaint to add an entity that was identified as a nonparty at fault. Where they differ is that MCL 600.2957(2) provides that a motion to amend must be filed within 91 days of the identification of the nonparty, and such an amended complaint will relate back to the date the original complaint was filed. MCR 2.112(K)(4), on the other hand, does not expressly require that a motion to amend be filed, nor does it address relation back. These differences have raised questions over the years.

The Court of Appeals in *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002) properly concluded that there is not an irreconcilable conflict between the two because the statute plainly requires a plaintiff to file a motion to amend a complaint to add an entity identified in a notice of nonparty fault, whereas the court rule says nothing on the subject, therefore, motions for leave to amend are always required. 254 Mich App at 443. The original Court of Appeals panel in our case reluctantly followed *Williams* and affirmed the dismissal of the claims against SEA as time barred, because they were added without a motion having been filed. The Court of Appeals then convened a special panel (consisting of Judges Servitto, Murphy, Cavanagh, Fort Hood, Borrello, Gleicher, and Shapiro) to revisit *Williams*. The special panel first concluded that this Court, by not mentioning anything about seeking leave to amend in the court rule, intended to supersede that statutory requirement and make it an amendment of right. The panel then found that abrogating the Motion requirement was this Court's prerogative under separation of powers principles. The panel then addressed the relation back issue,

concluding peremptorily that the relation-back provision in the statute remains valid and always applies, regardless of whether or not a motion for leave to amend was filed.

The special panel erred. First, the panel ignored the unambiguous plain language of both the statute and the court rule, which can be read in harmony with one another, and failed to give the clear and unambiguous statutory language its plain meaning, and enforce it as written. Second, the panel failed to apply the nuanced approach for determining the boundaries between legislative authority and judicial rulemaking authority under the separation of powers principles provided by this Court in *McDougall v Schanz*, 461 Mich 15, 30; 597 NW2d 148 (1999). In this case, even if there were a conflict between the court rule and the statute, the statute governs. Third, the panel erred in cherry picking from the court rule and the statute to create a new policy that allows the benefit of the statute—relation back—even if the requirements of the statute are not met. This Court should reverse and reinstate the Circuit Court's order granting summary disposition to SEA.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. FACTUAL HISTORY

Plaintiff purchased a Samsung refrigerator/freezer from Best Buy on May 21, 2011. (First Amended Complaint, ¶6, JA 62a.) The refrigerator was installed on May 31, 2011. (*Id.* at ¶7, JA 62a; Plaintiff's Dep., p. 30, JA 153a.) Two days later Plaintiff determined that water was coming from the refrigerator's water dispenser. (*Id.*, pp. 50-51, JA 158a) After trying unsuccessfully to stop it herself, she called Best Buy. (*Id.*, pp. 53, 55, JA 158a-159a.) Eventually, she shut off the water main in her home's crawl space and set up a service appointment with Best Buy. (*Id.*, pp. 63-69, JA 161a-162a.) Plaintiff then proceeded to clean up the water that was on the floor. She "grabbed every towel in the house" and put them on the

floor. (*Id.*, pp. 69-70, JA 162a-163a.) She then took a laundry basket of wet towels outside to dry when she claims she slipped and fell. (*Id.*, p. 77, JA 164a.)

II. PROCEDURAL HISTORY

A. Circuit Court Proceedings

Two years and almost eleven months after the June 2, 2011 fall, on April 29, 2014, Plaintiff filed a complaint in Ingham County Circuit Court against Best Buy only, despite knowing who manufactured her refrigerator. On February 12, 2015, Best Buy attempted to file a notice of nonparty fault identifying SEA as the refrigerator manufacturer. Best Buy's notice was not filed within 91 days after it filed its Answer, as required by MCR 2.112(K)(3)(c). Therefore, on March 16, 2015, Best Buy filed a motion for leave to file the notice of nonparty fault. (JA 3a-8a.) Plaintiff opposed the Motion, arguing she would be prejudiced by the notice because the three year statute of limitations had expired against SEA, and she therefore could no longer add claims against SEA. (Plaintiff's Brief in Opposition to Defendant's Motion for Leave to File Notice of Nonparty at Fault, JA 13a-15a.) Best Buy's motion was granted. (April 20, 2015 Order, JA 54a-55a.) However, Best Buy did not file a notice of nonparty fault after the court granted its Motion, apparently relying on the previous (and untimely) notice.

In the meantime, on February 27, 2015, Best Buy moved for summary disposition under MCR 2.116(C)(10), on the grounds that Plaintiff failed to establish causation. The Circuit Court granted Best Buy's motion, holding that Plaintiff could not establish that either the refrigerator or its installation were the proximate cause of her injuries. (April 8, 2015 Transcript, p. 17, JA 53a.) On May 11, 2015, after the court had ruled from the bench that it would dismiss Plaintiff's claims but before its order to that effect had been entered; almost 3 months after the February 12, 2015 notice of nonparty fault was untimely filed by Best Buy (without a notice ever filed after

the court granted leave for same); and three years and eleven months after her alleged fall, Plaintiff filed a First Amended Complaint. The Amended Complaint continued to assert claims against Best Buy (despite the earlier ruling from the bench), and added SEA as a defendant. (First Amended Complaint, JA 56a-75a.) Against SEA, Plaintiff asserted claims for negligence, breach of express and implied warranties, and failure to warn. Most significantly, Plaintiff did not seek leave from the court before filing the First Amended Complaint.

