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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULE 26(b)(5), ARIZONA RULES OF CIVIL PROCEDURE	**Petition No. R-10-0001** **COMMENT OF THE ARIZONA TRIAL LAWYERS ASSOCIATION/ARIZONA ASSOCIATION FOR JUSTICE TO THE PETITION SEEKING TO AMEND RULE 26(b)(5) OF THE ARIZONA RULES OF CIVIL PROCEDURE**

Preliminary Statement

The Arizona Trial Lawyers Association/Arizona Association for Justice—acting on a resolution of its Board of Directors and through its Amicus Committee—comments on and objects to the petition proposing changes to Arizona Rule of Civil Procedure 26(b)(5).

The petition proposes solving a nonexistent problem. It offers no good reason to eliminate Rule 26(b)(5)'s exception for late disclosure and replace it with a notice-and-prejudice standard where the defendant, exercising due diligence, could not discover nonparty liability in time to meet the 150-day deadline. Notably, the petition does not argue that Rule 26(b)(5)'s present version is unworkable. Nor does it contend that the present rule has frustrated the legislature's goal in enacting A.R.S. § 12-2506. The petition does not assert that tort defendants have unfairly had to pay more than their fair share of liability because of the present 150-day deadline (with its exception for newly-discovered evidence). The Court should thus reject the proposed amendment.

The present version of Rule 26(b)(5) is an integral part of Arizona's comparative-negligence system, which balances a defendant's right to pay no more than its fair share of damages with a victim's right to the fullest recovery that the law will allow.[1] Amending Rule 26(b)(5) would upset that balance by

[1] *Wester v. Crown Controls Corp.*, 974 F. Supp. 1284, 1287 (D. Ariz.

conferring a significant litigation advantage on defendants.

Legal Argument

1. Rule 26(b)(5) differs from other civil-procedure rules, since the Court created it to effectuate A.R.S. § 12-2506.

Petitioner asserts that the "prevalent approach" for requests for leave to take late or untimely action under the civil-procedure rules is a notice-and-prejudice standard.[2] But that's inaccurate. Under Rule 15(a), for example, a party does not have to miss a deadline when the party seeks leave to amend. The rule simply provides that parties may amend "as a matter of course" before the responsive pleading is served.[3] After filing the responsive pleading, a party must seek leave to amend.[4] Even so, Rule 15(a) mandates that leave "shall be freely

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1996). Under ARIZ. R. CIV. P. 26(b)(5), "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 nonparty 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 that party's answer, whichever is earlier. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any nonparty 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 newly discovered evidence of such nonparty's liability which could not have been discovered within the time periods for compliance with the requirements of this subpart 5.").

[2] *See* Pet. at 4.

[3] *See* ARIZ. R. CIV. P. 15(a).

[4] *Id.*

given."[5] And Arizona courts have construed that directive to require that amendments be "liberally allowed"[6] so "cases may be decided on the merits rather than on mere technicalities of pleadings."[7] Under the governing standard, undue delay, by itself, is an insufficient ground for the denial of leave to amend.[8] In fact, "substantial prejudice" to the opposing party that is the crucial factor.[9] And "even where a party is prejudiced, the prejudice must be balanced against the hardship to the moving party if leave to amend is denied."[10]

Rule 24(b) is similar. Since no deadline exists for permissive intervention under Rule 24(b), its undue-delay-and-prejudice factors do not apply only to late or untimely applications. They also apply to timely ones.

The petition cites only one rule not applying a notice or prejudice standard to late or untimely action. That is Rule 37(c), which addresses when and under what conditions a party may use evidence not timely disclosed. But, the deadline for disclosure is much shorter than Rule 26(b)(5)'s 150-day deadline.[11]

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[5] *Id*.

[6] *Owen v. Superior Ct.*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982); *Dube v. Likins*, 216 Ariz. 406, 415 ¶ 24, 167 P.3d 93, 102 ¶ 24 (App. 2007).

[7] *Cagle v. Carr*, 101 Ariz. 225, 227, 418 P.2d 381, 383 (1966). *See also Pargman v. Vickers*, 208 Ariz. 573, 578 ¶ 23, 96 P.3d 571, 575 ¶ 23 (App. 2004).

[8] *Owen*, 133 Ariz. at 79, 649 P.2d at 282.

[9] *Id*. *See also In re Appeal in Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994).

