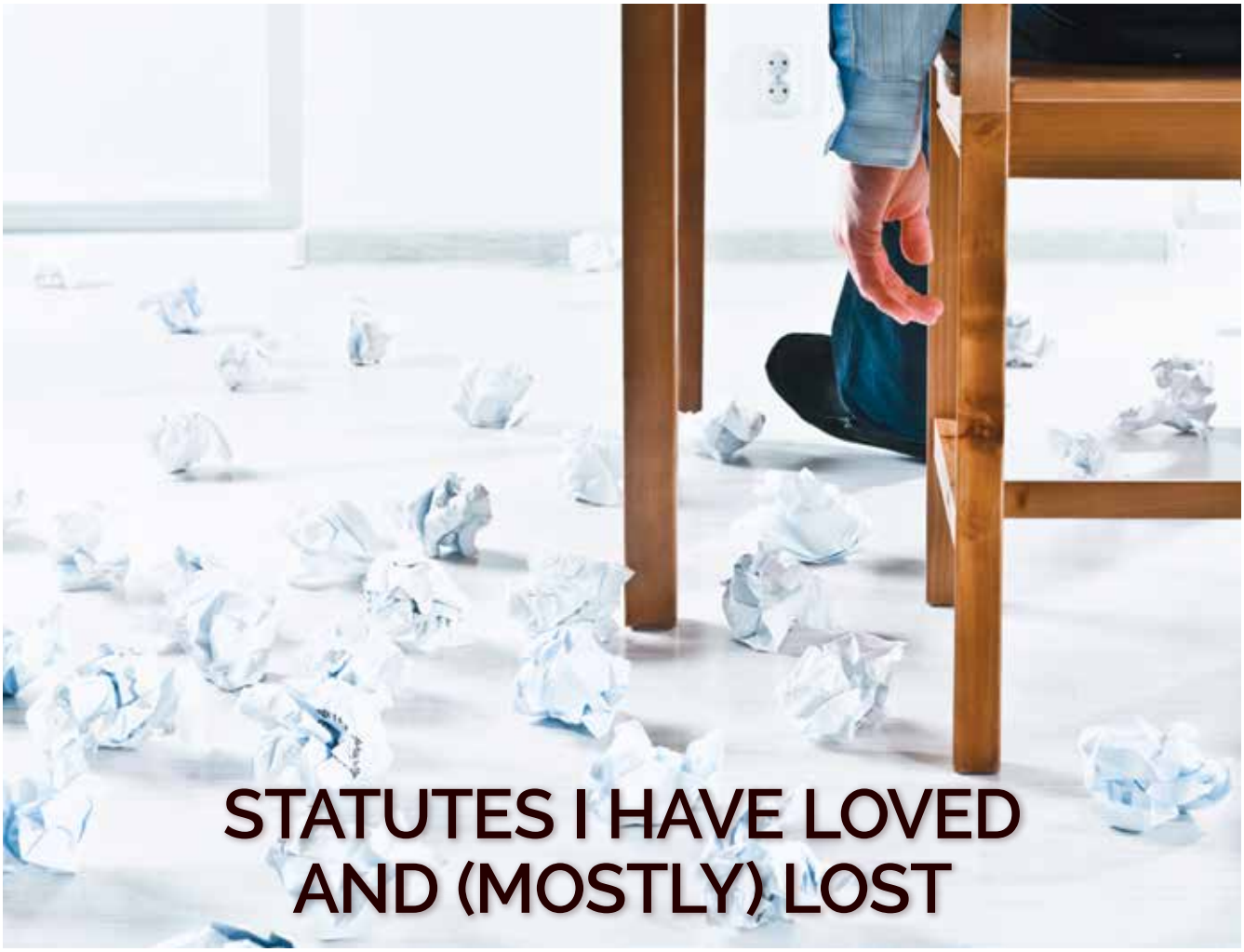

STATUTES I HAVE LOVED AND (MOSTLY) LOST

By Mark Granzotto

For an appellate attorney who concentrates in the area of negligence law, having personal feelings for particular statutes comes easy. Some recently enacted statutes became instant favorites since it was obvious that years of appellate litigation were going to be necessary to fully understand them.[1] Some less-favored statutes were bound to cause serious mischief because they either shouldn't have been written the way they were or shouldn't have been written at all.[2]

This article focuses on statutes of a different type—those that have been underused by courts and litigants. These statutes include several that, in my opinion, could and should have been interpreted in such a way as to effectively counter rulings that impeded the proper operation of the civil justice system.