In response, SEA filed a Motion for Summary Disposition under MCR 2.116(C)(7) and (10). (SEA's Motion for Summary Disposition, JA 76a-113a.) SEA argued that the claims against it were time-barred—the First Amended Complaint did not relate back to the date of filing of the original complaint because under MCL 600.2957(2), a complaint that is amended following the filing of a notice of nonparty fault only relates back if the plaintiff moved for leave to amend, which Plaintiff did not do.[1] SEA relied on *Barnes v USAA Cas Ins Co*, unpublished opinion of the Court of Appeals, issued Oct. 21, 2014 (Docket No. 316729)[2], which held that an amended complaint adding a party identified in a notice of non-party fault only relates back to the date of filing of the original complaint if it was amended pursuant to a motion, as required by the statute. Plaintiff filed a response (Plaintiff's Response to SEA's Motion for Summary Disposition, JA 114a-209a), arguing that under *Bint v Doe*, 274 Mich App 232; 732 NW2d 156 (2008), because the court allowed the late filing of a notice of non-party fault, she was entitled under MCR 2.112(K) to amend her complaint to add SEA as a defendant.

---

[1] Although no longer relevant to this appeal, SEA also argued that even if the Amended Complaint was timely, Plaintiff could not establish proximate cause against SEA because: she did not know whether water from the refrigerator caused her fall; her alleged injuries were unforeseeable and too far removed from the alleged defect; and the court had already held, in connection with Best Buy's motion, that Plaintiff could not establish that an alleged defect in the refrigerator was the proximate cause of her injuries.

[2] Attached as Ex. A.

Oral argument was held at which the court first noted that "this case has been hanging around for four years. They're [SEA] an absolute known party, no secret about it, we have Best Buy but I threw them out a long time ago….The statute of limitations is three years." (July 22, 2015 Transcript, p. 13, JA 214a.) The court continued:

> Samsung was a party that could have been noticed from the beginning and should have been added. It was completely foreseeable that when you have a suit like this you add in everybody and dismiss them later. You don't do it backwards like this….[W]e're trying to add and relate back and I'm not going to do, to disregard the wisdom of the Court of Appeals in *Barnes.* It is very instructive. It's almost identical to this case.

(*Id.*, pp. 15-16, JA 214a.) An order granting SEA's Motion and dismissing the First Amended Complaint was entered on July 27, 2015. (July 27, 2015 Order, JA 216a-218a.) The trial court relied primarily on the expiration of the statute of limitations as the justification for summary disposition, but clarified that the motion was granted on lack of proximate cause as an alternative ground. (July 22, 2015 Transcript, pp. 17-18, 215a.)

B. Court of Appeals I (original panel)

Plaintiff appealed. On December 22, 2016, a panel (Judges M. Kelley, O'Connell, and Beckering) issued a published opinion affirming the grant of summary disposition to SEA (on statute of limitations grounds) and reversing the grant of summary disposition for Best Buy (on causation grounds). The panel addressed causation first, holding that the trial court erred when it found a lack of factual cause or legal cause against both Defendants. (Original Panel Opinion, pp. 2-3, JA 220a-221a.) Turning to the statute of limitations issue (as to SEA only), the panel first compared MCL 600.2957(2)[3] with MCR 2.112(K)(4)[4] and concluded that unlike the statute,

---

[3] 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

the court rule does not require leave of court to file an amended complaint adding a nonparty identified in a notice of fault, if the amended complaint is filed within 91 days of the notice identifying the nonparty. (*Id.*, p. 5, JA 223a.) And the panel noted that unlike the statute, the court rule does not provide that the amended complaint will relate back to the date of the original complaint. (*Id.*) The panel then held that this case is controlled by *Williams v Arbor Home*, which held that "reading the court rule and the statute in conjunction, we conclude that leave of the court is indeed required before an amended pleading adding a nonparty becomes effective." (*Id.*)

The panel—which included Judge O'Connell—went on to state that "were we not bound by *Williams*, we would follow the reasoning of Judge O'Connell in his partial dissent" in that case. (*Id.*) Per the panel, Judge O'Connell's dissent noted that the court rule and statute were in conflict and in such a case, the court rule controls as it is a matter of procedure. He also was concerned with potential malpractice claims for filing amended complaints without permission of the court. (*Id.*, p. 6, JA 224a). The panel then stated, "following that approach, we would conclude that because [Plaintiff] followed the requirements set forth in MCR 2.112(K)(4), she properly added Samsung as a party and her amended complaint was timely because it related back to the date of her original complaint." (*Id.*, p. 7, JA 225a.) The panel said it was affirming the grant of summary disposition to SEA only because it was bound to do so by *Williams* and asked the Court of Appeals to convene a special panel. (*Id.*, p. 8, JA 226a.)

> 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.

[4] MCR 2.112(K)(4) provides:

> A party served with a notice under this subrule 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 later amendment as provided in MCR 2.118.

On January 17, 2017, the Court of Appeals entered an order vacating Part II(C) of the December 22, 2016 opinion—the part reluctantly affirming the ruling that Plaintiff's claim against SEA was time-barred—and convened a special panel to resolve the conflict with *Williams*. (JA 227a.)

C. Court of Appeals II (special panel)

On June 27, 2017, a special panel of the Court of Appeals issued an opinion and concurrence. The majority opinion (Judges Murphy, Cavanagh, Fort Hood, and Borrello) held that MCL 600.2957(2) and MCR 2.112(K)(4) conflict on a matter of procedure regarding whether leave of court is required to file an amended complaint to add a nonparty. (Special Panel Opinion, pp. 6-7, JA 233a-234a.) According to the panel, in creating the court rule this Court "intended to alter or streamline the process outlined by the Legislature" by allowing a party to timely file an amended pleading as a matter of course without seeking leave of court. (*Id.*, p. 1, JA 228a.) The majority further held that this Court was constitutionally empowered to modify the statutory requirement to seek leave to amend because the requirement was "purely an issue of practice and procedure" that fell within the "exclusive province of our Supreme Court." (*Id.*, p. 8, JA 235a.) Lastly, the majority held that the relation-back provision in the statute is fully applicable despite the panel's abrogation of the statutory requirement to seek leave to amend. (*Id.*, pp. 8-9, JA 235a-236a.) The majority reasoned that the legislative intent behind the relation-back provision was to allow a party to add an identified nonparty to a complaint "in all instances if done so timely," and that this Court—when drafting the court rule—"intended to provide assistance and details in implementing MCL 600.2957(2) where needed, not to nullify by silence the Legislature's clear desire to allow the relation back of an amended pleading for purposes of a given period of limitations." (*Id.*, p. 9, JA 236a.) In other words, the special panel majority held that regardless of the language of the statute, the court rule prevails and motions

are not required to have an amended complaint that adds an entity identified in a notice of nonparty fault relate back to the date of the filing of the original complaint, despite the lack of any statement regarding relation back in the court rule.