[10] *Romo v. Reyes*, 26 Ariz. App. 374, 376, 548 P.2d 1186 (1976).

[11] *See* ARIZ. R. CIV. P. 37(c)(1) (referring to failure to timely disclose

The petition notably fails to cite Rule 6(b)—the rule applicable to requests for enlargement of time to perform an act "after the expiration of the specified period" for the act to be done. Under Rule 6(b), the governing standard for such requests is excusable neglect. That standard requires the court to resolve the question of whether failure to accomplish the required act within the specified period was the kind of neglect that a reasonably prudent lawyer could commit under similar facts.[12] That inquiry resembles Rule 26(b)(5)'s exception. Under that exception, the question is really whether reasonably prudent defense counsel—exercising due diligence—could have discovered and disclosed the identity of the nonparty at fault within the 150-day period.[13]

Further, Rule 26(b)(5)'s exception for circumstances where disclosure cannot be made within 150 days of filing of the answer is based on the standard in Rule 60(c)(2).[14] Thus, contrary to Petitioner's implicit suggestion, the Rule

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information that Rule 26.1 requires); ARIZ. R. CIV. P. 26.1(b)(1) (requiring initial disclosures within 40 days of filing of the answer); ARIZ. R. CIV. P. 26.1(b)(2) (requiring additional disclosure to be made no more than 30 days after the information is discovered).

[12] *See*, *e.g.*, *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984); *Ellman Land Corp. v. Maricopa County*, 180 Ariz. 331, 339, 884 P.2d 217, 225 (App. 1994).

[13] *See Soto v. Brinkerhoff*, 183 Ariz. 333, 336, 903 P.2d 641, 644 (App. 1995) (Submitting fault of nonparty physician to jury was error where defense counsel knew of x-rays taken by nonparty physician within the 150-day period, but did nothing to obtain copies and have them examined.).

[14] Under Rule 60(c)(2), which is simply a specific application of the doctrine of "excusable neglect," a party may obtain relief from a judgment or

26(b)(5) exception has antecedents in the civil-procedure rules. It is not an unprecedented rule grafted onto the procedural rules.

But, it does not really matter whether Rule 26(b)(5)'s standard is inconsistent with that of other civil procedure rules. The promulgation of Rule 26(b)(5) was the result of a legislative directive to craft a rule to effectuate A.R.S. § 12-2506(B)'s purposes. Thus, it is unsurprising that it is unlike other civil-procedure rules.

In A.R.S. § 12-2506(B), the legislature provided that Arizona courts may consider a nonparty's fault only where "the plaintiff entered into a settlement agreement with the nonparty" or the defendant gave "notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault." The legislative policy of A.R.S. § 12-2506(A) is that each "defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault."

The legislature did not require that the trier of fact consider the fault of nonparties in every case. Instead, in A.R.S. § 12-2506(B), the legislature

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order based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d)." *See* ARIZ. R. CIV. P. 60(c)(2). *See also Brinkerhoff*, 183 Ariz. at 336, 903 P.2d at 644 (determining compliance with Rule 26(b)(5)'s exception under the newly discovered evidence standards of Rules 59(a)(4) and 60(c)(2)); "Majority Report," *Subcommittee Report on Notice Rules Relating to Allegations of Nonparties at Fault* at 2.

conditioned that right on the defendant providing notice to the plaintiff "in accordance with requirements established by court rule." This Court created the present version of Rule 26(b)(5) to carry out A.R.S. § 12-2506(B)'s purpose. That purpose was to balance between a defendant's right to be liable for only its own fault and the plaintiff's right to obtain the fullest recovery that the law allows. A plaintiff can only achieve a full recovery if the plaintiff has notice of alleged nonparty liability early enough to amend the complaint to add the nonparty as a party. In summary, to the extent that Rule 26(b)(5) imposes a standard different from some other civil procedure rules, that is a function of the legislative directive.

2. The petition provides no data or evidence that Rule 26(b)(5) imposes a "harsh" standard.

The petition states that the "standard contained in Rule 26(b)(5) to an untimely notice of non-party at fault is significantly harsher that that of *any* other Rule."[15] Petitioner further asserts that, "not only is there no discernable basis for the establishment of such a harsh standard, this result is contrary to good sense and fairness."[16] But the petition cites no empirical—or even anecdotal—evidence that Rule 26(b)(5)'s requirements have led to harsh results.