MCL 600.2315 and MCL 600.2321

These related statutes belong in the underused category. MCL 600.2315, which applies only to cases that have gone to verdict, contains a laundry list of potential trial court errors that are deemed immune from appellate reversal. Most significant is the statute's final subsection, MCL 600.2315(11), which provides that a judgment shall not be reversed "[f]or any other default or negligence of a clerk or officer of the court, or of the parties, or their counselors or attorneys, by which neither party shall have been prejudiced."

MCL 600.2321 references the "omissions, imperfections, variances and defects" identified in MCL 600.2315 as well as "all others of the like nature," and indicates they may be cured by the court by amendment provided they are not against "the right and justice of the matter."

Both MCL 600.2315 and MCL 600.2321 deserve greater prominence in the appeal of cases that have gone to verdict. They represent more specific legislative recognition of both a harmless error principle and the ability of a court to cure deficiencies that do not result in prejudice to another party.[3]

MCL 600.2957, MCL 600.2958, MCL 600.2959, and MCL 600.6304

These four statutes were enacted together in 1995. They altered the civil justice system by eliminating joint and several liability in most cases and introducing the concept of the at-fault nonparty.[4] These statutes also for the first time codified the concept of comparative fault, which had previously been only a common-law concept.[5]

The system adopted in these three statutes has been dubbed by the Michigan Court of Appeals as "fair share" liability; each party named in a personal injury case as well as nonparty tortfeasors are to be assigned a percentage of fault for their tortious acts or omissions that cause injury, and the liability of each tortfeasor is limited to the percentage of fault assigned to each.[6] But, in addition to the statutory adoption of comparative fault, MCL 600.2958 seemed to go one step further by declaring that in a personal injury action "a plaintiff's contributory fault does not bar that plaintiff's recovery of damages." When this language was written into MCL 600.2958, that statute held out the prospect that any principle of law, statutory or common, that resulted in the complete elimination of a plaintiff's right to recover based on the fault of the plaintiff would be discarded.

Such a reading of MCL 600.2957, MCL 600.2958, and MCL 600.2959 was buttressed by the 1995 amendment to the statute pertaining to the taking of verdicts in personal injury actions, MCL 600.6304. That statute specifies that the trier of fact in such an action *shall* make a finding as to the percentage of fault of all persons that contributed to the death or injury, including each plaintiff.[7]

MCL 600.2958's prescription that any fault attributable to the plaintiff would not bar all recovery cast doubt on one common-law doctrine—the so-called wrongful conduct rule. The wrongful conduct rule called for the complete elimination of the plaintiff's right to recover in a personal injury action based on a particular type of "fault" for which the plaintiff was found responsible—illegal conduct.[8]

Or consider MCL 600.2958's potential impact on another common-law doctrine that by all appearances has reintroduced the concept of contributory negligence, the now-discredited doctrine under which the entirety of plaintiff's recovery is eliminated due to any fault on the part of the plaintiff. I am speaking here of the now ubiquitous defense in premises liability cases—the open and obvious danger defense.

At a Glance

An appellate attorney muses on the existence of statutes that, given an even break, could have done more in the interest of justice.

At one point in time, the Michigan Supreme Court was at least conscious of the fact that courts had to be careful to avoid allowing the open and obvious danger defense to evolve into a rule of contributory negligence.[9] But increasingly, the Supreme Court's admonition against transforming the open and obvious danger defense into a rule of contributory fault has been ignored.[10]

These four statutes, and particularly MCL 600.2958, have not had the effect they could have had. The wrongful conduct rule continues to be applied[11] and the open and obvious danger defense continues to flourish. The effect of the language contained in MCL 600.2958 has been blunted by a provision in MCL 600.2957(3) which specifies that MCL 600.2957, MCL 600.2958, and MCL 600.2959 "do not eliminate or diminish a defense that currently exists, except as expressly provided in those sections." The weighty question presented by this language in MCL 600.2957(3) is whether an explicit legislative decree that "a plaintiff's contributory fault does not bar that plaintiff's recovery of damages" constitutes an express provision against the application of any common-law rule that deprives the plaintiff of all recovery because the plaintiff was responsible for some degree of fault.