A concurrence (Judge Gleicher, joined by Servitto and Shapiro) disagreed with the majority regarding the existence of a conflict. (Special Panel Concurrence, p. 1, JA 238a.) Instead, the concurrence concluded that the statute simply clarifies that if a plaintiff elects to seek leave of court to timely amend, the court must allow the amendment, and it therefore leaves a choice to plaintiffs—to file a motion or not to file a motion. (*Id*., pp. 2-3, JA 239a-240a.) In the eyes of the concurrence, the statute and the court rule are "entirely consistent with regard to the central and controlling issue: a plaintiff's right to timely amend a complaint to add an identified nonparty at fault as a party." (*Id*., p. 3, JA 240a.) As for relation back, the concurrence came to a similar conclusion as the majority by finding that the Legislature intended to provide relation back for "timely added nonparties at fault," and the court rule's silence regarding relation back does not present a conflict. (*Id.*, pp. 4-5, JA 241a-242a.) It also noted that a "separate court rule," MCR 2.118(D), addresses relation back, and provides that "an amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense in the amended pleading arose out of the conduct, transaction, or occurrence set forth…in the original pleading." (*Id.*, p. 2, JA 239a.) Although the concurrence admitted, in a footnote, that this Court held in *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007) that the relation back rule in MCR 2.118(D) does not apply to the addition of new parties. Despite this, the concurrence concluded that to not apply relation back to amended complaints filed by right, without a motion, would be contrary to the Legislative intent. (*Id.*, p. 5, n. 2., JA 242a.)

D. Application to this Court

SEA filed an application for leave to appeal to this Court. This Court granted leave, directing the parties to brief the following issues:

(1) Whether the Court of Appeals special panel correctly held that there is a conflict between MCL 600.2957(2) and MCR 2.112(K);

(2) Whether, in any event, a party may amend a complaint upon receipt of a notice of nonparty fault without first filing a motion to amend; and

(3) If so, whether the amendment relates back to the date the complaint was filed.

(April 4, 2018 Order, JA 243a.)

STANDARD OF REVIEW

The standard of review is *de novo* for many reasons. First, it is a review of a grant of summary disposition. See, e.g., *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). Furthermore, this Court reviews *de novo* questions regarding the interpretation of statues and court rules. See, e.g., *Estes v Titus*, 481 Mich 573, 578-79; 751 NW2d 493 (2008). The same is true for the question of whether a claim is time barred. See, e.g., *Caron v Cranbook Educ Comm*, 298 Mich App 629, 635; 828 NW2d 99 (2017).

ARGUMENT

The Court of Appeals' special panel erred for three primary reasons. The statute's motion requirement does not irreconcilably conflict with the court rule and is therefore enforceable. In any event, even if the leave of court requirement did conflict, it would still be enforceable because it would supersede the court rule under modern separation of powers principles. Thus, the special panel erred in holding that a plaintiff need not seek leave of court to amend a complaint to add a party identified in a notice of fault.

The special panel also erred in failing to recognize that the statutory relation-back provision is expressly contingent on filing a motion for leave to amend. The court rule says nothing about relation back, only the statute addresses the issue, and the statute requires the filing of a motion for leave to amend. By selectively picking and choosing from the court rule and the statute to give plaintiffs the best of both worlds—not having to seek leave to amend, and still getting the benefit of relation back—the panel improperly created a new rule contrary to the legislative intent. This Court should reverse and hold that leave of court must be sought to so amend a complaint, and that such an amended complaint will only relate back to the date of the original if a motion was filed.

I. THE COURT OF APPEALS SPECIAL PANEL ERRED IN FINDING AN IRRECONCILABLE CONFLICT BETWEEN THE COURT RULE AND THE STATUTE.

MCR 1.104 provides that procedural rules "set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court." See also *People v Carey (In re Carey)*, 241 Mich App 222, 231; 615 NW2d 742 (2000) ("MCR 1.104 . . . provides that rules of practice set forth in statutes that are not in conflict with any of the court rules are effective."); *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 723; 575 NW2d 68 (1997) (same). And the same basic rules of interpretation apply to both statutes and court rules: "Clear and unambiguous language is given its plain meaning and is enforced as written. But language that is facially ambiguous, so that reasonable minds could differ with respect to its meaning, is subject to judicial construction." *Fleet Bus Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). When determining whether a statute conflicts with a court rule, a court must read both in accordance with their plain meanings. *Neal*, 226 Mich App at 722; see also *Staff v Marder*, 242 Mich App 521, 530; 619 NW2d 57 (2000).

A finding that a procedural statute is invalid because it irreconcilably conflicts with a court rule—which is what the special panel majority held here—acts as a finding that the statute is unconstitutional on separation of powers principles; specifically, an intrusion on the judicial branch's primary authority to regulate practice and procedure. Const 1963, art 3, § 2; Const 1963, art 6, § 5; *McDougall*, 461 Mich at 26-27. As explained by this Court in *Neal*, when analyzing whether a procedural statute conflicts with a court rule, a court must proceed with immense caution before declaring a statute to be unconstitutional:

> The power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict. Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.

Id. at 722-23 (quoting *Council of Orgs & Others for Educ About Parochiaid v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997)).

The Legislature expressly mandated, through plain language, that a plaintiff must seek leave to amend before adding a nonparty identified by a defendant as potentially at fault. 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.