No facts indicate that Rule 26(b)(5) has left Arizona with a broken

[15] *See* Pet. at 4 (emphasis in original).
[16] *Id.*

comparative- fault system. Without such a showing, there is no reason to believe that Rule 26(b)(5)'s standard has prevented defendants from exercising their A.R.S. § 12-2506(A) right to be liable only for their own fault. Given that, the proposed amendment is unwarranted.

Precedent discloses no injustice crying for a rule change. In *LyphoMed*, the court of appeals reversed the trial court's refusal to let a drug-manufacturer defendant litigate the fault of nonparty physicians, despite the lack of timely formal notice.[17] There, the court of appeals found that the nature of LyphoMed's defense had been revealed in its pleadings. Thus, the plaintiff should have been alerted that LyphoMed would blame the doctors or nurses for the injuries.[18] Further, the court of appeals rejected the plaintiff's argument that it had relied on the lack of formal notice is settling with the hospital without requiring it to remain in the case through the trial.[19] These two conclusions were akin to the application of a notice/prejudice standard. Finally, *LyphoMed* cited Rule 6(b) as allowing enlargement of time to comply with Rule 26(b)(5).[20]

The only other case addressing untimely notice is *Brinkerhoff*, where the

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[17] *LyphoMed, Inc. v. Superior Court*, 172 Ariz. 423, 428-30, 837 P.2d 1158, 1163-65 (App. 1992).

[18] *Id.* at 429, 837 P.2d at 1164.

[19] *Id.* at 429-30, 837 P.2d at 1164-65.

[20] *Id.* at 426 n. 1, 430, 837 P.2d at 1161 n. 1, 1165.

plaintiff contracted an infection while hospitalized for abdominal surgery.[21] In its computer system, the hospital entered the information that the infection was resistant to certain antibiotics. But the hospital did not directly advise the plaintiff's attending physicians about that.[22] The infection traveled from the plaintiff's catheter site to her C-6 vertebra. After her discharge, she sought care for neck and back pain from an attending doctor as well as from a chiropractor.[23]

The chiropractor, read the plaintiff's x-rays, but missed the manifestation of the infection in the C-6 vertebra.[24] A month before trial, the defendants moved for leave to identify the chiropractor as a nonparty at fault.[25] They claimed that they did not learn about his fault until they heard the deposition testimony of the plaintiff's causation expert approximately two months before trial.[26] The trial court denied the plaintiff's motion to preclude the notice of nonparty at fault.[27] But the court of appeals reversed.

The *Brinkerhoff* court noted that, a year before trial, the defendants had received copies of the chiropractor's medical records, knew he had taken x-rays,

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[21] *Brinkerhoff*, 183 Ariz. at 334, 903 P.2d at 642.
[22] *Id.*
[23] *Id.* Ariz. at 334-35, 903 P.2d at 642-43.
[24] *Id.* at 334, 903 P.2d at 642.
[25] *Id.* at 335, 903 P.2d at 643.
[26] *Id.*
[27] *Id.*

but did nothing to obtain copies.[28] Thus, the court of appeals held that the defendants had failed to satisfy Rule 26(b)(5)'s late-disclosure exception[29] "Simply put, [the defendants] chose not to discover that which they could have discovered within the times prescribed by Rule 26(b)(5)."[30] Finally, the plaintiff had been prejudiced by the trial court's action in letting the jury consider the chiropractor's fault.[31] She could not add him as a named defendant because the statute of limitations had run.[32]

Since the 1995 *Brinkerhoff* case, no reported opinions have analyzed timeliness of notice under Rule 26(b)(5). Moreover, *LyphoMed* and *Brinkerhoff* did not complain that applying Rule 26(b)(5) led to harsh results, indicates that the current rule has not been problematic. Indeed, the courts have applied the current rule flexibly and fairly. Although *Rosner* addressed specificity of a nonparty notice, it also applied the rule in a balanced way.

In *Rosner*, hooligans beat the plaintiff at a nightclub and fled before police arrived.[33] The defendant nightclub filed a notice of nonparties at fault naming

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[28] *Id.*

[29] *Id.* at 336-37, 903 P.2d at 644-45.

[30] *Id.* at 336, 903 P.2d at 644.

[31] *Id.* at 335, 337, 903 P.2d at 643, 645.

