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Civil Procedure

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CIVIL PROCEDURE
ROBERT W. PETERSON†

I. INTRODUCTION

Over 230 cases decided during the Survey period involved some civil procedure issue; of these, as might be expected, very few involved issues of great pith or moment. The fact that many cases included procedural issues but few turned on them is probably a fair measure of two things. It might be generalized that Michigan procedure is doing a fair job, since a procedural system is probably functioning very well when most cases turn on the merits and not on procedural points. On the other hand, the number of procedural points urged on appeal indicates that, while lawyers may be liberal when it comes to procedural reform, still the ghost of Baron Parke guides them when it comes to actual litigation. The temptation to try to win a case on the pettifogging or the technical is strong, and, as evidenced by the number of procedural points in the advance sheets, it must be that winning a case on such a point is still considered a triumph of the lawyer’s art. The plethora of cases dictates the exercise of a high degree of discretion in choosing those to be reviewed. In doing so those that seemed of lasting or general interest or ones which suggested possible reform have been chosen.

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1. Baron Parke was so imbued with the mysticism of technical pleading requirements that when liberalized reforms were introduced he resigned from the bench. See Haenlein v. Saginaw Bldg. Trades Council, AFL, 361 Mich. 263, 275, 105 N.W.2d 166, 175 (1960) (Smith, J., dissenting).

2. The point was made quite well by Sergeant Haye’s dialogue, Crogate’s Case: A Dialogue in ye Shades on Special Pleading Reform, in W. HOLDSWORTH, A HISTORY OF ENGLISH LAW app. at 427 (3d ed. 1944) where a conversation between Crogate and Baron Surrebutter (no doubt the Baron Parke of note 1 supra) proceeds as follows:

SLR B. Done away with special pleading? Heaven forbid . . . . [W]e framed a series of rules on the subject, which have given a truly magnificent development to this admirable system; so much so, indeed, that nearly half the cases coming recently before the Court, have been decided upon points of pleading.

CROGATE. You astonish me. But pray how do the suitors like this sort of justice?

SUR B. Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adopted to suit the tastes and capacities of the ignorant.

II. JURISDICTIONAL AMOUNT

*General Research, Inc. v. American Employer's Insurance Co.* was a diversity action against seven insurance companies arising out of a single interruption of business (the Grand Rapids riots). The claims against four of the companies satisfied the $10,000 jurisdictional amount requirement of 28 U.S.C. § 1332(a), but the claims against the other three were under the limit. On motion to dismiss made by the latter three defendants, Judge Fox ruled that even though it may not be supported by a great weight of authority such aggregation of claims should be permitted.

The decision makes good sense, although the weight of authority is probably to the contrary. Unlike the situation where none of the individual claims satisfies the $10,000 requirement but their aggregate does, in *General Research* a suit could be maintained in federal court on four of the claims regardless of aggregation. Dismissal of the three smaller claims would only encourage needless dual litigation of claims so factually and legally related that they should be litigated in one action. The concept of ancillary jurisdiction provides a convenient doctrinal foundation upon which to base jurisdiction in this situation.

While there is little doubt as to the practicality of the *General Research* decision, the United States Supreme Court eschewed good sense, cast considerable doubt on Judge Fox's conclusion, and struck a blow against procedural reform in *Snyder v. Harris,* a case decided subsequent to *General Research.* In *Snyder* the Supreme Court ruled that even after the 1966 amendments, Federal Rule of Civil Procedure 23 (FRCP) requires that at least one named claimant in a class action must claim damages in excess of $10,000 if the individual claims should be categorized as separate and distinct rather than joint or common. One of the reasons for the 1966 amendment of rule 23 was that the concepts of "separate," "distinct," "joint," or "common" under the old class action practice often eluded definition. After *Snyder,* these discarded concepts will still govern class actions where the jurisdictional amount is not met by at least one litigant, even though the amount