(Emphasis added). In contrast, the plain language of MCR 2.112(K)(4) is silent as to whether a plaintiff must seek leave to amend before adding nonparties to a complaint. MCR 2.112(K)(4) simply states:

> A party served with a notice under this subrule 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 later amendment as provided in MCR 2.118.[5]

As the Court of Appeals correctly concluded in *Williams*, based on the plain language of both the statute and the court rule, there is no irreconcilable conflict between the two—the statute plainly requires a plaintiff to file a motion to amend, whereas MCR 2.112(K)(4) says nothing on the subject. 254 Mich App at 443 (the court rule "plainly allows a plaintiff to file an amended complaint adding a nonparty but *does not specifically mention* whether leave of the court is also required") (emphasis in original); see also *Barnes*, ("Absence of the requirement for a motion under MCR 2.112(K)(4) does not nullify the requirement as stated in MCL 600.2957(2) or create a conflict between the statutes, as plaintiff suggests.").

The two can be read together. The statute requires, if a notice of non-party fault has been filed and the plaintiff would like to add that party to the suit, the filing of a motion for leave to amend within a certain time period, and then states that the motion shall be granted. The court rule then makes clear that indeed this must be done with a 91 day time period, and is different from a motion for leave to amend a complaint filed under the general court rules (MCR 2.118), the latter of which is within the discretion of the court. The court rule does *not* say a motion is unnecessary.

If the existence of a conflict was a close call, the statute would still prevail, because when analyzing a potential conflict between a court rule and a procedural statute, "[e]very reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt." *Neal*, 226 Mich

[5] MCR 2.112(K)(4) was adopted in 1997, about two years after the "tort reform" amendments that included section 600.2957(2). The Staff Comments to the 1997 Amendments to the court rules state "new MCR 2.112(K) governs the procedures for identifying nonparties whose conduct is claimed to be a cause of the injury and for adding them as parties. See MCL 600.2957 and MCL 600.6304."

App at 722-23 (quoting *Council of Orgs*, 455 Mich at 570). (And, as discussed below, if there were a conflict, in this case, the statute governs.)

Instead of comparing and applying the plain meanings of the statute and court rule, the special panel applied the wrong standard entirely by opining on the virtue (or more accurately, the lack thereof) of the statutory requirement to seek leave to amend, concluding that it was "wasteful in regard to time, energy, and resources, as to both the courts and litigants" because the motion had to be granted. (Special Panel Opinion, p. 6, JA 233a.) So, the panel concluded, this Court must have intentionally meant to supersede the statutory procedure after "certainly realizing that the procedure is unnecessarily cumbersome and not conducive to judicial expediency and efficiency." (*Id.*, p. 7, JA 234a.).

There are multiple problems with the special panel's approach. First, it is far from obvious that the motion requirement is wasteful, as notifying the court of an intention to add parties can yield numerous benefits, including giving the court an immediate opportunity to confirm that the amendment is timely—that is, that the motion was filed within 91 days of identification of the non-party—and that other notice of nonparty fault procedural requirements have been met, and giving the court an opportunity to immediately revise scheduling orders, if needed. So there could well have been a method to what the special panel believed to be madness. More importantly, because the unambiguous plain language of the statute requires the filing of a motion for leave to amend, and does not conflict with the court rule, it was wholly inappropriate for the special panel to apply its own value judgments to the motion requirement in the first place. See *Fleet Bus. Credit*, 274 Mich App at 591 (judicial construction is only appropriate when language "is facially ambiguous, so that reasonable minds could differ with respect to its meaning").

Even if judicial construction was appropriate, there is no indication that the court rule was intended to supersede the motion requirement in the statute. The reviewing court must consider what meaning was "most likely understood by those who adopted" the relevant language in the court rule or statute. *Neal*, 226 Mich App at 722. And nothing related to the adoption of MCR 2.112(K)(4) reveals an understanding that the rule was meant to "supersede" the statute. Quite the contrary, as MCR 2.112(K) was "essentially intended to implement MCL 600.2957." *Bint*, 274 Mich App at 234 (quoting *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003)). This is evidenced by the fact that: (1) MCR 2.112(K) cites MCL 600.2957 in the court rule's first subsection, which is the court rule's up-front "applicability" section,[6] and (2) the staff comment for the 1997 Amendments for the addition of Rule 2.112(K) cites section 2957 as one of the corresponding statutory provisions to the rule. Despite these telling signs that there was no intention for the court rule to invalidate any part of the statute, the special panel nevertheless found the policy basis behind the statutory leave of court requirement so lacking that it assumed this Court *must* have intended for the court rule to supersede it. But if this Court intended for MCR 2.112(K) to "supersede" the basic procedural requirement to file a motion, established by the Legislature in the statute, presumably there would be a hint of this intention somewhere, or there would be a notation that there is a conflict with the statute, rather than the overt indications that the rule was meant to enact, and comport with, the statute.

At the very least, there is no conflict "that appears so clearly as to leave no room for reasonable doubt," *Council of Orgs*, 455 Mich at 570, which is what is required for a court rule

---

[6] MCR 2.112(K)(1) states:

> *Applicability.* This subrule applies to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death to which MCL 600.2957 and MCL 600.6304, as amended by 1995 PA 249, apply.

to invalidate a statute. The fact that there was a difference of opinion among different panels of the Court of Appeals so as to necessitate a special panel, and that even then, the members of the special panel disagreed amongst themselves, four to three, as to whether the statue and court rule conflict, is proof that a conflict is not "so clear as to leave no room for reasonable doubt." When it is not "so clear," this Court must lean on the side of the validity of the statute.

In sum, the answer to the Court's first question—is there a conflict between the statute and the court rule—is no.

II. THE COURT OF APPEALS SPECIAL PANEL ERRED IN HOLDING THAT A PARTY MAY AMEND A COMPLAINT UPON NOTICE OF NONPARTY FAULT WITHOUT FIRST FILING A MOTION.

Turning to the Court's second question, a party may not amend a complaint upon receipt of notice of a nonparty without first filing a motion to amend. Because, as discussed above, there is no conflict between the statute and court rule, the statute, including its motion requirement, is not invalidated and applies. But even if this Court were to find there is a conflict between the two, the statutory motion requirement was within the Legislature's constitutional authority and therefore supersedes any court rule that could be read to the contrary.