[32] *Id.*

[33] *Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 432, 937 P.2d 353, 354 (App. 1996).

the attackers—whose identities were unknown.[34] The trial court rejected the plaintiff's argument that the notice had failed to satisfy Rule 26(b)(5) because it did not provide sufficient identification to let him sue the nonparties. The trial court therefore refused to strike the notice.[35] The court of appeals affirmed, holding that the defendant had done all it could to identify the attackers.[36] The defendant had hired an investigator and, despite having gone "to great lengths," could not identify and find the assailants.[37] And the nightclub's nonparty at fault notice had stated facts supporting the assailants' liability.[38]

3. The "softer standard" the petition urges actually contradicts public policy and shifts the burden of proof to plaintiffs.

According to the petition, because Rule 26(b)(5) mandates an early disclosure deadline, common sense, public policy, and basic fairness militate in favor of "a softer standard for untimely disclosure."[39] But, the premise for the argument is flawed since the 150-day deadline is neither early nor late. It is simply a workable compromise between too little time and too much.

The 150-day period starts at the answer's filing. Thus, in cases where defendants answer in 20 days, they have 170 days to discover and disclose the

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[34] *Id.*
[35] *Id.* at 432, 434, 937 P.2d at 354, 356.
[36] *Id.* at 433, 937 P.2d at 355.
[37] *Id.*
[38] *Id.* at 434, 937 P.2d at 356.
[39] *See* Pet. at 4-6.

identity, location, and facts supporting liability of any nonparties at fault. That is almost six months from service of the complaint. But the civil-procedure rules now strongly encourage waiver of service.[40] Where a defendant waives service, it does not have to file its answer until 60 days after the request for waiver is sent.[41] Thus, in many cases, defendants can have 210 days—about seven months—from the time they receive notice of the complaint to the deadline for disclosing nonparties at fault.

We have some guidance from other jurisdictions. Florida and Ohio allow allocation in addition to contribution, but they have no specific rules. In a decision calling it an issue of first impression, the Florida Supreme Court ruled that the fault of a nonparty must be pled as an affirmative defense in the answer, or by amending the answer.[42] The Florida Supreme Court could have chosen to require nonparty-at-fault disclosure with the Rule 26.1 initial disclosures—40 days after filing the answer.[43] Or it could have done what the Colorado Legislature did—require the disclosure 90 days after the filing of the answer.[44] Or it could have set the deadline at 120 days after the answer, a date that the

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[40] *See* ARIZ. R. CIV. P. 4.2(d).
[41] *See* ARIZ. R. CIV. P. 4.2(d)(3).
[42] *Nash v. Wells Fargo Guard Services*, 678 So.2d 1262 (Fla. 1996).
[43] *See* ARIZ. R. CIV. P. 26.1(b).
[44] *See* COLO. REV. STAT. § 13-21-111.5(3)(b).

"Majority Report" mentioned.[45] But, the Florida Supreme Court did not choose any of those earlier dates.

More important than the fact that Rule 26(b)(5) sets a more generous deadline than it could have, the "softer standard" that the petition advocates would essentially shift the burden on the exception for late disclosure from defendants to plaintiffs. Defendants may argue that they will have the burden to establish lack of prejudice. But as litigators know, the practice—if not the "liberally allowed" standard under Rule 15(a)—for motions for leave to amend has milder results. To defeat a Rule 15(a) motion for leave to amend, the opposing party must convince the trial court why and how the proposed amendment would prejudice it.

Frequently, the party opposing leave to amend cannot know at the time the motion is decided how there will be prejudice. For example, the trial court may grant leave to amend and may only then find that a crucial witness on the new issues may have died. Or critical documents may have been lost or destroyed. The Petitioner's "softer standard" will force plaintiffs to shoulder the burden to establish prejudice, despite the fact that it the defendant has failed to comply with the time limit. Since the current rule lets a defendant make a belated designation showing excusable neglect, the practical consequence of

[45] *See* "Majority Report," *Subcommittee Report on Notice Rules Relating to Allegations of Nonparties at Fault* at 1.

shifting the burden of proof is rewarding those guilty of inexcusable neglect.

