STATE OF MICHIGAN
IN THE SUPREME COURT

PAULETTE STENZEL,

Plaintiff-Appellee,

v.

BEST BUY CO., INC.,

Defendant

and

SAMSUNG ELECTRONICS AMERICA, INC.

Defendant-Appellant.

Michigan Supreme Court No. 156262

Court of Appeals No. 328804

Ingham County Circuit Case No. 14-000527-NO

BRIEF OF AMICUS CURIAE MICHIGAN DEFENSE TRIAL COUNSEL, INC. IN SUPPORT OF DEFENDANT-APPELLANT SAMSUNG ELECTRONICS AMERICA, INC.'S BRIEF ON APPEAL

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STATEMENT OF QUESTIONS PRESENTED

The underlying issue is whether a special panel of the Court of Appeals, in looking beyond the plain language of both MCL 600.2957(2) and MCR 2.112(K), erred in reversing the Trial Court and the first panel of the Court of Appeals, finding a conflict between the language of the statute and the court rule, and thereby improperly applying both. The questions presently before this Court are therefore whether:

I. The special panel of the Court of Appeals erred in determining that a conflict existed between MCL 600.2957(2) and MCR 2.112(K);

II. The special panel of the Court of Appeals erred in holding that a plaintiff may amend a complaint following receipt of a notice of nonparty fault without filing a motion to amend; and

III. The special panel of the Court of Appeals erred in holding that the relation-back provision of MCL 600.2957(2) applies even where a plaintiff amends a complaint without first filing a motion?

In the view of Amicus Curiae, the approach established by the special panel of the Court of Appeals as to each of these issues fails to give effect to the plain meaning of either the statute or the court rule. As a result, the special panel found a conflict where none inherently existed, and then compounded this issue by holding that the language of the statute, which it found to be superseded, should nevertheless remain in effect as though incorporated into the court rule. In seeking to streamline the process established by MCL 600.2957(2) and MCR 2.112(K)(4), the Court of Appeals has effectively rewritten both the court rule and the statute.

STATEMENT OF INTEREST OF AMICUS CURIAE MICHIGAN DEFENSE TRIAL COUNSEL, INC.

Defendant-Appellant Samsung Electronics America, Inc. ("Samsung") seeks leave to appeal the published Michigan Court of Appeals' decision in *Stenzel v Best Buy Company, Inc*, 320 Mich App 262; 906 NW2d 801 (2017). The *Stenzel* Court, through a special panel convened following the decision of the first panel to hear the case,[1] reversed the trial court's grant of summary disposition in favor of Samsung. The trial court decision was based on Samsung's argument that the statute of limitations had run on plaintiff's claims. The first panel of the Court of Appeals affirmed the decision of the trial court; following rehearing, however, the special panel of the Court of Appeals reversed. In doing so, the special panel upended the settled state of affairs and created confusion with regard to both the procedural requirements and substantive rights of the parties following service of a notice of nonparty fault.

Amicus Curiae Michigan Defense Trial Counsel, Inc. ("MDTC") is a statewide organization of attorneys focused on the representation of defendants in civil proceedings. The goal of the MDTC is to enhance and promote the civil defense bar, and the MDTC accomplishes this by facilitating discourse among, and advancing the knowledge and skill of, defense lawyers to improve the adversary system of justice in Michigan. The MDTC appear before this court as a representative of defense lawyers and their clients throughout Michigan, a significant number of whom are potentially affected by the issues involved in this case.

The opinion of the Court of Appeals in this case involves an issue of significant importance to Amicus Curiae. The 1995 reforms abolished joint and several liability for most causes of action, and created an allocation-of-fault system in which each tortfeasor is liable only for the portion of

[1] *Stenzel v Best Buy Co*, 318 Mich App 411; 898 NW2d 236 (2016).

the total damages reflecting a tortfeasor's percentage of fault. *Velez v Tuma*, 492 Mich 1, 12; 821 NW2d 432 (2012). The mechanisms through which this allocation-of-fault system operates are controlled in part by the provisions of MCL 600.2957 and MCR 2.112(K). As the *Stenzel* decision addresses the relationship between these two sources of authority, the outcome of this matter is of great interest to the MDTC.

For reasons more fully explained below, the MDTC join Defendant-Appellant Samsung in urging this Court to reverse the special panel of the Court of Appeals so as to rectify the erroneous decision in *Stenzel*.