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4.1. *Id.* at 123-24.
of the judgment (and even the attorney's fee awarded to a successful plaintiff's attorney) may border on a vast and fabulous sum. The Court's opinion might have been based in part on a reluctance to expand diversity jurisdiction. Unfortunately, limiting diversity jurisdiction by interpreting the "amount in controversy" rubric narrowly also serves to restrict federal resolution of federal question litigation where the only basis of jurisdiction is 28 U.S.C. § 1331, which also contains a $10,000 limitation. This case no doubt came as a blow to those who anticipated use of rule 23 as an effective device for consumer protection in situations where state class action rules are less effective.7 There appears to be little reason for so restrictive an approach, especially in the class action setting, but after Snyder any relief will have to come from Congress.8

The doubt which Snyder casts on the General Research decision is not so much a product of any direct holding in Snyder as a product of some reasonable inferences from that opinion. The two dissenters capsulized the deleterious effect of Snyder as follows:

Litigants, lawyers, and federal courts must now continue to be ensnared in their complexities [the distinctions between "joint", "common", and "several"] in all cases where one or more of the coplaintiffs has a claim of less than the jurisdictional amount . . . .9

Their reading is supported by citations in the majority opinion to two cases holding that where the rights are several all claimants must satisfy the $10,000 amount.10 Any such holding would be unfortunate and would run contrary to the philosophy of ancillary and pendant jurisdiction recently approved by the Supreme Court.11

8. Professor Wright urges Congressional overturning of Snyder in C. Wright, supra note 4, at 316, and a bill has been introduced to do so for the consumer class action. See the remarks of Senator Tydings upon introducing the Class Action Jurisdiction Bill in 115 Cong. Rec. 4163 (Apr. 25, 1969). A reprint of the bill can be found in Id. at 4164.
9. 394 U.S. at 343 (Fortas, J., dissenting) (emphasis added).
11. In United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), the Court said: Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies are strongly encouraged . . . .
Pendant jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made,
III. Statute of Limitations

A number of significant cases decided during the Survey period affected the statute of limitations, many of which seem to reach divergent results. Cases of interest covered problems of classifying claims for purposes of determining which statutory period applies, problems of accrual, problems of adding new parties defendant after the period has run, and problems of tolling.

In State Mutual Cyclone Insurance Co. v. O & A Electric Cooperative,12 the Michigan Supreme Court held that a cause of action based on breach of contract to supply proper amounts of electricity, which resulted in the death of plaintiff's cows,13 was governed by the three-year statute of limitations for damages to "persons or property,"14 rather than the six-year limitation governing actions to "recover damages or sums due for breach of contract."15 Fries v. Holland Hitch Co.16 and Malesev v. Garavaglia17 both court of appeals cases released for publication after the State Mutual case, reached conclusions contrary to State Mutual.

In Fries a trailer hitch broke causing plaintiff's tractor and trailer to roll into a ditch, and plaintiff sought to recover both for damages done to the tractor and trailer and incidental damages due to loss of use. Plaintiff's theory was that the manufacturer breached an implied warranty of fitness for purpose and that the manufacturer...
knew or should have known of the defect. The court, even though it cited *State Mutual*, held that the three-year limitation period applied because there was "no express contractual provision." In *Malesev* plaintiffs originally sued to recover damages done to their land on account of blasting by the defendant. When this action was dismissed because commenced more than three years after the cause of action accrued, plaintiffs commenced another action claiming recovery as third party beneficiaries of a contract (apparently of indemnification) between the road commission and the construction firms doing the blasting. The court held that in such a case the six-year statute of limitations would apply, since the cause of action would be based on breach of an express contract.