A. There is no conflict between the statute and court rule, and applying both imposes a requirement that a plaintiff seek leave to amend.

As properly held in *Williams*, 254 Mich App 439, the statute plainly requires a plaintiff to first file a motion to amend before adding a nonparty to a complaint, whereas the court rule says nothing on the subject. Therefore, the absence of an irreconcilable conflict between the statute and court rule means that when read together, a plaintiff must file a timely motion for leave to amend before adding a party identified in a notice of nonparty fault, and the motion will be granted.

The special panel's conclusion that a motion is *not* required violates well-established principles of statutory interpretation. "Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Altman v Meridian*, 439 Mich 623, 635; 487 NW2d 155 (1992) (quoting *Baker v General Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980)). Yet relegating the statutory motion requirement—comprising almost the entire first sentence of 600.2957(2)—to optional status essentially treats it as absolute "surplusage." This is because if the statute already included an unconditional right to amend without leave of court (at least within the 91 day window), then all references to filing a motion in the statute would be pointless. Under the canons of statutory interpretation, we must assume the legislature did not waste space by outlining a motion process in subsection 2 when it simply could have said that the plaintiff may amend a pleading within 91 days, period (or could have said that leave of court is not required). Because the statute and court rule do not conflict, a plaintiff must file a motion for leave to amend before adding a party identified in a notice of nonparty fault.

B. The special panel erred by analyzing the statutory condition in a vacuum and ignoring modern separation of powers principles

Even if there was a conflict, the special panel erred in finding that the rule prevailed over the statute and that Plaintiff therefore had no obligation to obtain leave of court prior to amending her complaint to add SEA. The special panel snubbed this issue by saying it is "beyond rational argument" that the question of whether a pleading can be amended is an issue of procedure and not substance and therefore, the court rule, rather than the statute, prevails. (Special panel opinion, p. 8, JA 235a.) This is an oversimplification of the issue and ignores binding precedent.

In *McDougall v Schanz*, 461 Mich 15, 30; 597 NW2d 148 (1999), this Court set forth a nuanced approach for determining the boundaries between legislative authority and judicial rulemaking authority under separation of powers principles. The conflict in *McDougall* was between MRE 702—providing general expert qualification standards—and a statute that provided expert qualification standards for certain medical malpractice actions. *McDougall* noted that under *Perin v Peuler*, 373 Mich 561; 130 NW2d 4 (1964), the rules of evidence were considered procedural and therefore within the Court's inherent rulemaking authority under Article 6, section 5 of the Michigan Constitution, meaning the rule of evidence would supersede a statute to the contrary. But *McDougall* recognized that *Perin* "overstated the reach of our rule-making authority," 461 Mich at 29, by articulating an excessively mechanical approach to classifying laws as procedural or substantive based on superficial characteristics, and then automatically assigning them to the judicial or legislative branches on that basis. Instead, *McDougall* set forth a more functional approach, concluding that a statute will only violate Article 6, section 5 when "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified." *Id.* at 30. Applying this standard to the facts before it, the *McDougall* Court held that the statute superseded the rule of evidence because the statute "reflects wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists," including the "social costs of defensive medicine," the "allocation of risks," and "the costs of malpractice insurance." *Id.* at 35. In essence, because the "Legislature is authorized to change a common-law cause of action or abolish it altogether, it necessarily has the ability to circumscribe those qualified to give the requisite proofs to establish the elements of the cause of action." *Id.* at 36.

The key take-away from *McDougall* is that it is constitutionally permissible for the Legislature to impose conditions on substantive rights, even if the conditions would traditionally be considered procedural when viewed in isolation. This message was confirmed through this Court's application of *McDougall* in *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003). *Gladych* considered the constitutional validity of MCL 600.5856, which imposed conditions on statute of limitations tolling. A court rule stated that an action was "commenced" by "filing a complaint with the court," and the statute of limitations periods referred to the date an action was "commenced." *Id.* at 598-600. But the statutory tolling conditions expressly stated that the statute of limitations is not tolled by the mere filing of a complaint (which would be sufficient under the court rule); instead, the statute required a defendant to be served for the limitations period to be tolled. *Id.* at 598-99. A previous case, *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971), limited the application of the tolling conditions from the statute to avoid what it perceived to be a conflict with the court rule. But *Gladych* overruled *Buscaino*, based on *McDougall*, concluding that the limitation periods are not procedural but serve substantive goals, and therefore not only are limitations periods themselves within legislative authority, but the "additional requirements regarding the tolling of the statute of limitations" supersede the court rule to the extent there is a conflict. *Id.* at 600-601.[7]

In this case, contrary to the special panel's quick assumption that the statute was all procedural, the relation-back provision in MCL 600.2957(2) relates to statutes of limitations and is therefore substantive in nature and within the legislative prerogative. And the Legislature chose to make that substantive right conditional on seeking leave to amend—just as it did when

[7] The issue was relevant because the plaintiff filed the complaint one day before expiration of the limitations period, but did not serve the defendant until after expiration. *Gladych*, 468 Mich at 596.

it imposed expert qualification standards on medical malpractice actions (*McDougall*) and statutory tolling conditions on limitation periods (*Gladych*). Both *McDougall* and *Gladych* found such statutory conditions to be entirely permissible based on their inextricable connection to substantive rights. The same result is warranted here.

Considering the broader context of MCL 600.2957(2) strengthens this conclusion. MCL 600.2957(2) functions to implement an overwhelmingly substantive statutory scheme that was designed to abolish joint and several liability and replace it with a system "designed to allocate fault and responsibility for damages among multiple tortfeasors." *Kaiser v Allen*, 480 Mich 31, 37; 746 NW2d 92 (2008). The motion requirement furthers the statutory scheme by, among other things, requiring the court to evaluate the timeliness of an amendment prior to granting leave to amend to bring in a party, including parties against whom a claim would otherwise be time-barred.[8] This not only minimizes the disruptive impact of untimely attempts to add parties late in litigation, it also protects non-parties from the wasteful burden of obtaining counsel to engage in motion practice simply to establish that the proposed amendment was untimely. Hence, the motion requirement reflects considerations beyond the mere "judicial dispatch of litigation" (the subject matter constituting the judicial branch's exclusive rulemaking domain).