STATEMENT OF FACTS AND PROCEEDINGS

Amicus Curiae rely upon the Statement of Material Proceedings and Facts set forth in Defendant-Appellant's Brief on Appeal.

ARGUMENT

The underlying issue raised by this appeal is whether the approach adopted by the special panel of the Court of Appeals resolves an underlying issue as to the application of both MCL 600.2957(2) and MCR 2.112(K). Because the special panel failed to properly apply the plain language of both the statute and the court rule, the Court of Appeals respectfully erred in holding that a plaintiff is entitled to amend a complaint without first filing a motion, and to have any such amendment relate-back to the original filing date of the complaint.

I. THE COURT OF APPEALS ERRED IN FINDING AN IRRECONCILABLE CONFLICT BETWEEN THE PROVISIONS OF MCL 600.2957(2) AND MCR 2.112(K).

The foremost rule of statutory interpretation, and a court's primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). "If the language of a statute is clear and unambiguous,

the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135; 545 NW2d 642 (1996). Further, when called on to construe a court rule, a court applies the legal principles that govern the construction and application of statutes. *McAuley v General Motors Corp,* 457 Mich 513, 518; 578 NW2d 282 (1998).

Nevertheless, "[r]ules of practice set forth in any statute, if not in conflict with any of the court rules, are effective until superseded by rules adopted by the Supreme Court." MCR 1.104. Absent an inherent conflict between a court rule and a statute, there is no need to determine whether there was an infringement or supplantation of judicial or legislative authority. *People v Mateo,* 453 Mich 203, 211; 551 NW2d 891 (1996). When determining whether a statute conflicts with a court rule, a court must read both in accordance with their plain meanings. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 722; 575 NW2d 68 (1997).

The issue presented here is whether the language of this statutory provision inherently conflicts with, and is therefore superseded by, the court rule. In light of the plain language of both the statute and the court rule, there is no inherent conflict, and the plain language of both provisions may be applied in a complementary manner. Specifically, MCL 600.2957(2) provides that:

> (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 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.

By way of comparison, MCR 2.112(K)(4) provides that:

> (4) Amendment Adding Party. 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.

Although both provisions address whether a party may add a claim against a nonparty, the language is *not* contradictory when considered with regard to plain meaning.

Specifically, both provisions require a party to have received notice of nonparty fault. The court rule provides that within 91 days of receiving notice of nonparty fault, a plaintiff is permitted to amend a complaint so as to bring a cause of action against the nonparty. The statute provides that within 91 days of receiving notice of nonparty fault, a plaintiff may file a motion with the court for leave to amend its complaint and bring a cause of action against the nonparty. Neither provision requires or permits an action that is inherently precluded by the other. Rather, the statute, simply provides that, where a party files a motion seeking leave to amend, the court shall grant such motion and the new cause of action relates back to the original filing date of the complaint.

Taking the provisions together, and reading them in accordance with their plain meanings, it is clear that the statute addresses issues as to which the court rule is simply silent. This was the conclusion of the Court of Appeals in *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002) (vacated in part on other grounds, 469 Mich 898; 669 NW2d 814 (2003)), and it remains the most logical reading of the court rule and the statute:

> 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. The statute, on the other hand, states that leave of the court is indeed required. As argued by defendants, the statute therefore merely includes more detail than the court rule. Moreover, the court rule specifically refers to M.C.L. § 600.2957 . . . and the statute is again specifically mentioned in the staff comment to the 1997 amendment of MCR 2.112. The staff comment to the 1997 amendment indicates that the court rule was essentially meant to implement the statute. 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.

Williams, 254 Mich App at 443-44 (emphasis in original).

The *Williams* majority read these provisions together, properly "giv[ing] effect to every word, phrase, and clause." *Johnson v Recca,* 492 Mich 169, 177; 821 NW2d 520 (2012). In contrast to this approach, the special panel of the Court of Appeals in *Stenzel* did not read the provisions together so much as it declared a conflict and then *merged* them together, discarding the statute's requirement that a plaintiff file a motion while simultaneously incorporating the benefit of doing so—the relation back of the new cause of action to the initial filing date of the complaint—into the court rule. The result is that plaintiffs are granted rights *not* expressly conferred by the court rule or statute.