It is apparent that the reasoning in *Fries* and the result in *Malesev* are inconsistent with the supreme court's opinion in *State Mutual*. The genesis of the confusion is an inherent ambiguity injected into the statute by the Revised Judicature Act of 1961 (RJA). Prior to 1961 the statute of limitations provided a basic six-year limitation for all actions, followed by a proviso clause limiting actions for damages to person, property, or land to three years. No mention was made of actions based on contract. Under such a statutory scheme it is clear that the applicable period turned on the nature of the injury rather than the theory of the plaintiff. The RJA of 1961 altered that scheme by placing the three- and six-year periods in separate sections and providing a special section dealing with actions on contracts. The relevant portions of the two sections now read:

The period of limitations is 3 years for all other actions to recover

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18. We believe that the correct construction of these statutory provisions to be that where the injury is to specific property of persons, the 3-year limitation controls. The 6-year period may be thought of as an exception applicable to such actions wherein the injury is occasioned by breach of some express contractual provision. [Cases cited]. On the other hand, in contracts of a commercial nature or where the breach injures one in his financial expectations and economic benefit rather than his person or specific property, then such actions may be brought within 6 years whether found upon express or implied contract.

19. Unlike the *Fries* case, the *Malesev* court only cited the subsequently reversed court of appeals opinion in *State Mutual* even though the *Malesev* opinion was released for publication after the supreme court's opinion.


damage for injuries to persons and property. RJA § 5805(7).
The period of limitations is 6 years for all other actions to recover
damages or sums due for breach of contract. RJA § 5807(8).

Since "damages . . . for breach of contract" in many cases can
include "damages . . . to persons and property," in order to
reconcile these two sections either RJA 5805 must be read as
qualifying RJA 5807, leaving the six-year limitation to govern
economic harm, such as loss of bargain and failure to pay amounts
due under a contract, or the applicable period must turn on the
theory of the pleader, leaving all contract actions governed by
section 5807 and all other actions for damages to persons or
property governed by section 5805.

The Committee Comments support the latter approach since
they refer to RJA 5805 as "a compilation of the limitations on the
general tort remedies" and RJA 5807 as "the periods of
limitations relating to contract remedies." This scheme also is used
within the body of the two sections to draw distinctions between the
kinds of cases to which shorter or longer statutes of limitations
apply. Thus, an assault and battery cause of action must be brought
within two years, whereas a negligence action can be brought within
three; but if filed after two years cannot be dismissed because the
conduct might also amount to an assault and battery. "In
determining whether the statute has run on plaintiff's cause of action
he is entitled to the benefit of the allegations of a cause of action, if
any, against which the statute has not run." Likewise, for purposes
of accrual, "actions for damages based on breach of warranty of
quality or fitness" accrue when the breach was or should have
reasonably been discovered even though, presumably, the same
claim based on negligence might have accrued differently.

The court in State Mutual did its best with an inconsistent
statute and probably aligned itself with the majority of courts which

(under State Mutual six-year period governed third-party action by city against lessee on
"save and hold harmless" clause although city was originally held liable for damages to "person
or property"). The Fries court added a third possibility; see note 18 supra. A distinction
between "express" and "implied" contracts is, however, nowhere found in the statute.
23. RJA § 5805, Committee Note at 822 (1961).
24. Id. § 5807, Committee Note at 835.
27. Id. § 5827.
have faced the same kind of problem. It is questionable whether the policies fostered by a statute of limitations are best served by the distinctions presently drawn. If, for instance, the defendant refused to deliver a cow, an action to recover loss of profits during the period necessary for the plaintiff to purchase another cow would be governed, presumably, by the six-year period. Yet, if the defendant breached a contract to deliver proper quantities of electricity and killed plaintiff’s cow, plaintiff could neither recover for the cow nor for the loss of profits pending purchase of another if suit is brought after three years. The defendant’s interest in repose is not stronger in one case than the other; the reflection on the validity of plaintiff’s claim due to dilatory commencement is no worse; and the proof, other than the body of the cow, is not staler.