In addition, the petition only recognizes a single aspect of the public policies operating here. On the defense side of the equation is A.R.S. § 12-2506(A)'s legislative policy that a defendant should only be liable for its own fault. But, the federal district court correctly stated that "Arizona state courts recognize that [Rule] 26(b)(5) and A.R.S. § 12-2506(B) work together to protect the substantive rights of a plaintiff."[46] The main purpose of Rule 26(b)(5) is " to identify for the plaintiff any unknown persons or entities who may have caused the injury in time to allow the plaintiff to bring them into the action before the statute of limitations expires."[47] Another purpose is to ensure that each party knows "exactly what every other party in a case is claiming with respect to who caused the injury."[48] "[A]ny possible hardship may be mitigated by the rule's exception for newly discovered evidence."[49] Thus, the present version of Rule 26(b)(5) "strikes a balance between a defendant's right to liability commensurate with fault and a plaintiff's right to full recovery."[50] Amending Rule 26(b)(5)

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[46] *Wester*, 974 F. Supp. at 1287.

[47] *LyphoMed*, 172 Ariz. at 428, 837 P.2d at 1163. *See also Scottsdale Ins. Co. v. Cendejas*, 220 Ariz. 281, 286 ¶ 18, 205 P.3d 1128, 1133 ¶ 18 (App. 2009).

[48] *LyphoMed*, 172 Ariz. at 428, 837 P.2d at 1163.

[49] *Wester*, 974 F. Supp. at 1287 (the court also noted that defendants "could escape a draconian application of the rule by making a showing of excusable neglect").

[50] *Id.*

upsets the balance achieved by the current rule by giving a significant litigation advantage to defendants.

If late disclosure falls under a prejudice standard, there will be more late disclosure. The plaintiff will likely be forced to quickly add the nonparty as a party just to preserve the right to recover against the nonparty, even if the plaintiff believes that a finding of fault is unlikely. This contradicts the interests of economy and justice, and creates a major risk of distracting the plaintiff from preparing the case against the defendant that the plaintiff believes is the real tortfeasor.

As a practical matter, the petition's "softer standard" both makes it too easy for defendants and imposes too much on plaintiffs. Defendants name nonparties at fault because it's cheap and easy—and the practice has tremendous upside. Too readily filing nonparty-at-fault notices expands and confuses the litigation. And the smallest degree of success provides a dollar-for-dollar reduction in the damage award against the principal defendant or defendants.[51] On the other hand, plaintiffs end up adding nonparties as parties only as defensive measures, not because they believe that the new parties are liable for a significant share of fault.[52]

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[51] *See* William D. Cleaveland, *The Empty Chair Game: Is the Price More Than We Should Pay?*, 33 ARIZ. ATT'Y 16, 18-19 (Jan. 1997).

[52] *Id.*

Nonparties are not active in the litigation. A defendant, thus, has an unfair advantage over the nonparty and the plaintiff when the defendant makes late disclosure of the nonparty at fault. Even if the statute of limitations has not expired and disclosure is not made on the eve of trial, both the defendant and the plaintiff are disadvantaged. If the plaintiff adds the newly disclosed nonparty as a defendant, the plaintiff is burdened with trying to demonstrate the liability of not only the defendant whom she believes is the real tortfeasor, but also the new nonparty. And the plaintiff must do that late in the game.

If the newly disclosed nonparty is, for example, the plaintiff's family doctor, the plaintiff may not want to sue the nonparty. In that case, the plaintiff will have to prove the defendant's liability while also disproving the liability of the nonparty family doctor—with no help from the nonparty. The plaintiff might not have access to evidence in the nonparty's possession that the nonparty (if motivated) could use to protect from the defendant that named the nonparty as a nonparty at fault. The proposed rule change imposes an additional burden on plaintiffs to represent nonparties' interests as well as their own. And it gives defendants an unfair advantage by letting them easily and cheaply shift fault to nonparties late in the contest.

Conclusion

There is nothing in the petition showing that its operation has caused

unfairness. Rather, accepting the proposed rule change will result in unfairness to plaintiffs. The present version of Rule 26(b)(5) has carefully balanced the legitimate interests of both defendants and plaintiffs.[53] This Court should not upset that balance.

DATED this 20th day of May, 2010.

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Certificate of Service

On the above date, counsel electronically filed the original of this

[53] *See* Mark Siegel and H. Michael Wright, *The Squirrel, The Phantom and Everybody Else but Me*, 31 ARIZ. ATT'Y 23, 28 (Jan. 1995) ("The rule as it is written requires defendants to notice plaintiffs of the specific identity, location, and facts supporting the liability of any non-party at fault, and to notice them in a timely manner. Fairness and the law both require this rule be strictly enforced.").

document in Word and pdf formats with the Clerk of the Court, Arizona Supreme Court, and mailed a copy to:

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