The approach and reasoning of the *Neal* Court is informative on this point. Specifically, the plaintiff in *Neal* argued that the provisions of MCL 600.2912b[2] conflicted with MCR 2.101(B), and were therefore superseded by the court rule. *Neal, supra*, 226 Mich at 722. Noting that the Supreme Court's rule-making power with regard to matters of practice and procedure was superior to that of the legislature, the Court elected to assume, for the purposes of the determination, that §2912b was a rule of procedure. *Id.* Nevertheless, the Court found that §2912b's requirements did *not* conflict with the court rule because they did "not change the manner in which or how a civil action is commenced in medical malpractice cases." *Id.* at 723. Instead, the Court considered the procedural requirements imposed by the statute to be only a "temporal requirement" that had to be met before a plaintiff could properly commence an action in accordance with the court rule. *Id.*

[2] In the words of the Court, "§ 2912b(1) was enacted for the purpose of promoting settlement without the need for formal litigation and reducing the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs." *Neal, supra*, at 720. As such, the statute provided that a plaintiff could not commence a medical malpractice action unless the plaintiff had given written notice at least 182 days before the action was commenced. *Id.*

Such reasoning is applicable here. Even assuming that both MCL 600.2957(2) and MCR 2.112(K)(4) are procedural rules, the statute only provides an additional component to the court rule, one that comprises part the combined function of the provisions as they work together. Neither the statute nor the court rule *must* be read so as to be in conflict, and therefore no irreconcilable conflict exists "so as to leave no room for reasonable doubt."

Again, these provisions *can* be read in a "complementary" manner.[3] This possibility should preclude a finding of irreconcilable conflict: "[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*, *supra*, 226 Mich at 722-23 (quoting *Cady v Detroit,* 289 Mich 499, 505; 286 NW 805 (1939)). From a practical standpoint, however, the approach adopted by the special panel of the Court of Appeals encourages litigants to look beyond the language of a statute or court rule so as to more readily find irreconcilable conflict. This stands in contrast to the reasoned, consistent approach that has long been promulgated by this Court.[4]

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

Having established that there is no irreconcilable conflict between the court rule and the statute, the proper approach in construing the appropriate procedure for amendment following a notice of nonparty fault is to apply both provisions. In interpreting statutory language, "[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered

[3] As noted by the concurrence in *Stenzel. See Stenzel, supra,* 320 Mich App at 290.

[4] See, e.g., this Court's decision in *Council of Organizations & Others for Education About Parochiaid, Inc v Governor,* 455 Mich 557, 570; 566 NW2d 208 (1997), wherein this Court stated that, "wherever possible, an interpretation that does not create constitutional invalidity is preferred to one that does."

nugatory if at all possible." *Altman v Meridian*, 439 Mich 623, 635; 487 NW2d 155 (1992) (citations omitted). As noted above, there is no irreconcilable conflict between the court rule and the statute, and the language of these provisions must be taken together. In light of the statute's express requirement that a motion be filed, the proper approach for bringing claims against a nonparty is for the plaintiff to file a motion.

However, this would be true even if the court rule and the statute did address the same issue, and were irreconcilably in conflict. In contrast to the circumstances assumed by the *Neal* Court regarding MCL 600.2912b, MCL 600.2957(2) *does* grant a substantive right, and is not simply a rule that can be superseded by a procedural rule created by the Supreme Court.[5] Thus the conflict here appears to have been imputed by the special panels' conclusion that it is "beyond rational argument" that both the court rule and the statute addressed an issue of procedure, and therefore that the court rule controlled. *Stenzel*, *supra*, 320 Mich App at 280. Defendant-Appellant Samsung has addressed the approach taken by the special panel as it applies to this issue, including extensive discussion of this Court's ruling in *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999), in its Brief on Appeal, and Amicus Curiae will not belabor the point here. However, the fact remains that the provisions of MCL 600.2957(2) are appropriately considered in accordance with the reasoning of the *Neal* and *McDougall* Courts.[6]

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[5] This point was conceded by the *Stenzel* majority, which contrasted the "procedural component" of the first sentence of MCL 600.2957(2) with the second sentence's "the substantive component" of allowing a party to "amend a pleading to add an identified nonparty at fault." *Stenzel, supra*, 320 Mich App at 281. Nevertheless, the special panel's application remains flawed.