MCL 600.1901 and MCL 600.5856(a)

In two areas of medical malpractice litigation, the Michigan Supreme Court has created a species of what might be described as spectral cases: those that are in suit but not "commenced," at least for statute of limitations purposes. In *Scarsella v Pollak* and *Burton v Reed City Hospital Corporation*,[12] the Court ruled that two medical malpractice cases were not "commenced" because of a failure to comply with the procedural requirements for filing a medical malpractice case.[13] In *Scarsella*, the plaintiff failed to include an affidavit of merit with his complaint as required by MCL 600.2912d, and in *Burton*, the plaintiff failed to wait the 182-day period required by MCL 600.2912b after mailing a notice of intent before filing suit.[14]

The holding in *Scarsella* and *Burton* that these cases were never commenced invariably dooms a plaintiff's case even if dismissal for failure to comply with MCL 600.2912b or MCL 600.2912d is without prejudice. The reason is that because the plaintiff's spectral case was never commenced, the plaintiff will be unable to claim the tolling effect of MCL 600.5856(a).[15] The creation of these spectral cases also presents procedural problems for the courts: does the defendant facing an "uncommenced" case have to comply with the court rules or even a trial court order?[16]

In a summary opinion issued in 2007, the Michigan Supreme Court intimated that a defendant facing a case that was not commenced could choose a course of conduct that was in violation of the court rules.[17] The Court rightfully had second thoughts about this conclusion in its decision in *Saffian v*

Simmons. In *Saffian*, the Court cited to the "chaotic uncertainty" that would be created if a defendant could simply ignore the court rules in a case deemed "not commenced."[18]

The more serious question presented by *Scarsella* and *Burton* is whether the chaotic uncertainty potentially emanating from cases that are in limbo of having been filed but not commenced is whether either of these two decisions could be deemed compatible with MCL 600.1901 or MCL 600.5856(a).

By concluding in *Scarsella* and *Burton* that these two cases were not commenced, the Court failed to consider MCL 600.1901, the statute that actually covers how and when a case is commenced. That statute simply states: "A civil action is commenced by filing a complaint with the court." Under MCL 600.1901, neither *Scarsella* nor *Burton* could be classified as cases that were not commenced.

Moreover, on the specific question of whether the statute of limitations was tolled in these two cases, MCL 600.5856(a) was supposed to supply the answer. That statute is equally simple and unequivocal: it provides that the period of limitations is tolled when a complaint is filed, provided that service is effectuated within the period provided by the Michigan Court Rules.[19] Once again, both *Scarsella* and *Burton* are cases in which tolling of the statute of limitations would have been appropriate under the literal text of the one Michigan statute that governs it—MCL 600.5856(a).

The Court's creation of a class of spectral cases that were unquestionably commenced under the applicable statute but not commenced for limitations purposes in *Scarsella* and *Burton* came at a time when the Court's majority professed adherence to an extreme form of textualism in the interpretation of statutes. Yet the precise holding in *Scarsella* that the plaintiff had not commenced his cause of action because he did not attach an affidavit of merit to his complaint had no statutory support. That holding also happened to be at odds with both MCL 600.1901 and MCL 600.5856.[20]

While there is at least some textual support for the conclusion reached in *Burton*, that decision likewise cannot be harmonized with MCL 600.1901. The textual support for the *Burton* decision is found in MCL 600.2912b(1), which specifies that a party "shall not commence" a medical malpractice action unless written notice has been provided in accordance with the time period prescribed by that statute. The Michigan Supreme Court held that the language of MCL 600.1901 had to give way to this language in MCL 600.2912b since the latter was the "more specific statutory provision" and had to take precedence over the general statute, MCL 600.1901.[21]

This is a curious distinction in light of the fact that with respect to the subject at hand in *Burton*—whether a cause of action is "commenced" for purposes of tolling the statute of limitations—the more specific statutory section should be Michigan's statute on the subject of the commencement of a cause of action, MCL 600.1901, not a statute calling for a presuit notice period in medical malpractice cases. Reading these two statutes together, courts must "endeavor to read them harmoniously and to give both statutes a reasonable effect."[22] A more logical reading of MCL 600.1901 and MCL 600.2912b together is that a malpractice case filed before the expiration of the mandatory waiting period is *improperly* commenced (and, therefore, subject to dismissal without prejudice), but it is certainly commenced under MCL 600.1901.

