STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal From the Michigan Court of Appeals)

ROBERT GLADYCH,

Plaintiff-Appellee,

vs.

NEW FAMILY HOMES, INC.,

Defendant-Appellant.

/

Supreme Court No. 119948

Court of Appeals No. 222343

Macomb Circuit No. 99-264-NI

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction. MCR 7.301(A)(2), 7.302(C)(2); see also, MCLA 600.215, 217.

COUNTER-STATEMENT OF QUESTION PRESENTED

DID PLAINTIFF TIMELY FILE HIS COMPLAINT WITHIN THE PERIOD OF LIMITATIONS EVEN THOUGH HE SERVED IT SUBSEQUENTLY WITHIN THE EXTENDED LIFE OF THE SUMMONS BECAUSE: (A) THAT CONCLUSION IS CONSISTENT WITH THE PLAIN MEANING OF THE PERTINENT STATUTES, INCLUDING MCLA 600.1901, AND 5805; (B) BUSCAINO WAS AND IS A CORRECT, SOUND PRECEDENT; (C) MCLA 600.5856 IS A TOLLING PROVISION WHICH HAS NOTHING WHATSOEVER TO DO WITH THIS CASE; (D) THERE IS NO "McDOUGALL" ISSUE, THERE BEING NO INCONSISTENCY BETWEEN ANY RULE AND ANY STATUTE, AND THE MATTER IS PROCEDURAL RATHER THAN SUBSTANTIVE; (E) THE LAW OF OTHER STATES AND FEDERAL LAW ON POINT ARE COMPLETELY CONSISTENT WITH BUSCAINO AND THE COURT OF APPEALS' DECISIONS IN THIS AND OTHER CASES; AND (F) GIVEN RECENT AMENDMENTS AND JURISPRUDENTIAL DEVELOPMENTS WHICH SHORTEN AND STRICTLY REGULATE THE TIMING OF SERVICE OF PROCESS AND EXTENSIONS THEREOF THERE IS NO REASON WHATSOEVER TO DEPART FROM BUSCAINO?

Plaintiff and the Court of Appeals answer, "**YES**".

The Visiting Circuit Judge and Defendant answer, "**NO**".

COUNTER-STATEMENT OF FACTS

Plaintiff, Robert Gladych, commenced this action on January 22, 1999, filing his personal injury Complaint, arising from an incident which occurred on January 23, 1996 (Appx. pp. 1A-5A; Complaint filed: 1/22/99, at ¶ 6).[1]

On April 20, 1999, Plaintiff petitioned ex-parte for issuance of a second summons, noting that he had attempted service upon Defendant, New Family Homes, at three different addresses without success, and attaching to the petition the Affidavit of Heather Ware. Ms. Ware averred that on March 16, 1999, service of process had been forwarded to the Macomb County Sheriff's Department for service upon Defendant's resident agent, but the Sheriff returned an Affidavit indicating that the resident agent "was no longer at this address" (Appx. p. 8A; Ware Affidavit). Service was attempted also by certified mail, twice, without success (Appx. p. 9A; Ware Affidavit, p. 2). Also attached to the ex-parte petition was the Affidavit of the Deputy Sheriff, Ms. Guiette indicating an unsuccessful service attempt (Appx. p. 10A).

The Circuit Court ordered the issuance of a second summons, extending to July 20, 1999 (Order entered: 4/20/99; see: Appx. p. 46A).

It is uncontested that service took place within the life of the second summons, on May 4, 1999 (Appx. p. 12A).

Defendant moved for summary disposition, asserting that the statute of limitations barred Plaintiff's claim. According to Defendant, the statute of limitations was not "tolled" by the filing of the Complaint because the Summons and Complaint had not been served on the Defendant within the period of limitations (Appx. pp. 15A-18A; S.D. Motion & Brief filed: 5/26/99); citing, MCLA 600.5856; MSA 27A.5856.

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[1] The references are to Defendant-Appellant's Appendix.