[6] Notably, another possibility exists that allows the court rule and the statute to be read consistently, but separately, so as to give plaintiffs two options. Although general principles of statutory interpretation provide that the statute and the court rule should be read together, and that the motion requirement is nevertheless applicable to all causes of action brought pursuant to notice of nonparty fault, a separate reading of these provisions raises another possibility. Specifically, under this approach, a plaintiff would be permitted to amend a complaint following notice of nonparty fault without seeking leave of the court, but would not be entitled to receive the benefit that the

In practice, this is neither a difficult nor burdensome step. The special panel reasoned that in implementing MCR 2.112(K), the Supreme Court had "intended to streamline the amendment process, the result of which was the creation of a conflict between the court rule and the statute." *Stenzel*, *supra*, 320 Mich App at 282. However, in attempting to further this inferred effort to "streamline" the process, the special panel failed to consider whether the motion requirement might provide any sort of benefit to the parties or the court. Rather, the position of the special panel, and of the Plaintiff-Appellee, appears to be that this step is both redundant and wasteful because the court has no choice but to grant a timely-filed motion brought after the receipt of a notice of nonparty fault:

> The process or procedure contemplated by the Legislature can accurately be characterized as wasteful in regard to time, energy, and resources as to both the courts and litigants. Conceptually, under the statute, the process could potentially entail the filing and service of a motion for leave to amend a pleading, the filing and service of a response to the motion, the scheduling of a hearing, the service of a notice of hearing, an appearance by counsel at the hearing, oral argument, and the court's preordained ruling as dictated by MCL 600.2957(2).

Stenzel, *supra*, 320 Mich App at 277.

This description of the onerous burden imposed by the requirement that a party file a motion does not present the whole picture, however. In contrast to the special panel's portrayal of this process, the fact that the statute requires the court to grant a timely motion cuts both ways. Because the court must grant the motion, the issues that can reasonably be raised in any response, and indeed the likelihood of a party choosing to respond in the first place, are inherently limited. A party that, upon receiving notice of a plaintiff's motion to amend the complaint, elects to respond is likely to be doing so only in order to point out that the moving party did *not* meet the

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claims related-back to the original filing date. If the plaintiff did elect to file a motion pursuant to MCL 600.2957(2), the claims would relate-back.

requirements of the statute or the court rule that give rise to plaintiff's right to file the motion. Such a party could argue that the motion had not been filed within the requisite 91-day period, or that the notice of nonparty fault had not been timely served. The requirement that the court grant the motion so long as the basic requirements had been met would further restrict any dispute to the issue of whether the requirements had actually been met. As such, the process would not appear to be as burdensome as initially suggested.

In addition, the motion requirement also provides a benefit to the parties, the court, and the nonparty allegedly at fault. The fact that the court would be forced to consider the motion would bring the issue of timeliness to the forefront even where no party elected to file a response. Further, the motion would allow the court and the parties to address scheduling and discovery matters, or to at least consider potential issues relating to same, without delay.[7] And it protects nonparties against the need to respond to a claim where the plaintiff's belief that amendment is justified is incorrect; by forcing a plaintiff to demonstrate the validity of the amendment before simply filing and serving an amended complaint, the risk of costly, but necessarily fruitless, litigation is curtailed.

Because the special panel of the Court of Appeals erred in finding that a conflict existed between the provisions of MCL 600.2957(2) and MCR 2.112(K), it erroneously held that there was no requirement that a party must file a motion before amending a complaint to add a cause of

[7] The apparent value of these benefits is reflected in MCR 4.002(A)(1), the court rule relating to the transfer of actions from the district court to the circuit court. MCR 4.002(A)(1) provides that, where a defendant asserts a counterclaim or cross-claim in amount exceeding the jurisdiction of the district court, the "judge shall either order the action transferred to the circuit court to which appeal of the action would ordinarily lie ***or inform the defendant that transfer will not be ordered without a motion and notice to the other parties."*** [emphasis added]. As such, this Court clearly recognized the benefit of a motion under circumstances where there it appears the district court is nevertheless required to grant the motion.

action against a nonparty. Reading the statute and the court rule together, it is clear that the legislature intended that to be the appropriate procedure, and nothing in the court rule explicitly provides that the Supreme Court intended to change this state of affairs. Nevertheless, the substantive nature of the statutory relation-back provision supports that the requirement that a party file a motion is controlling, regardless.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT AN AMENDMENT FOLLOWING RECEIPT OF A NOTICE OF NONPARTY FAULT RELATES BACK TO THE FILING DATE OF THE COMPLAINT WHERE THE PLAINTIFF DOES NOT FILE A MOTION.

