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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULE 26(b)(5),
ARIZONA RULES OF CIVIL PROCEDURE

Supreme Court No. R-

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, James K. Kloss of the law firm of Lewis Brisbois, Bisgaard & Smith respectfully petitions the Court to amend a portion of Rule 26(b)(5) of the Arizona Rules of Civil Procedure, pertaining to the standard applied for allowing the acceptance of a non-party at fault named more than 150 days after the answer (a copy of the proposed amended rule is attached as Appendix A). The rule as currently applied is inconsistent with other procedural rules relating to untimely actions and is contrary to public policy. Because identification of a non-party at fault is an affirmative defense, the proposed amendment would align Rule 26(b)(5) with Rule 15, and put in place the same standard for the Court to consider when either a non-party or a party is being added to a case relatively late.

I. The History of the Rule and the Public Policy of Arizona.

Rule 26(b)(5), concerning the naming of non-parties at fault, was the result of the gradual legislative adoption, beginning in the 1980s, of the Uniform Contribution Among Tortfeasors Act (“UCATA”), allowing for rights of contribution, and limiting joint and several liability. Over the succeeding years, the Arizona legislature amended the statutory scheme several times, ultimately creating A.R.S. § 12-2506 which virtually wiped out joint and several liability in Arizona. Since that time, courts have recognized the legislative intent, as a matter of public policy in Arizona, to broadly extinguish joint and several liability, except in very limited circumstances. *See, e.g., State Farm Insurance Companies v. Premier Manufactured Systems, Inc.*, 217 Ariz. 222, 172 P.3d 410 (277).

Following the Legislature's virtual abolition of joint and several liability, this Court looked to adopt a procedural rule to implement the naming of non-parties at fault. The task ultimately was assigned to the Civil Practice and Procedure Committee of the State Bar. A review of the limited historical information available on the Committee's work indicates that the Committee had a significant disagreement concerning the timing of the naming of non-parties at fault¹. The split was ideological; attorneys generally representing plaintiffs sought a very early deadline to name non-parties at fault, while attorneys generally representing defendants sought a very late date. The plaintiff attorneys sought to implement a deadline of 150 days following the answer; the defense attorneys sought a deadline at when

¹ Because of page limitations, the documents from the historical record cannot be provided here. The documents consist of Arizona Supreme Court documents from 1988, concerning the first adoption of Rule 26(b)(5), and the Minutes from meetings of the State Bar Civil Practice and Procedure Committee in 1987 and 1988.

the motion to set was filed.²

Based on the limited historical record, it appears that the sole bone of contention was the initial deadline for filing a timely notice of non-party at fault. There is no evidence of a discussion about the standard to apply for an untimely notice, which suggests that the issue was not subject to a broad-based analysis prior to adoption. This position is supported, as well, by the result of the rule change. Ultimately, for reasons still unclear, the version sought by the plaintiffs' attorneys was adopted - - which had the result of using the earlier deadline for naming the non-parties at fault. With an early deadline adopted, it would have made abundant sense to create more flexibility when considering untimely notices, yet it was as though the Committee's work stopped once the 150-day rule was established.

Since the initial adoption of Rule 26(b)(5), courts have repeatedly recognized that joint and several liability is not the public policy of Arizona. Courts have recognized that it is the public policy of Arizona to favor several liability, wherever possible and appropriate. Despite the clear shift in public policy, Rule 26(b)(5) continues on, more than 20 years later, with a very harsh standard that prevents wide use of the non-party at fault defense, a fact which is contrary to the public policy of Arizona.

II. Comparison of the Rule 26(b)(5) Untimeliness Standard to Other Rules.

The Arizona Rules of Civil Procedure frequently deal with the standard to apply when a party takes action after a specific deadline. Whether it is a plaintiff seeking to amend a complaint to add a new claim or

² This discussion was held during the late 1980s, when motions to set were common, and were typically filed perhaps 60 or 90 days prior to trial. Accordingly, this was an extremely late deadline.

party, or the filing of an untimely discovery response, the Rules (as well as the case law) often have to deal with what standard to apply to an untimely action. The standard contained in Rule 26(b)(5) to an untimely notice of non-party at fault is significantly harsher than that of any other Rule.