The Circuit Court, per visiting Judge Roland Olzark, formerly of Wayne Circuit, granted the motion, stating, "Well, my understanding of the law is that it has to be done [i.e., service] within that statutory period of time" (Appx. p. 38A; TR., 7/26/99, at p. 5). The Circuit Court entered its Order Granting Summary Disposition on August 26, 1999 (Appx. p. 40A-41A).

The Court of Appeals reversed, stating:

> "Plaintiff was injured on January 23, 1996 and had three years from that date to file suit. MCL 600.5805(1), (9); MSA 27A.5805(1), (9). He filed this action on January 22, 1999. The trial court ruled that pursuant to MCL 600.5856(a), (c); MSA 27A.5856(a), (c), the limitations period continued to run until Plaintiff either delivered the Summons and Complaint to a deputy sheriff for service or effectuated service of process on Defendant and because Plaintiff did neither by January 23, 1999, the action was barred. This was error. Because Plaintiff filed this action before the three-year limitations period expired, it was timely filed. Goniwicha v Harkai, 393 Mich 255 [1974]; Buscaino v Rhodes, 385 Mich 474, 481, 484 [1971], overruled in part on other grounds by McDougall v Schanz, 461 Mich 15 [1999]. Because the limitations period had not expired before Plaintiff filed suit, the tolling provisions of § 5856 were not implicated." Id., at 481-482.

(Appx. pp. 42A-43A). Following the denial of a timely-filed rehearing motion, in which Defendant, for the first time, raised its "McDougall" argument, this Court granted leave to appeal, stating:

> "*** The parties are directed to include among the questions to be briefed whether Buscaino v Rhodes, 385 Mich 474 (1971), is consistent with the language of MCL 600.1901 and of MCR 2.101(B) to the effect that a civil action is commenced by filing a complaint with the court."

(Appx. p. 45A; see also, 467 Mich 856 [2002]).

ARGUMENT

PLAINTIFF TIMELY FILED HIS COMPLAINT WITHIN THE PERIOD OF LIMITATIONS NOTWITHSTANDING HE DID NOT SERVE IT WITHIN THAT PERIOD BUT WITHIN THE EXTENDED LIFE OF THE SUMMONS

A. The Pertinent Statutes' Plain Meaning

The statute of limitations applicable to this case provides, in pertinent part:

> "(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> ***
>
> "(9) The period of limitations is three years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property."

MCLA 600.5805(1), (9) (emphasis added).

Thus, the plaintiff timely files if "the action is commenced" within the applicable time. Mr. Gladych filed his Complaint within three years.

When is a civil action "commenced"? The Legislature has given the answer:

"A civil action is commenced by filing a complaint with the court."

MCLA 600.1901.

There are no other requirements. The Court must give "the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous." Pohutski v City of Allen Park, 465 Mich 675, 683 (2002). Where, as here, the language is unambiguous, the Court presumes "that the Legislature intended the meaning clearly expressed -- no further judicial construction is required or permitted, and the statute must be enforced as written." Id.; quoting, DiBenedetto v West Shore Hospital, 461 Mich

394, 402 (2000). "Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature." Pohutski, 465 Mich 675, 683.

Furthermore, MCLA 600.5805(1), supra, must be read together with MCLA 600.1901, defining when a civil action is "commenced" for purposes of the statute of limitations. "When parsing a statute, we presume every word is used for a purpose." Pohutski, 465 Mich 675, 684. Additionally, it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory." Robertson v Daimler Chrysler Corp., 465 Mich 732, 748 (2002). The meaning of "commenced", as it appears in MCLA 600.5805(1), must be discerned from its statutory context or setting, including the express, definitional provision of MCLA 600.1901, stating that a civil action is commenced "by filing a complaint with the court." Id. See, Crowe v Detroit, 465 Mich 1, 6-7 (2001). Thus, MCLA 600.5805(1) is properly construed "not in isolation but with reference to and in the context of related provisions," specifically, MCLA 600.1901, "in order to give effect to the whole enactment." Guitar v Bieniek, 402 Mich 152, 158 (1978). Section 5805(1) should not be "divorced" from those sections of the Revised Judicature Act "which precede" it. Herald Co. v Bay City, 463 Mich 111, 130, fn. 10 (2000).

