

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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VAUGHN ZAVSZA and BONNIE ZAVSZA,

Plaintiffs-Appellants,

v

ANGELO IAFRATE, ANGELO'S CRUSHED  
CONCRETE, INC., and ANGELO IAFRATE  
CONSTRUCTION COMPANY, d/b/a ANGELO  
IAFRATE COMPANY,

Defendants-Appellees,

and

C.A. HULL COMPANY, INC., PK  
CONTRACTING, INC., HIGHWAY SERVICE  
COMPANY, SANCHEZ CONSTRUCTION  
COMPANY, HARLAN ELECTRIC COMPANY,  
THOMPSON-McCULLY COMPANY,  
SHEARWELD CORPORATION, WHALEY  
STEEL CORPORATION, and RITE WAY  
FENCE, INC.,

Defendants.

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Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order of dismissal entered on appellees' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Vaughn Zavsza was involved in an automobile accident on July 15, 1997, on southbound I-75 near the I-94 interchange in Detroit. Plaintiffs filed this action on February 2, 2000, asserting that defendants were performing construction work in the area and were negligent in managing the traffic flow. Defendant C.A. Hull Company was named as a defendant in an amended complaint filed July 14, 2000. On January 4, 2002, C.A. Hull moved to identify Angelo Iafate as a nonparty at fault. The court granted the motion, and granted leave

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for plaintiffs to file an amended complaint adding appellees as defendants. The court subsequently granted appellees' motion to set aside the notice of nonparty fault, finding that Hull failed to establish that it exercised due diligence in identifying and naming appellees.

MCR 2.112(K)(3)(c) sets forth the timing requirements for a notice of nonparty fault:

(c) The notice must be filed within 91 days after the party files its first responsive pleading. On motion, the court shall allow a later filing of the notice on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party.

MCR 2.112(K)(3)(b) provides that the notice must designate the nonparty or give the best identification of the nonparty that is possible. The plain and unambiguous language of the statutes and court rules permits a defendant to argue that a nonparty is at fault although the nonparty cannot be identified. *Rinke v Potrzebowski*, 254 Mich App 411, 415-416; 657 NW2d 169 (2002).

C.A. Hull was aware that appellees were performing construction work in the area of the accident when it filed its motion for summary disposition on October 16, 2001. Yet, it did not file its notice of nonparty fault until January 2002. It explained the initial delay in discovering Iafrate's involvement through the late receipt of a response to a FOIA request by the Department of Transportation. However, it gave no explanation for the three-month delay after it filed its motion for summary disposition.

In addition, it is reasonable to conclude that C.A. Hull would be likely to know that there was another construction project being performed in the area of its project. In its answer to the complaint, it stated that it performed work on I-94, and it did not perform any work on I-75 where the accident occurred as alleged in plaintiff's complaint. Thus Hull could have filed a timely notice of nonparty fault, even though it could not identify who was involved. *Rinke, supra*. The court rule only requires that a defendant give the best identification that is possible. In such an instance, the court could still determine fault between or among the named parties. MCL 600.2957.

Because C.A. Hull knew or should have known about the existence of the nonparty to give timely notice under MCR 2.112(K)(3)(c), the trial court properly granted appellees' motion where Hull failed to show reasonable diligence in identifying the nonparty.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Janet T. Neff  
/s/ Helene N. White