The prevalent approach to untimely actions reflected in the Rules is flexible and fair-minded to both parties. The typical standard to apply when a party seeks to take a late or untimely action is a notice/prejudice standard. *See* Rule 15, Arizona Rules of Civil Procedure, and cases interpreting it. This is also reflected in multiple other Rules. *See, e.g.*, Rule 24(b), and 37(c), Arizona Rules of Civil Procedure. When a notice/prejudice standard is not delineated, other Rules frequently apply a "good cause" standard. *See, e.g.*, Rule 30(a), 35(c), and 36(b), Arizona Rules of Civil Procedure. Whether the standard be notice/prejudice or good cause, no other Rule in Arizona applies as harsh a standard to the taking of untimely action as does Rule 26(b)(5).

III. Why Should the Rule 26(b)(5) Untimeliness Standard be Changed?

The Rule 26(b)(5) standard should be softened for several reasons. First, not only is there is no discernable basis for the establishment of such a harsh standard, this result is contrary to good sense and fairness. Historical examination demonstrates that there was an argument between attorneys for plaintiffs and attorneys for defendants about whether there should be an early or late deadline for disclosure of non-parties at fault. Plaintiffs' counsel won the basic argument. Common sense would indicate that if an early deadline was to be set, then a softer standard for untimely disclosure would be appropriate. Conversely, if a late deadline had been agreed to, then a harsher standard might be appropriate. In this case, the plaintiffs'

view won both the battle and the war. There is an early deadline for disclosure of non-parties at fault, and a tough standard for later disclosure. There is no explanation or historical record why an early deadline should be combined with a harsh untimeliness standard. Common sense would indicate this combination is inappropriate.

Second, the public policy of Arizona compels a softer standard. Unlike, for example, the standard to be utilized for a plaintiff to amend their complaint, where there is no expression of public policy by the State Legislature on the issue, in this instance, there is a clear expression of the public policy by our State Legislature. Our State Legislature has clearly and repeatedly stated that joint and several liability is heavily disfavored under Arizona law. Our courts, in applying that public policy, have repeatedly found in favor of expansion of non-party at fault rights. Whatever the particular practice or feeling of any attorney, it must be recognized that the Legislature and the Court system have spoken. Several liability only is to be the rule in Arizona, and a restrictive rule that in effect creates joint and several liability where none should exist is contrary to Arizona's public policy. Further, there is a basic public policy of Arizona to favor a trial on the merits. Just as a plaintiff seeking to add a new defendant 150 days or more after the original complaint is governed by a notice/prejudice standard, so should a non-party at fault addition by a defendant. Both permit a trial on the merits, consistent with Arizona's public policy.

Third, when a Rule contains a standard that is out of step with every single other procedural rule, everyone should question why that is so. Why does Rule 26(b)(5) have the single toughest standard for taking untimely action? No good reason can be offered, and when combined with the expressions of public policy by our Legislature and Courts, there are very

good reasons why Rule 26(b)(5) should, if anything, have the softest standard.

Finally, there is the inherent unfairness of the Rule itself. Under the Rule, a defendant cannot name a non-party at fault more than 150 days after answering without showing that there was essentially no method by which the identity of the non-party could have been discovered and named earlier. There is no "reasonableness" standard to the Rule. Instead, it is a bright-line inquiry as to whether the non-party could theoretically have been identified earlier.

How does this work in practical terms? For example, an independent witness may have knowledge concerning the identity of a non-party at fault. In some cases, that independent witness may not be disclosed or deposed until later in the litigation, often for very good reasons. But, if the witness could have, in any way, shape or form, been contacted or deposed within a 150-day time period, then the untimely notice of non-party at fault cannot be utilized. There are very good reasons why an independent witness may not be contacted or deposed within the first 150 days. For example, cases often involve multiple defendants, with defendants being served and answering at different times. The first defendant answering may well have a large portion of its 150-day deadline pass before the last defendant even appears in the case. Discovery is commonly delayed until all parties are present, in order to avoid excess costs and duplication. Disclosure statements are then sought before discovery begins, for the very good reason that the parties wish to see what evidence is possessed by every other party. Thus, all or most of a defendant's 150 days following the answer may be used up by the time it takes the parties to join the case and file initial disclosure statements. The parties then typically confer and cooperate on the scheduling of discovery.

A witness who may not be available to talk under any circumstances other than a formal deposition may very well thus not give initial testimony until more than 150 days after answering. Thus, the identity of a non-party at fault may not be located until more than 150 days after the answer, for very good and common sense reasons. However, common sense and reasonableness are not factors in determining whether or not untimely notice of non-party at fault will be accepted under Rule 26(b)(5). Instead, the court would look at this example and see that the defendant could have deposed the person earlier, even though it made absolutely no sense under the procedural posture of the case. Thus, the defendants' non-party at fault notice would not be accepted.