In sum, the special panel ignored the central premise of *McDougall* and *Gladych* by looking at the statutory motion in a vacuum, labeling it as procedural, and then concluding that any court rule in conflict (and as stated above, there really is no conflict) must supersede. When MCL 600.2957(2) is viewed in its entirety, and within the context of the broader statutory

[8] See MCL 600.2957(2) ("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 . . . .") (emphasis added).

scheme in which it sits, the condition of seeking leave amend is within the Legislature's constitutional authority and would supersede MCR 2.112(K)(4).

III. THE SPECIAL PANEL ERRED IN HOLDING THAT THE RELATION-BACK PRIVILEGE APPLIES EVEN IF A MOTION IS NOT FILED.

A. Relation back is contingent on filing a motion for leave to amend because the Legislature said so using plain language.

When the language of a statute is unambiguous, courts must "presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Gladych*, 468 Mich at 597. "[C]ourts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature." *Id.*

MCL 600.2957(2) could not be more clear in its instruction for when the substantive right of relation-back is granted.[9] Subsection 2 says in its entirety:

> 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.

(Emphasis added.) In other words, subsection 2 expressly limits relation back to causes of actions "added under this subsection," and the subsection specifies just one method for adding a nonparty: "motion of a party within 91 days after identification of a nonparty." Therefore, under the plain language of the statute, relation back is expressly contingent on filing a motion within 91 days.

[9] The relation-back provision in MCL 600.2957(2)—like limitations periods themselves—are clearly substantive in nature and within the legislative prerogative, as recognized by the special panel. (Special panel opinion, p. 9, JA 236a)

Yet both the special panel and concurrence ignored the plain language of the statute when purporting to divine the Legislature's intent. The majority did so by concluding that the statute "reflected the Legislature's intent to allow a party, in all instances if done so timely, to amend a pleading to add an identified nonparty at fault" and the Legislature's "clear desire to allow the relation back of an amended pleading for purposes of a given period of limitations." (Special panel opinion, p. 9, JA 236a) (emphasis added). Similarly, the special panel concurrence found that the statute grants relation back whenever a nonparty is "timely added." (Concurrence, p. 4, JA 241a.) But the Legislature did not actually say relation-back is permitted "in all instances if done so timely." Instead the Legislature said that relation back only applies to a "cause of action added under [subsection 2]," and subsection 2 expressly requires not just timeliness, but also leave of court. The Court of Appeals' substitution of its own opinion, that timeliness alone is sufficient for relation-back; for the plain language of the statute, which also requires leave of court, contravenes well-established statutory interpretation principles. See *Gladych*, 468 Mich at 597.[10] The special panel concluded its brief, two paragraph, discussion on the relation back issue by stating "the Michigan Supreme Court left that matter [the relation back of an amended pleading for statute of limitations purposes] untouched and the relation back provision fully enforceable." (Special panel opinion, p. 9, JA 236a.) But the "relation back provision" in the statute requires bringing a motion, and the special panel's opinion does not make the statutory requirement "fully enforceable"; to the contrary, it reads it out of existence. The special panel's

[10] The reference in the concurrence to MCR 2.118(D) as support for finding relation back without a motion is inapposite. As acknowledged by the concurrence, this Court held in *Miller v Chapman Contracting*, 477 Mich at 106, that MCR 2.118(D) only governs relation back for additional claims or defenses against *existing parties*, not the addition of *new parties*—as is evident from the plain language of MCR 2.118(D). ("An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth…in the original pleading.") MCR 2.118(D) is irrelevant to the question of relation back when an entity identified in a notice of non-party at fault is added to a complaint as a party.

logic makes no sense—it found that even though the statute requires a timely motion to amend the complaint, while the court rule does not mention a motion, a motion is *never* required; and even though the statute grants relation back only when a timely motion is filed, while the court rule does not mention this either, you *always* get relation back under the court rule with a timely amendment of right. In other words, the special panel held that the court rule governed, and then re-wrote the court rule, taking what it liked from the statute—the right to relation back—and reading that into the court rule; while ignoring what it did not like from the statute—the motion requirement—and finding that should not be read into the court rule. This sort of picking and choosing is improper. Either both the statute and court rule apply, or one or the other applies, but to create a hybrid of the two and apply that is without precedent.

Finally, the special panel should have conducted a severability analysis once it decided that the court rule invalidated the statute's motion requirement. *Midland Cogeneration Venture LP v Naftaly*, 489 Mich 83, 95-96; 803 NW2d 674 (2011) (holding that a statutory provision was unconstitutional and then stating "we must determine whether the entire statute is unconstitutional or whether its last sentence is severable"). The severability standard is provided by MCL 8.5, which provides a presumption that remaining portions of an act will remain valid without their severed portions, "provided such remaining portions are not determined by the court to be inoperable," and "unless such construction would be inconsistent with the manifest intent of the legislature." Here, in the plain language of MCL 600.2957(2), the Legislature manifested a clear intent that the motion requirement is a condition precedent to the relation-back provision. Therefore, retaining the relation-back provision in the absence of the motion requirement—as the special panel did by virtue of its holding—is "inconsistent with the manifest intent of the legislature." Similarly, this Court could retain a portion of the statute if it finds that

timely motions are not always required to amend a complaint to add a party identified in a notice of non-party fault, by holding that such a motion is required though in order to have the amended complaint relate back to the original complaint filing date.