Although the court rule does not address whether a motion is necessary, the statute does—and expressly ties the grant of a substantive right to a plaintiff to the filing of a motion. The statute clearly provides that where a party receives notice of nonparty fault, and brings this to the attention of the court by filing a motion, the court must then grant the motion. The benefit of adhering to these requirements is that the plaintiff's cause of action against the nonparty is not barred by the statute of limitations. Inherently, the relation-back provision is dependent on the filing of the requisite motion in accordance with the plain language of MCL 600.2957(2).

It is the plaintiff's burden to plead a factually supported claim, and to identify the parties against whom it has a cause of action before filing same. The relation-back provision of MCL 600.2957(2) allows a plaintiff who would have otherwise missed an opportunity to seek relief to do so upon receipt of notice as to the nonparty, simply by filing a motion. This is an enormous benefit; the general rule is that amendments that pertain to the addition of new parties do not relate-back. *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007) (finding that MCR 2.118(D) did not apply where the amendment involved the addition of new parties to the action). As noted by the Defendant-Appellant, the Court has previously found that this is

particularly true with respect to a claim for medical malpractice. It has long been held that an action for medical malpractice must be pled more specifically than other types of negligence. See *Simonelli v Cassidy*, 336 Mich 635, 644; 59 NW2d 28 (1953); *Badalamenti v William Beaumont Hosp – Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999) (holding that a claim for medical malpractice must be pled with specificity). There is no reason that, in order to obtain the substantial benefit that a claim is preserved even though it would otherwise be barred by the statute of limitations, the plaintiff should not have to comply with the negligible procedural requirement that it file a motion.

This Court has recognized the value of both the purpose and intent of both notice and other such procedural provisions in the afore-mentioned medical malpractice context. See, e.g., *Driver v Naini*, 490 Mich 239, 254-255; 802 NW2d 311 (2011) (stating that "[t]he legislative purpose behind the notice requirement [includes] reducing the cost of medical malpractice litigation…") (citation omitted). The goal of the notice requirement, as well as other, related provisions, is to provide the parties with an opportunity to exchange information, undertake investigation, and assess the merits of their relative positions so that meaningful efforts at resolution can occur prior to the commencement of litigation. This Court has required strict enforcement of the notice provision, directing dismissal of the complaint if proper notice is not given. *Roberts v Mecosta Co Gen Hospital*, 466 Mich 57, 70-71; 642 NW2d 663 (2002). In *Dorris v Detroit Osteopathic Hospital,* 460 Mich 26, 47; 594 NW2d 455 (1999), where the issue concerned whether the claim sounded in ordinary negligence or medical malpractice, this Court noted that the appropriate sanction for failure to comply with the statutory notice of intent requirement was dismissal without prejudice.

Here, the requirement that a plaintiff file a motion is fundamentally similar. The motion requirement protects against the risk that a nonparty at fault could be compelled to respond to an action where the plaintiff's belief that a cause of action may be brought against the nonparty is ultimately misplaced. In other words, where a plaintiff may amend a complaint as of right, and without the requirement that it file a motion, a party as to whom the statute of limitations had long ago expired could be served with a complaint and forced to respond—only to discover that the statute of limitations precluded plaintiff from properly bringing the action. Statutes of limitations are intended to "compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend" and to protect the courts from stale claims. They further prevent actions "where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured" and to protect "potential defendants from protracted fear of litigation." *Moll v Abbott Laboratories,* 444 Mich 1, 14; 506 NW2d 816 (1993). The goal of streamlined process should not undermine the inherent benefits to both litigants and courts provided by statutes of limitation.

The burden imposed by the requirement that a party file a motion is inconsequential when compared to the substantial and meaningful advantage that a plaintiff obtains by filing the motion. More importantly, the holding of the special panel of the Court of Appeals that a plaintiff may obtain the benefit of the relation-back provision of MCL 600.2957(2) without first filing a motion is based on an improper merger of the language of the court rule and the statute. As such, a party's amendment to add a new cause of action should only relate-back when it is predicated on the filing of a motion.

CONCLUSION AND RELIEF REQUESTED

For the reasons explained above, Amicus Curiae The Michigan Defense Trial Counsel, Inc., join Defendant-Appellant Samsung Electronics America, Inc. in urging this Court to reverse the decision in *Stenzel*.

Dated: July 25, 2018

Respectfully submitted,

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