Moreover, it is difficult to conceive why any claim should be permitted after six years, particularly when, if it comes to trial in a metropolitan area, court delay could age it by over another three years. No matter how well preserved, a nine-year old claim is bound to be stale. A uniform period for all claims would do much to eliminate confusion and promote the defendant’s legitimate interest in being “secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.” The present four-year period in the Uniform Commercial Code would be the likely candidate, since any other period might frustrate the policy of uniformity furthered by the Code. Special periods shorter than four years could be adopted for actions in which the evidence is unusually transient or the action is one unpopular in the law. For claims where the wrong is difficult to discover but upon discovery the evidence is unusually reliable, the harshness of the rule could be

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28. See cases collected in 34 AM. JUR. Limitations of Actions §§ 103, 104 (1941); 53 C.J.S. Limitations of Actions §§ 73, 74 (1968).
30. MICH. COMP. LAWS ANN. § 440.2725, official U.C.C. Comment at 810 (1967). This period seems long, but it was selected because “within the normal commercial record keeping period.”
31. This policy might be frustrated by the present six-year limitation on contract damage claims. However, since the UCC was enacted after the RJA of 1961, the UCC limitation period would probably cover any contract action which fell within the ambit of the UCC.
32. Libel and slander and assault and batter would qualify for this.
ameliorated by an accrual upon discovery provision. Then perhaps an outside limit on undiscovered causes of action should be set.

If the applicable period is unclear, Michigan law as to when a cause of action accrues is hardly more clear. In Duncan v. Beres the court of appeals held that the statute does not begin to run against a claim for contribution until the amount is paid; however, the Michigan Supreme Court held in Morgan v. McDermott that a claim for contribution against a county for failure to maintain a safe road was cut off after sixty days if within that time the county was not properly notified of the accident. Where the statute of limitations is the same as to both defendants, abusive delay on the part of one defendant in impeding the other can be checked by refusing to allow the impleader under the Michigan General Court Rule 204 (GCR). Where the periods are different because of the character of the parties, the plaintiff by delaying the filing of suit could, under Morgan, cut off the defendant from his right to contribution which would have existed had the suit been brought in time for the third party complaint to have been filed. This ability

33. This was the rationale that led the New York Court of Appeals to adopt, by a questionable technique of statutory interpretation, an accrual upon discovery approach for malpractice cases involving foreign objects left in the patient’s body. Approximately nine other jurisdictions have a rule limited to foreign object cases. See Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 432, 248 N.E.2d 871, 875, 301 N.Y.S.2d 23, 27 (1969).


36. 382 Mich. 333, 169 N.W.2d 897 (1969). This case is actually more recent than the Survey period, but is mentioned here because it relates to the problem in Duncan.

37. Unless otherwise noted, reference to GCR will be to the 1963 promulgation.
of the plaintiff to select which of several wrongdoers is to bear the full onus of judgment was precisely the kind of unequal justice that the contribution between joint tort-feasors section of RJA\textsuperscript{38} and the impleader provisions of GCR 204.1 were designed to eliminate.

Another serious ambiguity in the Michigan statute of limitations is in its general accrual provision, RJA 5827, which states that unless otherwise expressly provided a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."\textsuperscript{39} The language is somewhat similar to that in a Connecticut statute\textsuperscript{40} which was interpreted to mean the cause of action accrued when an object was manufactured and sold, not when it caused injury. Under the Connecticut statute the cause of action might be barred before there is any injury if, as might happen in a products liability case, the product is marketed more than three years before the injury. Since the Michigan statute is not as clear as those in other states, it is an invitation to litigation. At least two lower courts in Michigan have held that a cause of action does not accrue until the injury—even as to a machine manufactured in 1923.\textsuperscript{41} Both courts placed much reliance on \textit{Coury v. General Motors Corp.}\textsuperscript{42} where the court held that a cause of action for wrongful death did not accrue until the

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\item 38. RJA § 2925 (1961).
\item 39. \textit{Id.} § 5827.
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No action to recover damages for injury to the person, or to real or personal property, caused by negligence . . . shall be brought but within one year from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of. . . [emphasis added].
\end{quote}
In addition, where a personal injury action is based on breach of warranty, the applicable statute of limitations in Connecticut is the one governing tort actions rather than that governing contract actions. Rempe v. General Elec. Co., 28 Conn. Supp. 160, 254 A.2d 577 (Super Ct. 1969).