B. Filing a motion is not an unfair obligation in exchange for the privilege of relation back.

Relation back is only necessary where a plaintiff wishes to add a nonparty to a complaint after the statute of limitations has already expired. If a plaintiff is outside the limitations period, he or she has no grounds to presume that they can add a non-party to a complaint without leave of court *and* have the limitations period automatically relate back to the date of the original complaint. Relation back is an exception to the statute of limitations general rules, a substantive privilege that the Legislature chose to grant via MCL 600.2957(2). And even a cursory glance at MCL 600.2957(2)—to which the court rule refers—would put a plaintiff on notice of the requirement to file a motion. Filing a motion is not too much to ask under the circumstances. Indeed, section MCL 600.2957(2) is just two sentences, with the second sentence regarding relation back coming after the first sentencing providing that a plaintiff must file a motion for leave to amend within 91 days. There should be little risk of undue surprise to a plaintiff who fails to comply with the simple requirement to file a motion, because the motion requirement is imposed by the same statutory subsection that grants plaintiff the privilege to add a party outside of the limitations period in the first place.

The answer to the Court's third and final question—whether the amendment relates back to the date the complaint was filed, if a motion to amend was not filed—is no. Here, no motion for leave to amend to add SEA was filed, and the Amended Complaint was filed well after the statute of limitations had run. Therefore, the Circuit Court properly granted SEA's motion for summary disposition, finding the claims against it to be time-barred.

CONCLUSION AND REQUEST FOR RELIEF

For the above-stated reasons, Defendant-Appellant SEA respectfully requests that this Court reverse the Court of Appeals' special panel decision, reinstate the Circuit Court order granting summary disposition to SEA, and grant such other relief as is just and proper.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Dated: May 30, 2018

By: */s/ Jill M. Wheaton*

Paul L. Nystrom (P57067)
Jill M. Wheaton (P49921)
Dykema Gossett PLLC
Attorneys for Defendant-Appellant Samsung Electronics America, Inc.
39577 Woodward Ave., Ste. 300
Bloomfield Hills, MI 48304

CERTIFICATE OF SERVICE

I certify that on May 30, 2018, I electronically filed ***Defendant-Appellant Samsung Electronics America, Inc.'s Brief on Appeal*** with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF participants.

By: /s/Jill M. Wheaton
Paul L. Nystrom (P57067)
Jill M. Wheaton (P49921)
Dykema Gossett PLLC
39577 Woodward Ave., Ste. 300
Bloomfield Hills, MI 48304

Attorneys for Defendant-Appellant Samsung Electronics America, Inc.

Dated: May 30, 2018

INDEX OF EXHIBITS

Exhibit A

Barnes v. Usaa Cas. Ins. Co.

Court of Appeals of Michigan

October 21, 2014, Decided

No. 316729

Reporter
2014 Mich. App. LEXIS 1953 *

WILLIE BARNES and MARTICA WILSON, Plaintiffs-Appellees, v USAA CASUALTY INSURANCE COMPANY, Defendant, and MARY SHROSBREE, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Oakland Circuit Court. LC No. 2012-128177-NI.

Judges: Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

Opinion

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying her motion for summary disposition pursuant to MCR 2.116(C)(7). For the reasons stated in this opinion, we reverse the trial court's order and remand for entry of an order granting defendant's motion for summary disposition.

The basic facts are undisputed. Plaintiffs were in an automobile accident on July 17, 2009. Plaintiff Martica Wilson was driving a car in which plaintiff Willie Barnes was a passenger. A car, allegedly driven by defendant Mary Shrosbree (hereinafter referred to as defendant) turned into Wilson's lane of travel. Wilson swerved and crashed. Defendant USAA Casualty Insurance Company (USAA)[1] insured Wilson's vehicle. On July 17, 2012, exactly three years later, plaintiffs filed suit against USAA seeking underinsured/uninsured motorist benefits. USAA filed its first responsive pleading on September 20, 2012. On January 11, 2013, USAA filed a notice of nonparty fault identifying defendant as a nonparty who may have been responsible for plaintiffs' injuries in whole or in part. USAA filed its notice of nonparty fault **[*2]** 113 days after USAA filed its responsive pleading. On January 16, 2013, just six days after USAA filed its notice of nonparty fault, plaintiffs filed an amended complaint bringing a claim against defendant. On March 4, 2013, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that the statute of limitations had expired and barred plaintiffs' claim. Plaintiffs argued that because they amended their complaint pursuant to MCR 2.112(K)(4), the date of their amended complaint related back to the date of their original complaint as provided in MCL 600.2957(2). The trial court agreed with plaintiffs and denied defendant's motion for summary disposition. Defendant now appeals.

Defendant argues that the trial court erred in denying her motion for summary disposition because the statute of limitations barred plaintiffs' claim. We agree. This Court reviews de novo the trial court's denial of a defendant's motion for summary disposition and the interpretation of court

[1] USAA is not a party to this appeal. In addition, in the trial court, plaintiff and USAA stipulated to an order dismissing USAA from the claim.

rules and statutes. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). "We interpret court rules using the same principles that govern the interpretation of **[*3]** statutes." *Id.* When reviewing a statute or court rule, our goal is to "give effect to the plain meaning of the text." *Id.* "If the text is unambiguous, we apply the language as written without construction or interpretation." *Id.*

Defendant alleges that plaintiffs' claim is barred by the statute of limitations because plaintiffs' amended complaint was filed more than three years after the car accident. Plaintiff relies on MCL 600.2957(2), which would allow plaintiffs, after identification of a nonparty at fault, to move to amend their complaint to include the nonparty. The amended complaint would relate back to the originally filed complaint, thus extending the statute of limitations. MCL 600.2957(2) provides:

> Upon motion of a party within 91 days after identification of a non-party, 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.

MCR 2.112(K) is a rule of procedure, which was intended to implement MCL 600.2957. *Bint v Doe*, 274 Mich App 232, 234; 732 NW2d 156 (2007). "The purposes of the court **[*4]** rule are to provide notice that liability will be apportioned, provide notice of nonparties subject to allocated liability, and allow an amendment to add parties, thereby promoting judicial efficiency by having all liability issues decided in a single proceeding." *Id.* In order to take advantage of MCL 600.2957(2), a party must first comply with MCR 2.112(K). *Staff v Johnson*, 242 Mich App 521, 533-534; 619 NW2d 57 (2000).