MCLA 600.1901, supra, is practically identical to MCR 2.101(B), providing that "a civil action is commenced by filing a complaint with a court." This coincidence of language only renders the Court of Appeals' decision all the more appropriate, given that Mr. Gladych "commenced" this action within the period of limitations.[2]

---

[2] The same principles of construction apply to court rules as to statutes. E.g., Richards v McNamee, 240 Mich App 444, 451 (2000).

Plaintiff commenced this action within three years of the occurrence of his injury, thus satisfying the applicable statute of limitations. Defendant's discussion of legislative history is completely irrelevant, given the plain meaning of MCLA 600.1901 and 5805(1), supra.

B. Buscaino Is Consistent With The Plain Meaning Of The Pertinent Statutes And Court Rule; Buscaino Is Correct And Remains Sound Precedent

This Court has "directed" the parties "to include among the questions to be briefed whether Buscaino v Rhodes, 385 Mich 474 (1971), is consistent with the language of MCL 600.1901 and MCR 2.101(B) to the effect that a civil action is commenced by filing a complaint with the court" (Appx. p. 45A; 467 Mich 856 [2002]). In fact, Buscaino is plainly consistent with each of those provisions, which are identical to one another, in providing that an action is "commenced" by filing a complaint, as Mr. Gladych did within three years of the occurrence of his injury. Furthermore, Buscaino is sound precedent, contrary to Defendant's arguments.

In Buscaino, this Court held, consistent with the predecessor "GCR" to MCR 2.101(B), that an action is commenced by the filing of the complaint, so that a complaint filed within the three-year period of limitations is timely filed, notwithstanding that the plaintiff effects service beyond the three-year timeframe. The Court did not make reference to the statute containing the same rule, MCLA 600.1901, supra, but that is hardly of any consequence, and if anything, only shows the consistency of Buscaino with the statute as well as the court rule. In Buscaino, the Court held that the plaintiffs had complied with the statute of limitations, by filing the complaint in timely fashion, and that "the fact of subsequent service of the complaint can in no way affect the commencing of the action." 385 Mich 474, 484. The Court further held that the tolling provision appearing at MCLA 600.5856 has nothing to do with the matter, but deals only with prior lawsuits not adjudicated on the merits (see: Argument "C", *infra*).

Decisions since Buscaino only emphasize the correctness of the Court of Appeals' decision herein. The same day it decided Buscaino, this Court decided Kuenzer v Osborn, 385 Mich 517 (1971). In Kuenzer, the Complaint was timely filed, but the papers were delivered to the Sheriff after the statute of limitations would have run. Id., 518. This Court held in favor of the plaintiff:

> "The issue involved is identical to the one in Buscaino v Rhodes (1971), 385 Mich 474. We there held that there was compliance with the statute of limitations when an action was commenced in accordance with GCR 1963, 101. Therefore, for the reasons given in Buscaino v Rhodes, the Court of Appeals is affirmed and the case is remanded for trial." [385 Mich at p. 518].

About three years later, the Court decided Goniwicha v Harkai, 393 Mich 255 (1974). The plaintiffs commenced that action within the period of limitation, but did not complete personal service until "almost four years after the accident, two years and seven months after suit was commenced." Id., 255. This Court rejected the Court of Appeals' determination that service had to be made "within a reasonable time after the period provided in the statute for timely commencement of an action." Id., 257. This Court stated:

> "The 'reasonable time' limitation on the Buscaino holding is at odds with the procedure set forth in Amended Rule 102 providing for dismissal of actions in cases in which service is not effected. That procedure governs without regard to the 'reasonableness' of the time which has elapsed since commencement of the action or since the date on which the statute of limitations would otherwise expire." [393 Mich at 257-258].

The same is true in the present case. The Circuit Court determined, by granting the petition for issuance of the second summons, that good cause existed for such issuance. Defendant did not challenge the order for issuance of the second summons. It is thus now established that good cause did exist, based on Plaintiff's efforts to serve the Defendant within the life of the original summons. See, Bush v Beemer, 224 Mich App 457 (1997); MCR 2.102(D); see also, Richards v McNamee, supra, 240 Mich App 444, 448-452.