MCL 600.2301

MCL 600.2301 contains two important sentences. The first extends to a trial court the power to amend "any process, pleading or proceeding." The Michigan Supreme Court employed this sentence in *Bush v Shabahang*, allowing the amendment of a notice of intent that was defective under MCL 600.2912b(4).[23] The Court has spent the last eight years limiting the reach of both the *Bush* ruling and the first sentence of MCL 600.2301.[24]

The more intriguing part of MCL 600.2301 is its final sentence, which states that a court "at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." The significant question associated with this sentence is whether it could have provided an inroad against strict adherence to statutory requirements that a textualist court might otherwise impose.

What comes to mind in this context is the series of Michigan Supreme Court rulings on the necessity of strict adherence to presuit notice requirements in cases filed against governmental agencies. In *Rowland v Washtenaw County Road Commission*, the Court overruled 30 years of precedent on the subject of the necessary compliance with a presuit notice statute.[25] In *Rowland*, the Court considered the presuit notice required by MCL 600.1404(1) for cases in which a plaintiff intends to bring a case against a governmental agency based on a highway defect. In prior rulings reviewed and overruled in *Rowland*, the Court had held on somewhat dubious constitutional grounds that the plaintiff's failure to comply with a statutory presuit notice requirement was not to be the basis for the dismissal of the plaintiff's claim unless the governmental agency/defendant could establish that it was prejudiced by the plaintiff's lack of compliance.[26]

The Court in *Rowland* rejected this line of cases, ushering in a number of decisions in which presuit notice requirements were enforced with vigor and even the most technical of deviations from the statutory notice requirement were deemed grounds for the dismissal of a plaintiff's case.[27] In one of its post-*Rowland* decisions, the Supreme Court summarized its approach to these cases by noting that when the legislature conditions the ability to file a claim "on a plaintiff's having filed specific statutory notice, courts may not engraft an 'actual prejudice' component onto the statute as a precondition to enforcing the legislative prohibition."[28]

But has the legislature actually decreed that *every* failure on the part of a plaintiff to comply with a presuit notice statute

must result in the complete dismissal of his or her case? Application of the second sentence of MCL 600.2301 would suggest that this is not necessarily so. Indeed, that sentence offers support for the conclusion that the pre-*Rowland* cases which demanded proof of a defendant's actual prejudice before enforcement of a presuit notice requirement results in the complete dismissal of a case, while perhaps not constitutionally mandated, were not wrongly decided. Courts are charged with disregarding any defect in the proceedings that does not result in prejudice to the opposing party. If the underlying purposes of the presuit notice requirement have been served, MCL 600.2301 provides a legislatively approved basis for disregarding any errors associated with a presuit notice.

At the very least, MCL 600.2301 had the potential to counter a number of harsh rulings by a Michigan Supreme Court that had no tolerance for deviation from statutory or procedural requirements and no conception of any principle of substantial compliance. Like several of the other statutes discussed in this article, that potential has not been realized. ■

