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SMB LEGAL NOTES

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ARIZONA CLARIFIES NON-PARTY AT FAULT STANDARDS

Construction litigation implicates levels of relationships between owners, developers, general contractors, designers, consultants, trades, and suppliers. As a consequence of this simple fact of life, in most construction defect lawsuits, the parties will often seek to blame others down the chain of delegation for the allegations of defective workmanship or materials.

Arizona, like most states, uses comparative fault, allowing a defendant to ask the jury to apportion fault for negligence and other fault-based allegations between all parties involved in the lawsuit. In states like California, the only formal requirement for apportioning fault against people and entities not already a part of the lawsuit, is that a special verdict be prepared for the jury. However, in Arizona, a defendant must file a notice designating non-parties at fault within 150 days of filing an answer.

Recently, the Arizona Court of Appeals ruled that in order for a notice of non-parties at fault to be effective it must state facts that will explain why a relevant non-party is at fault for the damages alleged. *Scottsdale Ins. Co. v. Cendejas*, 220 Ariz. 281, 205 P.3d 1128 (App. 2009). This is an important ruling in that notices of non-parties at fault are quite commonplace in Arizona litigation, and quite frequently state only that another person is or may have been negligent with respect to the events in the complaint. This traditional approach by Arizona lawyers is understandable, given that Arizona lawsuits are filed under a "notice pleading" standard, for which the plaintiff only needs to say "the defendant was negligent and caused me damages" in order for the lawsuit to go forward. However, with the recent *Cendejas* decision, notices of non-parties at fault will be subject to a stricter standard that will require more factual investigation.

The danger to cases already pending in Arizona courts is that notices of non-parties at fault that have already been filed by the 150-day deadline may continue to allege only that a non-party's "negligence contributed to the plaintiff's damages." Given the new ruling by the Arizona Court of Appeals in *Cendejas*, these notices are vulnerable to being stricken by trial judges. As the Court of Appeals declared in *Cendejas*, if the notice of non-party at fault is not sufficient under Arizona's Rules of Civil Procedure, the trial court may strike the notice. Even if the judge does not specifically strike the notice, at trial, a defendant cannot ask a jury to apportion fault to the non-party if the notice was not properly prepared.

Another frequent issue in Arizona cases is what notice requirements apply where a defendant wants to have the jury apportion fault to a co-defendant who has since been dismissed from the action. In *LyphoMed, Inc. v. Superior Court*, 172 Ariz. 423, 837 P.2d 1158 (App. 1992), the court ruled that the notice requirements do not apply to a person who is, or was, a party to the action. However, it is unclear whether the *LyphoMed* decision would allow a defendant to make unsupported allegations against a former co-defendant, when designating that former party as a non-party at fault. Good practice from now on should be to include specific facts in notices of non-parties at fault.

The construction litigation practice group at SMB has proven experience in litigation involving construction defects, delay claims, and in defending construction accident claims.

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