

STATE OF MICHIGAN
COURT OF APPEALS

DAVID WILLIAMS,

Plaintiff-Appellant,

v

ARBOR HOME, INC. and MICHIGAN
ELEVATOR CO.,

Defendants-Appellees.

FOR PUBLICATION

December 17, 2002
9:10 a.m.

No. 225693

Wayne Circuit Court
LC No. 99-913425-NO

Updated Copy
February 14, 2003

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I respectfully dissent. I concur with the majority opinion that the sole issue in this case involves the application of MCR 2.112(K)(4). I also concur with the majority opinion that plaintiff's amended complaint complies with the requirements set forth in MCR 2.112(K). However, I disagree with the majority's opinion that there exists no conflict between MCR 2.112(K)(4) and MCL 600.2957(2). I also disagree with the majority's conclusion that plaintiff, who complied with the requirements of the court rule, should be denied access to the appellate courts. Therefore, I would allow the appeal to proceed.

In my opinion, the majority's decision achieves three unacceptable results in this case. First, the decision is in conflict with *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000) (Hood, P.J., writing for the majority; O'Connell, J., dissenting on other grounds). Second, the decision effectively denies plaintiff any appellate review of the lower court decision because plaintiff followed the court rules exactly. Third, the decision subjects numerous Michigan attorneys to malpractice claims for the common practice of filing an amended complaint without leave granted. In *Staff*, *supra* at 531, Judge Hood held that MCR 2.112(K) and MCL 600.2957(2) were in conflict. Then, Judge Hood concluded, "the conflict between the court rules and the statute is resolved in favor of the court rules because it involves a matter of procedure." *Staff*, *supra* at 533, citing *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). The majority opinion, using what can best be described as a process of smoke and mirrors, concludes that the present subsections of the court rules and the statute are not in conflict. I prefer to use previous case law that is exactly on point to conclude that a conflict exists.¹ I also note that this

¹ I note that under the no conflict court rule, MCR 7.215(I)(1), we are bound by our decision in *Staff*.

issue would not exist unless the parties had already confronted this conflict between the statute and the court rule.

In my opinion, the conflict is extremely simple.² The court rule provides that under the present factual situation, leave of the court is not required to file an amended complaint. MCR 2.112(K)(4). On the other hand, the statute implies that leave of the court must be obtained before filing an amended complaint. MCL 600.2957(2). Ordinary common sense dictates that either plaintiff is required to obtain leave of the court to file an amended complaint, or plaintiff is not required to obtain leave of the court. Hence, a conflict exists. I concur with Judge Hood's conclusion in *Staff, supra*, that the issue whether a plaintiff must file for leave to amend a complaint is a matter of procedure, and, therefore, the court rule controls. See also *McDougall, supra*.

Even if I accepted the majority's dubious logic concerning the interplay between the statute and the court rule, I would not penalize the plaintiff for precisely following the court rule. The unintended consequences of the majority's opinion is that numerous competent attorneys in this state will now be subject to legal malpractice lawsuits for precisely following the court rules.

In my opinion, plaintiff should be allowed access to the appellate courts to argue his substantive appellate issues. Therefore, I would allow the appeal to proceed.

/s/ Peter D. O'Connell

² Assuming the majority position is correct that there is no conflict, MCL 600.2957(2) does not *require* a motion to be filed to amend the complaint. It does mandate that *if* a motion to amend is filed within ninety-one days, the judge *shall* grant the motion.