Neither MCLA 600.5805(1), nor MCLA 600.1901, contains a reference to "service" as required to meet the statute of limitations. Where that is the case, this Court has long held that service is not required in order to satisfy the statute, so long as service is made within the life of the summons. See, Christe v Springfield Fire & Marine Insurance Co., 207 Mich 12, 14-15 (1919).

This Court has recently indicated the continuing soundness of Buscaino. In Scarsella v Pollak, 461 Mich 547 (2000), the Court held that a medical malpractice complaint filed without the affidavit of merit required by MCLA 600.2912(D)(1) is a nullity, insofar as the applicable period of limitation is concerned, thus effecting no tolling of the statute. By way of footnote, however, this Court stated:

> "In general, of course, a statute of limitations requires only that a complaint be filed within the limitation period. Buscaino v Rhodes, 385 Mich 474, 481 [1971], partially overruled on other grounds, McDougall v Schanz, 461 Mich 15 [1999]. The summons can be served within ninety-one days thereafter, unless a second summons (valid for a definite period not exceeding one year) is issued within the first ninety-one day period. MCR 2.102(A), (D)."

Scarsella, 461 Mich 547, 552, fn. 3. The Scarsella footnote sets forth the precise situation in this case. Defendant has no statute of limitations argument.

Indeed, the Court of Appeals, during the pendency of this appeal, has issued a published decision, thoroughly explaining that McDougall did not overrule the main holding of Buscaino. Terrace Land Development v Seeligson & Jordan, 250 Mich App 452 (2002). In Terrace Land Development, the Court stated:

> "The McDougall decision did not overrule the Buscaino court's determination that MCL 600.5856 applies to cases where a prior lawsuit was involved between the parties, nor did it overrule the determination that the date of filing a complaint measured the timeframe upon which to determine whether the statute of limitations barred a claim. The Buscaino decision did not involve a conflict between the court rule and MCL 600.5856 because the statute was not applicable ..."

250 Mich App 452, 461. As noted in greater detail within Argument "D", *infra*, McDougall poses no basis for reversal here, both because there is no conflict between any applicable statute and MCR 2.101(B), and because the matter is procedural in nature, rather than substantive.

Buscaino remains sound precedent. This Court should affirm.

C. MCLA 600.5856 Is A Tolling Provision Which Has Nothing To Do With This Case

One of the "tolling" provisions of the Revised Judicature Act is MCLA 600.5856, providing:

> "The statutes of limitations or repose are tolled:
>
> "(a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
>
> "(b) At the time jurisdiction over the defendant is otherwise acquired.
>
> "(c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer."

This provision "deals only with prior lawsuits between the parties which have not adjudicated the merits of the action." Mair v Consumers Power Co., 419 Mich 74, 79 (1984); quoting, Buscaino, 385 Mich 474, 482 (1971). In Mair, this Court refused to extend tolling effect to a prior, administrative proceeding, concluding that the "tolling event" could be nothing "other than a lawsuit," and could not be an administrative proceeding. 419 Mich 74, 80. As explained in Mair, MCLA 600.5856 is a tolling provision which only relates to a previous event, specifically, a previous lawsuit. As explained historically in Mair, and in Buscaino itself:

> "In Buscaino v Rhodes, supra, we recognized our present tolling statute [MCLA 600.5856] as merely the successor to 1948 CL 609.19, which provided with considerable detail those actions which, upon dismissal, would constitute tolling events. 1948 CL 609.19 acted to extend the statute of limitations only when the

> initial action was defeated on a matter of form, not substance, and the plaintiff had acted in good faith. See Backus v Kirsch, 264 Mich 73 [1933]; McMillan v Reaume, 137 Mich 1 [1904]. This prior statute, with its reference to 'actions' and 'writs or declarations' failing for lack of 'service' or 'default' and its further references to 'verdicts' and 'judgments' being 'arrested' or 'reversed on writ of error', obviously contemplated only a prior lawsuit as the triggering event. Those terms do not appear in our present statute. However, it is clear that the present statute was not intended to alter the purpose of that prior statute. The comments of the drafters of the statute reveal their purpose to be little more than to change the method by which the tolling time was computed ..."