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ENDNOTES

1. See, e.g., MCL 600.2912b, MCL 600.2912d, and MCL 600.2912e.
2. See, e.g., MCL 600.2912a(2), MCL 600.2169, and MCL 691.1407(2).
3. MCR 2.613(A).
4. MCL 600.2957(1).
5. MCL 600.2958, MCL 600.2959, and *Placek v City of Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979). Before *Placek*, the doctrine of contributory negligence held sway. Under that doctrine, *any* negligence on the part of the plaintiff foreclosed all recovery. *Grummel v Decker*, 294 Mich 71, 77; 292 NW2d 562 (1940).
6. *Greer v Advantage Health*, 305 Mich App 192, 200–201; 852 NW2d 198 (2014) and *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2002).
7. MCL 600.6304(1) and MCL 600.6304(2). MCL 600.6304(8) also defines the term "fault" broadly to encompass any omission or conduct "that is a proximate cause of damage sustained by a party." See *Shinholster v Annapolis Hosp*, 471 Mich App 540, 551–553; 685 NW2d 275 (2004).
8. *Orzel v Scott Drug Co*, 449 Mich 550, 561–562; 537 NW2d 208 (1995) and *Manning v Bishop of Marquette*, 345 Mich 130, 133–134; 76 NW2d 75 (1956).
9. In *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523; 629 NW2d 384 (2001), the trial court granted summary disposition on the basis of the open and obvious danger defense, reasoning that this defense foreclosed recovery because the plaintiff was walking and not paying proper attention to the surrounding circumstances. The *Lugo* Court affirmed the grant of summary disposition but rejected the trial court's reasoning, stressing that the open and obvious danger defense focuses on the condition of the property and not the plaintiff's purportedly negligent conduct. The *Lugo* Court acknowledged that the trial court's reasoning was erroneous because "Michigan follows the rule of comparative negligence…[which] reduces the amount of damages the plaintiff may recover but does not preclude recovery altogether."
10. See *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934; 782 NW2d 210 (2010), where the Court reinstated a grant of summary disposition arising out of a fall on ice while noting that "wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger on casual inspection," and *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012), affirming summary disposition on the basis of the open and obvious danger defense while noting an overriding public policy that people should take reasonable care for their own safety, precluding a landowner's duty to take extraordinary measures to keep people safe unless there's an unreasonable risk. *Janson*, *Buhalis*, and other appellate decisions have strayed from determining whether a particular condition on the defendant's property is open and obvious and wandered into formulating the defense that the *Lugo* Court warned against—the open and obvious danger defense based on the plaintiff's failure to exercise appropriate care for his or her own safety.
11. *Stolicker v Kohl's Dep't Stores, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 1, 2012 (Docket No. 302573) and *Whaley v A Forever Recovery, Inc*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 2017 (Docket No. 331521).
12. *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000) and *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005).
13. The Michigan Supreme Court, without citing statutory support for its conclusion, appeared to create a third class of "uncommenced" cases in *Driver v Naini*, 490 Mich 239, 254; 802 NW2d 311 (2011) when it held that "a proceeding cannot be pending if it was time-barred at the outset." The *Driver* holding suggests that a case later found to be barred by the statute of limitations is not "commenced," thus creating a potentially bigger class of spectral cases than either *Scarsella* or *Burton*. The effect of the *Driver* ruling is somewhat muted since the primary ramification of a case being "uncommenced" is its impact on the tolling of the statute of limitations as provided in MCL 600.5856(a).
14. *Scarsella*, 461 Mich at 552 and *Burton*, 471 Mich at 754.
15. MCL 600.5856(a) states that the statute of limitations is tolled "at the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules."
16. As Justice David Viviano notes while dissenting in *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68, 101; 869 NW2d 213 (2015), a potential ramification of a case that is deemed "not commenced" could be that "the defendant has no obligation to file affirmative defenses, or an answer for that matter." The same could be said of such a defendant's disregard of a trial court's scheduling order, e.g., *Kemerko Clawson, LLC v RXIV Inc*, 269 Mich App 347, 351; 711 NW2d 801(2005).
17. *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007).
18. *Saffian v Simmons*, 477 Mich 8, 14; 727 NW2d 132 (2007). See also *Sanders v McLaren-Macomb*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 336409).
19. *Gladych v New Family Homes, Inc*, 468 Mich 594, 598–600; 664 NW2d 705 (2003).
20. Several Supreme Court justices have rightly questioned *Scarsella*'s adherence to the relevant statutes. See *Kirkaldy v Rim*, 478 Mich 581, 586–588; 734 NW2d 201 (2007) (J. Cavanaugh, J. Kelly, dissenting); and *Castro v Goulet*, 501 Mich 884, 885–888; 901 NW2d 614 (2017) (J. Viviano, concurring).
21. *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68, 93–95; 869 NW2d 213 (2015).
22. *House Speaker v State Admin Bd*, 441 Mich 547, 568; 495 NW2d 539 (1993); *People v Webb*, 458 Mich 265, 273–274; 580 NW2d 884 (1998).
23. *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009).
24. See *Ligons v Crittenton Hosp*, 490 Mich 61, 85–87; 803 NW2d 271 (2011) (holding that an affidavit of merit submitted with a medical malpractice complaint may not be amended under MCL 600.2301 because it is not part of the "process" or "proceeding" of such a case. *Ligons*'s less than convincing attempt to distinguish *Bush* is of limited practical effect in light of a 2010 amendment of MCR 2.112(L)(2)(b), which allows amendment of an affidavit of merit by court rule); *Driver v Naini*, 490 Mich 239, 251–255; 802 NW2d 311 (2011) (holding that MCL 600.2301 applies only to "pending" cases and the plaintiff's cause of action filed after the expiration of the statute of limitations was not "pending").
25. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).
26. *Id.* at 200, 210.
27. *Id.* See, e.g., *Fairley v Dep't of Corrections*, 497 Mich 290; 871 NW2d 129 (2015).
28. *McCahan v Brennan*, 492 Mich 730, 738; 822 NW2d 747 (2012).