North Carolina has reached much the same result, but based the result on their judicial interpretation of "wrong" rather than on statutory language as specific as that in the Connecticut statute. Land v. Neill Pontiac, Inc., 6 N.C. App. 197, 169 S.E.2d 537 (1969) (cause of action for negligent manufacture of auto accrued at the time of sale rather than at time when gas tank fell from car causing buyer injury). The interesting question would be whether the \textit{Land} case would apply the same accrual date to an injured bystander.

\item 42. 376 Mich. 248, 137 N.W.2d 134 (1965).
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decedent's demise, even though the injuries happened long before. The Coury case is scant authority for interpreting the present statute because, although decided in 1965, the action involved was filed before the RJA of 1961 went into effect, and prior thereto the statute contained no provision similar to RJA 5827. The courts' results are bolstered both by the large majority of jurisdictions which require some injury before a cause of action accrues and by the wording of RJA 5827 which provides that the period commences to run after the claim first accrued to claimant or someone through whom he claims. Since the claimant for negligent manufacture is not identified until some injury occurs to him, it would not be possible to satisfy section 5827 prior to injury.

In any event, a ruling that the statute had run would not result in dismissal of most of these cases since they usually include a cause of action based on breach of warranty, and RJA 5833 expressly provides that such claims do not accrue until "the breach of warranty is discovered or reasonably should be discovered." The section leaves unanswered the question who should discover the defect—the purchaser or the operator of the machine—but, since much the same evidence will be introduced to support both negligence and breach of warranty claims, there is little reason to bar one and not the other.

There is something to be said for a manufacturer who, after forty-six years, is called upon to defend a claim that a machine was either defective or negligently manufactured. The evidence on liability will be very stale and many material witnesses will, no doubt, have expired. While it might be justifiable to hold a manufacturer liable for the useful life of the product, since it is on the useful life that the products value is based, such a limitation is exceptionally vague and probably unworkable. The most reasonable solution might be to adopt an outside limit on all actions commenced after a specified period from the date the product is injected into the stream of commerce.

Two cases decided during the Survey period reached opposite conclusions on the question whether a plaintiff may add a defendant after the statute of limitations has run where the plaintiff erred in suing the wrong defendant and the proper defendant had knowledge within the period that a suit had been filed. In Bebsinger v. Reid

43. See Annot. 4 A.L.R.3d 821, 830 (1965).
the plaintiff originally served and sued Reid, the owner of the truck involved in a collision. After the period had run the court allowed the plaintiff to add as a defendant, Happyland Shows, Inc., of which Reid was resident agent, stockholder, an incorporator, and president. In *Apple v. Solomon*,45 the plaintiff originally served Straith Clinic and after the period had run was not allowed to add Straith Memorial Hospital, Inc., a legally separate entity sharing the same premises. Both cases attempted to apply *Wells v. Detroit News Inc.*,46 the leading case in Michigan on the question. The primary difference between the *Bebsinger* and the *Apple* cases is that in the former the person actually served could have accepted service for the corporation while in the latter the agent of Straith Clinic could not have accepted service for Straith Memorial Hospital, Inc. Although in both cases it was assumed the proper defendant had actual notice of the suit, another significant difference is that in *Bebsinger* Reid answered admitting ownership of the car, thus tending to mislead the plaintiff, while in *Apple* the answer was not misleading and the plaintiff waited fifteen months to raise the objection. The *Wells* case, however, allowed the new party to be added after plaintiff's "protracted slumber" of eighteen months,47 so the critical fact, and the one present in *Bebsinger* and *Wells*, was probably that the party served could have accepted service for the proper party had the summons and complaint designated the proper party.471

Federal Rule of Civil Procedure 15(c) expressly allows a party to be added when the party knew or should have known that but for a mistake concerning identity he would have been sued, and the party had such notice of the action that he would not be prejudiced in maintaining his defense. The federal rule does not require as a prerequisite that a proper party be served by the wrong name. It would seem that, if service of summons and complaint results in such a defendant being fully informed, the policy of the statute of limitations would be adequately fulfilled. Service on a person otherwise qualified to accept service for the intended defendant

46. 360 Mich. 634, 104 N.W.2d 767 (1960).
47. Id. at 643, 104 N.W.2d at 771 (Black, J., dissenting).
471 The best that can be said with respect to a general rule in other jurisdictions is that courts have taken firm stands on all sides of the issue. See the analysis in Martz v. Miller Bros. Co., 244 F. Supp. 246 (D. Del. 1965) (decided before but discussing the 1966 amendment to Fed. R. Civ. P. 15(c)).
should only be a factor to be taken into account in determining actual notice. Perhaps an amendment to GCR 118 along these lines should be considered.