Mair, 419 Mich 74, 81 (emphasis added).[3]

MCLA 600.5856 merely allows "a lawsuit to go forward notwithstanding the statute of limitations when the defendant has already received notice of the allegations against him as a result of the prior lawsuit." Mair, 419 Mich 74, 83 (emphasis added). "The statute can only be used to toll the statute of limitations when the plaintiff makes a false start within the time limits of the statute of limitations and subsequently learns that the action cannot continue." Id.

In Buscaino, the Court persuasively analyzed this particular point as follows:

> "First, GCR 1963, 101 means that an action is commenced by the filing of a complaint. It has that meaning in the context of the statute of limitations, as well as every other context.
>
> "Second, MCLA § 600.5856[; MSA 27A.5856] has nothing to do with when an action is commenced. It has to do with when statutes of limitations are tolled.
>
> "'To toll a statute of limitations means to show facts which remove its bar of the action.' Black's Law Dictionary (4th ed.), p. 1658.

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[3] 1948 CL 609.19 provided as follows: "If, in any action, duly commenced within the time limited in this chapter, and allowed therefor, the writ or declaration shall fail of a sufficient service or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ be abated or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year."

> "Since there can be no question of 'removing' the bar of the statute of limitations unless and until, in the absence of tolling the statute would have barred the action, there can be no issue of 'tolling' in any case where the action is commenced within the statutory period of limitations.
>
> "It is only when the action is not commenced within the statutory period -- as determined by consulting the date of claim, the date of filing the complaint and a calendar -- it is only when a prima facie bar of the statute appears, that tolling comes into play."

385 Mich 474, 481.

Defendant refers to certain committee comments, but as noted in Buscaino itself, the Committee Comment "recognizes" the true "function of MCLA 600.5856," as follows:

> "In the event of the dismissal, on some ground other than the merits (as for example -- lack of jurisdiction over the subject matter) of an action in which jurisdiction over the defendant is acquired, the period of time from the time of service or the acquisition of jurisdiction over the defendant until dismissal will not count as a part of the time of limitation, for during such time the statute has been tolled. Subsections (1) and (2)." [385 Mich 474, 482-483].

Thus, "nothing is gained by the requirement of MCLA § 600.5856," as reference to that provision "merely complicates an otherwise simple procedure." Id., 483. This Court should adhere to the logic of Mair and of Buscaino and conclude that MCLA 600.5856 is a tolling provision which has nothing to do with the issue before this Court. MCLA 600.5856 applies only when there was a prior case dismissed other than on the merits. E.g., Dorsey v Kasyonan, 193 Mich App 711, 712-714 (1992); Lausman v Benton Twp., 169 Mich App 625, 630 (1988); see also, Terrace Land Development, 250 Mich App 452, 459-462.

D. There Is No "McDougall" Issue Here: (1) There Is No Inconsistency Between Any Court Rule And Any Statute; (2) Buscaino And The Court Of Appeals' Decisions Herein And In Other Cases Are Consistent With The Pertinent Statutes, Including MCLA 600.1901 And 5805; (3) The Issue Presented Is Procedural, Not Substantive

In McDougall v Schanz, 461 Mich 15 (1999), this Court concluded that:

(a) A statute governing expert witness qualifications in medical malpractice cases conflicts with the judicially-issued rules of evidence;

(b) The statute involves a matter of substantive law; and

(c) The statute was a valid exercise of the Legislature's public policy-making prerogative.

Of course, the first step in any "McDougall" analysis is a determination whether the statute and court rule conflict. McDougall, 461 Mich 15, 24-26.

In this case, there is no conflict between any applicable statute and MCR 2.101(B), providing that "a civil action is commenced by filing a complaint with a court." For reasons already noted, MCLA 600.5856 does not apply. It is a tolling provision applicable only in a case in which a prior lawsuit was dismissed other than on the merits. The absence of conflict between statute and court rule, in the present matter, is made especially obvious by MCLA 600.1901, which mirrors the language of MCR 2.101(B). The Legislature has specifically ordained, consistent with MCR 2.101(B), that "A civil action is commenced by filing a complaint with the court." Thus, Mr. Gladych timely filed his Complaint, because he "commenced" the case within three years. MCLA 600.5805(1), (9). There is no conflict.

