

STATE OF MICHIGAN  
COURT OF APPEALS

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DOREEN BINT and ROBERT BINT,  
  
Plaintiffs-Appellees,

v

ROGER DOE, USF HOLLAND, INC., TST  
SOLUTIONS, INC., USF LOGISTICS, INC.,  
US FREIGHTWAYS, INC., US FREIGHTWAYS  
CORP., THOMAS NATIONWIDE TRANSPORT,  
and KPN, INC.,

Defendants,

and

ROGER BROCK and CON-WAY  
TRANSPORTATION SERVICES, INC.,

Defendants-Appellants.

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FOR PUBLICATION  
February 6, 2007  
9:15 a.m.

No. 266242  
Huron Circuit Court  
LC No. 02-001746-NI

Official Reported Version

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

ZAHRA, P.J. (*concurring*).

I concur in the result reached and the reasoning employed in the majority opinion. I write separately because I disagree with the conclusion reached in *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000), that there is a conflict between MCR 2.112(K) and MCL 600.2957(2).<sup>1</sup>

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<sup>1</sup> I recognize that MCR 7.215(J)(1) requires that all panels of this Court follow the rule of law established in prior published decisions. However, a prior published decision need not be followed if it does not dictate the outcome of the subsequent case. MCR 7.215(J)(3)(a). As noted in the majority opinion, *Staff* is distinguishable from the present case because the notice requirements of MCR 2.112(K) were satisfied in the present case and they were not satisfied in *Staff*. In *Staff*, *supra* at 533-534, the majority held that "[b]ecause plaintiff failed to comply with the notice requirements and the litigation against defendants was commenced after the statutory

(continued...)

In *Staff*, the plaintiff argued that MCL 600.2957(2) extended the period of limitations for parties added pursuant to MCR 2.112(K). *Staff*, *supra* at 530. This Court rejected the literal meaning of the statute and concluded that the statute conflicts with the court rule. *Id.* at 531. This Court further concluded that statutes of limitations are procedural, and, therefore, the court rule prevails over the statute. *Id.* at 533.

*Staff* wrongly concluded that a conflict exists between the court rule and the statute. A conflict does not exist merely because the court rule uses the permissive word "may" while the statute uses the mandatory word "shall." The court rule addresses the conduct of the parties. A party served with a notice of a nonparty being at fault may file an amended pleading within 91 days of receipt of the notice. The permissive word "may" is used in the court rule because a plaintiff controls his or her pleadings and cannot be required to amend a complaint. By contrast, the statute is directed at the conduct of the court. The statute provides that if a plaintiff elects to file a motion to amend within 91 days of receipt of a notice of a nonparty being at fault, the court "shall grant leave to the moving party . . . ." MCL 600.2957(2).

The statute and the court rule are consistent. The plaintiff may elect to amend the complaint. If the plaintiff so elects, the court shall grant the amendment. There being no conflict between the statute and the court rule, we are bound to implement the remainder of MCL 600.2957(2), which provides that 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."

Applying this statutory provision to the facts of the present case, it is clear that the cause of action asserted against defendants, although brought nine years after the events occurred, is timely because the claim against defendants, had it been asserted in the original action, would have been timely. If the Legislature did not intend such stale claims to be initiated under MCL 600.2957(2), it is for the Legislature, not the courts, to say so.

/s/ Brian K. Zahra

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(...continued)

two-year period, we reverse . . . ." (Emphasis added). While the language employed by the majority opinion in *Staff* was very broad as it related the alleged conflict between the court rule and the statute, the holding was premised on the plaintiff's failure to comply with the notice requirements of MCR 2.112(K).