How can a rule of procedure in determining whether an untimely action will be accepted not consider the reasonableness of the conduct of the moving party? How can a court be forbidden from looking at whether the party acted in good faith or with good cause? The Rule 26(b)(5) standard is, quite simply, completely out of step with any notion of reasonableness or common sense.

Finally, there is the flip side, prejudice. Typically, when a party seeks to take an untimely action, one of the first things a court will do is look at whether such action will cause unfair prejudice to the other side. Under the Rule 26(b)(5) standard, the notion of unfair prejudice to the plaintiff is completely absent. The most often cited objection to a softer standard for untimely notices of non-parties at fault is that the plaintiff will be prejudiced because a non-party will be named that cannot be added to the suit as a new defendant because of the expiration of the statute of limitations. While this example occurs in only a very limited non-party situation, it is a complete red herring. Changing the Rule 26(b)(5) untimeliness standard to a

notice/prejudice analysis will not, in any way, negatively impact plaintiffs. If a notice/prejudice standard is applied, a court would immediately look to determine whether adding the untimely non-party at fault would have an unfairly prejudicial effect on the plaintiff by, for example, adding a non-party that cannot be added to the litigation as a formal party because of the expiration of the statute of limitations. The statute of limitations objection is exactly why a notice/prejudice standard should be applied, because the court would be free then to examine the reasonableness of the conduct of the defendant (such as by looking for undue delay), and by looking to determine whether the plaintiff has as a result been unfairly prejudiced.

A notice/prejudice standard would look for unfair prejudice. Simply because the plaintiffs might be harmed by the addition of a non-party of fault is not unfair prejudice. It is the prejudice inherent when a defendant has available to it a good defense. If the defendant is added more than 150 days after its answer is an entity such as the plaintiff's employer, there would be no unfair prejudice to the plaintiff because the plaintiff could not sue its employer anyway because of the exclusive remedy of worker's compensation. In such a case, there would be no unfair prejudice, there would simply be the prejudice inherent in the defendant raising a new defense.

IV. Summary and Conclusions.

Procedural rules should not be created that favor one side or the other in litigation. Rules should be created that create a fair balance and allow the orderly proceeding of litigation. Rules can and should provide for deadlines, but Rules should also provide for a reasonable standard to allow a party to take action after the applicable deadline, under appropriate circumstances.

The Arizona Rules of Civil Procedure frequently confront the issue of

The Arizona Rules of Civil Procedure frequently confront the issue of the party seeking to take action and that is not within a deadline or the specific confines of a Rule. The procedural rules uniformly provide for the examination of reasonableness, good cause, undue delay, and unfair prejudice. The one and only Rule which does not follow this train of thought is the untimeliness standard for notices of non-party at fault under Rule 26(b)(5).

The historical record demonstrates that attorneys for plaintiffs won in an essentially 50/50 vote with defense attorneys on forcing a very early deadline for notices of non-party of fault. Assuming the 150-day deadline is not changed, then common sense dictates there should be a relatively soft standard for allowing notices filed after the deadline. For the Rule to contain an early deadline, but a harsh standard for taking untimely action, defies common sense.

Rule 26(b)(5)'s untimeliness standard is out of step with the Arizona Rules of Civil Procedure; it is out of step with common sense; it is out of step with the public policy of Arizona; and, it is out of step with any notion of fair play. It should be changed.

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RESPECTFULLY SUBMITTED this 6th day of January, 2010.

**LEWIS BRISBOIS BISGAARD & SMITH
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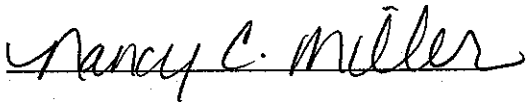
By



James K. Kloss

ORIGINAL and six (6) copies
filed this 6th day of January, 2010, with:

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Nancy C. Miller

APPENDIX A

Proposed Amendment to Rule 26(b)(5) (proposed additions are shown by underscoring and deletions are shown by "strike-through")

Rule 26(b)(5) Non-Party at Fault

Any party who alleges, pursuant to A.R.S. 12-2506(B) (as amended) that a person or entity not a party to the action was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location, and the facts supporting the claimed liability of such non-party at the time of compliance with the requirements of Rule 38.1(b)(2) of these Rules, or within one hundred fifty (150) days after the filing of the party's answer, whichever is earlier. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any non-party whose identity is not disclosed in accordance with the requirements of this subpart 5 except upon written agreement of the parties or upon motion establishing a lack of undue delay and unfair prejudice to all other parties. ~~Establishing newly discovered evidence of such non-party's liability which could not have been discovered within the time periods for compliance with the requirements of this subpart 5.~~