Secondly, McDougall provides no basis for reversal here, because, unlike the evidentiary point at issue in McDougall, in this case, we are concerned with the most procedural of matters, the procedural mechanism for satisfaction of the statute of limitations (i.e., the filing of a complaint). The expert witness qualification statute at issue in McDougall reflected "wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists." 461 Mich 15, 35. In contrast, the present case presents an issue which is inextricably linked to "judicial dispatch of litigation," a matter which McDougall would characterize as procedural. 461 Mich 15, 30; quoting, Kirby v Larsen, 400 Mich 585, 598 (1977)

(Opinion of Williams J.); citing, 3 Honigman & Hawkins, Michigan Court Rules Annotated (2nd ed.), p. 404 (additional citations omitted). Whatever "policy" considerations Defendant identifies relate to the timing of commencement of litigation, which is itself procedural in nature.

In McDougall, this Court cautioned that the line between "practice and procedure" and "substantive law" presents a difficult task, "one that must be made on a case-by-case basis ..." 461 Mich 15, 36. The statute of limitations, and the manner in which an action is commenced, are procedural matters. In People v Russo, 439 Mich 584, 595 (1992), this Court stated:

> "In Michigan, statutes of limitations are generally regarded as procedural and not substantive in nature. Lothian v Detroit, 414 Mich 160, 166 [1982]; Forest v Parmalee, 402 Mich 348, 359 [1978]."

Such statutes are "procedural, not substantive, in nature." Lothian, at 166. "Michigan law has long held that the statute of limitations is regarded as procedural, not substantive." Staff v Johnson, 242 Mich App 521, 531 (2000); see also, Schumacher v Tidswell, 138 Mich App 708, 718 (1984) ("Statutes of limitation are procedural and governed by the law of the forum"); United States v Wahl, 583 F2d 285, 287 (CA 6, 1978) ("The manner in which an action is commenced, and when it is deemed to have begun, are governed by the law of the forum"). Such statutes plainly involve the dispatch of judicial business, and are, therefore, procedural in nature, within the meaning of McDougall, 461 Mich 15, 35.

In summary, there is no need to assess whether MCLA 600.5856 is "substantive" or procedural in nature, given that it does not conflict with MCR 2.101(B). Indeed, the statute on point is MCLA 600.1901, providing that a civil action is commenced by filing a complaint with the Court, which is thus completely consistent with MCR 2.101(B). The statute cited by Defendant, MCLA 600.5856, is not on point. In McDougall, 461 Mich 15, 24, this Court stated

that it would strive to construe statutes and court rules "so as not to conflict, thus making it unnecessary to reach the constitutional question," and further stated:

> "When there is no inherent conflict, '[w]e are not required to decide whether [the] statute is a legislative attempt to supplant the Court's authority.' People v Mateo, 453 Mich 203, 211 [1996]. 'We do not lightly presume that the Legislature intended a conflict, calling into question this Court's authority to control practice and procedure in the courts.' People v Dobben, 440 Mich 679, 697, n 22 [1992]."

McDougall, 461 Mich 15, 24.

Secondly, the procedural matter here is one governed by the court rule, even if one unjustifiably imagines that there is a conflict between court rule and statute.

E. The Law In Other States And Federal Law Are Consistent With Buscaino And With Plaintiff's Argument

A review of the law from other states, 27 ALR 2d 236, et. seq., discloses that judicial decisions in this area vary according to the "considerable variation in the statutes and rules of court or civil procedure with regard to what shall be deemed the commencement of an action." Id., 243. In Michigan, as noted above, "a civil action is commenced by filing a complaint with the court," and the plaintiff satisfies the statute if "the action is commenced within the periods of time prescribed" by the statute. MCLA 600.1901, 5805(1). Hence, the general law supports Plaintiff's position in this appeal.