MCR 2.112(K)(3)(c) requires that a notice of nonparty fault must be filed within 91 days after a defendant files its first responsive pleading. The court rule states:

> 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. [MCR 2.112(K)(3)(c).]

In addition, MCR 2.112(K)(4) provides that "[a] party served with a notice under this subrule 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." In other words, an amended complaint may be filed within 91 days.

The trial court erred in granting defendant's motion for summary disposition because plaintiffs and USAA **[*5]** failed to follow the requirements of MCL 600.2957(2) and MCR 2.112(K). First, USAA failed to comply with MCR 2.112(K). USAA filed its first responsive pleading on September 20, 2012. On January 11, 2013, it filed its notice of nonparty fault. Because the notice of nonparty fault was filed 113 days after its first responsive pleading, it was untimely. MCL 2.112(K)(3)(c). As such, USAA was required to file a motion seeking permission to allow a later filing of the notice and show "that the facts on which the notice is based were not and could not with reasonable diligence have been known to [it] earlier." MCR 2.112(K)(3)(c). Further, before granting leave, the trial court also had to find that the "late filing of the notice does not result in unfair prejudice to the opposing party," i.e. plaintiffs. MCR 2.112(K)(3)(c). However, USAA did not file a motion with the court to allow a later filing of a notice of nonparty fault.

Plaintiffs argue that they did not have an affirmative responsibility to object to USAA's procedural deficiency. However, where a defendant failed to comply with the notice requirements of MCR 2.112(K), this Court has found that a plaintiff

cannot rely on MCL 600.2957(2) to file an amended pleading to add a nonparty at fault after expiration of the limitations period. *Staff*, 242 Mich App at 530-536.[2] The holding in **[*6]** *Staff* controls in this case, and USAA's failure to follow the requirements of MCR 2.112(K) prevent the application of MCL 600.2957(2).[3]

Second, plaintiffs failed to file a motion to amend their complaint as required by MCL 600.2957(2). The plain language of the statute requires that plaintiffs file a motion to amend. Because the language of the statute is unambiguous, we must apply the language as written and without construction or interpretation. *Ligons*, 490 Mich at 70. We reject plaintiffs' assertion that because MCR 2.112(K)(4) does not require a motion to amend the complaint, plaintiffs were not required to file a motion. Absence of the requirement for a motion under MCR 2.112(K)(4) does not nullify the requirement as stated in MCL 600.2957(2) or create a conflict between the statutes, as plaintiff suggests.[4] Pursuant to MCL 600.2957(2), plaintiffs needed to file a motion to amend their complaint. Because they did not, plaintiffs are unable to rely on MCL 600.2957(2) to extend the statute of limitations.

In summary, we hold that the trial court erred in denying defendant's motion for summary disposition because (1) USAA failed to file a motion to enter its untimely notice of nonparty fault pursuant to MCR 2.112(K)(3)(c), and plaintiffs failed to object and (2) plaintiffs did not file a motion to amend their complaint to add defendant as required by MCL 600.2957(2).[5]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood

End of Document

[2] The *Bint* Court summarized the holding in *Staff*:

> In *Staff*, this Court found a conflict between MCL 600.2957(2) and MCR 2.112(K)(4) because the statute provides that the trial court *shall* grant leave to file an amended pleading and the court rule provides that a party *may* file an amended pleading. This Court also noted that the statute does not place any time restrictions on the filing of a motion to add a nonparty, while the court rule employs a reasonable time frame and contains an unfair-prejudice provision. Because statutes of limitations involve matters of procedure, this Court resolved the conflict in favor of the court rule and concluded that the statute of limitations applied because the parties had purposely failed to comply with the notice provisions of the court rule. [*Bint*, 274 Mich App at 234-235 (internal citations omitted) (emphasis in original).]

As noted, that *Staff* Court ultimately held that a parties' failure to follow the notice requirements of MCR 2.112(K) prevented application of MCL 600.2957(2). *Staff*, 242 Mich App at 533-534.

[3] We reject plaintiffs' assertion that this Court should apply the holding in *Bint*, 274 Mich App at 233. While plaintiff suggests that *Bint* overruled *Staff* when it found that **[*7]** MCL 600.2957 and MCR 2.112(K) did not conflict, a review of the holdings revealed that the *Bint* Court distinguished its holding from *Staff*. *Id.* at 234-235. Similarly, the current case is distinguishable from *Bint*, because in *Bint*, the parties complied with the notice provisions of MCR 2.112(K), while the parties in this case, and in *Staff*, did not.

[4] We do not agree with plaintiffs that the *Staff* holding that MCR 2.112(K) and MCL 600.2957(2) conflict extends to the responsibility of the **[*8]** plaintiff to file a motion to amend to add a nonparty at fault. The *Staff* Court held that the conflict related to the responsibilities of the parties when filing notice of nonparty fault and subsequent amendments. *Staff*, 242 Mich App at 531-536. The *Staff* Court did not find that a plaintiff did not need to file a motion to amend a complaint to add a nonparty and specifically referenced the requirement that the plaintiff file a motion to amend ("[MCL 600.2957(2)] fails to place any time restrictions on the filing of the motion to add a nonparty." *Id.* at 531. "The construction of MCL 600.2957 . . . urged by plaintiff would require the trial court add a party by motion alone . . ." *Id.* at 533.).

[5] We do not agree with defendant that MCR 2.118(A) required plaintiff to file a motion to amend the complaint because it was filed more than 14 days after plaintiffs were served with USAA's responsive pleading. MCR 2.112(K)(4) provides that "[t]he court may permit later amendment **[*9]** as provided in MCR 2.118." Here, plaintiffs were not untimely in filing their amended complaint, and, thus, MCR 2.118(A) does not apply.