Federal law sustains Plaintiff's argument as well. Under Fed.R.Civ.P. 3, "A civil action is commenced by filing a complaint with the court." This is identical to MCLA 600.1901, supra. The United States Supreme Court holds that the plaintiff timely commences an action by filing the complaint, even though the plaintiff serves the pleading later. West v Conrail, 481 US 35, 39; 107 S Ct 1538; 95 LEd2d 32, 37 (1987); United States v Wahl, 583 F2d 285, 287-288 (CA 6, 1978) (additional citations omitted).

F. Given Recent Amendments And Jurisprudential Developments Which Shorten and Strictly Regulate The Timing Of Service Of Process And Extensions Thereof There Is No Reason Whatsoever To Depart From Buscaino

In 1991, by amendment of MCR 2.102(D), this Court halved the life of the summons from 182 to 91 days. The Court of Appeals has since held that the "good cause" requisite to issuance of a second summons under MCR 2.102(D) exists only if the plaintiff shows diligent efforts in trying to serve process, rather than in matters that should logically precede the decision to serve process, such as determining whether the action has merit. Bush v Beemer, 224 Mich App 457, 464 (1997); see also, Richards v McNamee, 240 Mich App 444, 448-452 (2000). The Court of Appeals has just recently held, further, that there is no authority for issuance of a "third" summons, apparently under any circumstances. Hyslop v Wojjusik, ___ Mich App ___ (No. 230279; published: 8/13/02).

Given these severe limitations upon the issuance process and satisfaction of the service requirement, there is no need whatsoever to superimpose MCLA 600.5856 upon the clear and unambiguous legislative scheme that governs commencement of the action for limitations purposes. MCLA 600.1901, 5805(1), supra. Under current Michigan law, furthermore, there is no chance for an "extension" of the life of the summons once the service period expires, a service period which is half of what it was a decade ago, because an extension must come within the original service time. Hyslop, supra; Durfy v Kellogg, 193 Mich App 141 (1992); MCR 2.102(D). This differs from federal law, which requires an extension if "good cause" is present, but allows an extension even in the absence of "good cause." Thompson v Brown, 91 F3d 20, 21 (CA 5, 1996); Espinoza v United States, 52 F3d 838, 840-841 (CA 10, 1995).

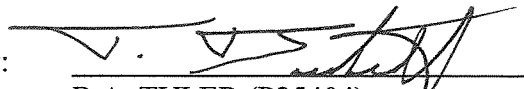
There is never an excuse for departing from a plain and unambiguous legislative edict. MCLA 600.1901, 5805(1), supra. Such a departure would be even more unjustifiable, when there is no need for it. Michigan law currently does its utmost to advance the Defendant's interest in timely commencement and processing of litigation. Under these circumstances, this Court should find itself compelled to adhere to the plain, unambiguous meaning of the governing statutes, and remain persuaded by the soundness of the Buscaino holding.

RELIEF

Plaintiff-Appellee, Robert Gladych, respectfully asks this Honorable Court to affirm the Court of Appeals' judgment.

Respectfully submitted,

SOMMERS, SCHWARTZ, SILVER
& SCHWARTZ, P.C.

By: 

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Dated: 10/8/02

STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal From the Michigan Court of Appeals)

ROBERT GLADYCH,

Plaintiff-Appellee,

vs.

NEW FAMILY HOMES, INC.,

Defendant-Appellant.

Supreme Court No. 119948

Court of Appeals No. 222343

Macomb Circuit No. 99-264-NI

_____/

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_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

SHARON THRASHER, being first duly sworn, deposes and says that on the 9th day of October, 2002, she served two (2) copies of the PLAINTIFF-APPELLEE'S BRIEF ON APPEAL upon the following:

James Sukkar, Esq.
Julie Nichols, Eq.
1050 Wilshire Drive, Suite 320
Troy, MI 48084

by placing said copies in an envelope properly addressed and depositing said envelope in the U.S. mail located at Southfield, Michigan.

Further, Deponent sayeth not.

Sharon Thrasher
SHARON THRASHER

Subscribed and sworn to before me,
this 9th day of October, 2002.

NOTARY PUBLIC

PATRICIA L. CHAPMAN
Notary Public, Oakland County, Michigan
My Commission Expires September 19, 2006