IV. Discovery

In the case of Dowood Co. v. Michigan Tool Co., the court of appeals moved another step in the direction of the line of cases which has substantially undercut the admissibility limitation on the scope of discovery found in GCR 302.2. Plaintiff was suing for damages done by a fire allegedly caused by defendant's product. Plaintiff deposed an employee of the defendant and asked him for information about any fires occurring both prior and subsequent to plaintiff's fire that might have involved defendant's product. Defense counsel objected on the ground that the evidence was inadmissible unless the subsequent fires happened under conditions substantially similar to the conditions surrounding plaintiff's fire, and no such foundation for the question had been laid. The court ordered the questions answered, noting that to require such a foundation at a discovery deposition would be like the bank of Will Rogers' day, which was "a place where a man can borrow some money if he can prove he doesn't need to."

Although the Michigan rule differs from the more broadly worded federal rule, the approach taken towards the admissibility requirement by the Michigan courts has substantially reduced the shield that the requirement was supposed to provide against "fishing expeditions." In 1966 the supreme court repealed the admissibility requirement with respect to discovery of documents under GCR 310, and the very liberal approach to the admissibility requirement has left it somewhat moribund. Such being the case, query whether the continued existence of the admissibility requirement is worth its

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51. Fed. R. Civ. P. 26(b) provides in part: "[T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."
52. See authorities cited note 49 supra.
nuisance potential as a bone of contention at depositions and in interrogatories. Since the scope of inquiry is approaching so nearly the federal one and appellate review of discovery questions is difficult and rare, is there any valid reason not to adopt the federal standard and get as a bonus the vast wealth of existing authority on federal discovery problems?1

In contrast to the liberal approach taken to the General Court Rules, the new District Court Rules (DCR) have the potential of being very restrictive on discovery. DCR 302 provides that no discovery is available in the district courts without court order. If recovery is sought for damages to person or property, pretrial examination or inspection “may” be ordered, but depositions may be taken only for use as testimony and upon order of the court after a showing of good cause. This rule is probably a reaction against a tendency of attorneys to discover a case to death, a practice inimical to the purposes for establishing courts with a $3,000 jurisdictional limit. Nevertheless, the limitations on discovery will no doubt lead to more attacks on pleadings by way of motions to strike, motions for more definite statement, and motions for summary judgment. Hopefully the limitations on discovery will in the long run prove more efficient and will not lead back to relying solely on artful pleading to define and limit the scope of law suits. It is interesting to note that this restrictive discovery rule also runs contrary to the trend in Detroit Common Pleas Court, which in 1967 adopted the circuit court discovery rules for all actions in which more than $1,000 damages are claimed.


53.1. It would, however, be a mistake to infer that the federal decisions are all uniform. The Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts relating to Deposition and Discovery, 43 F.R.D. 211 (1967), will, if adopted, resolve many conflicts. For the most part, where there are conflicting decisions the proposed rules opt for the position permitting broader discovery.

54. The “leave it to discovery” approach taken toward objections to specificity in pleadings by another case during the survey period, Major v. Schmidt Trucking Co., 15 Mich. App. 75, 166 N.W.2d 517 (1968), would not be satisfactory in the district court.

The question of whether insurance policy limits are discoverable is one much mooted. In GCR 301.1(6) the Michigan Supreme Court resolved that they should not be discoverable unless "relevant to an issue in the case and admissible in evidence." The Federal Rules of Civil Procedure do not expressly speak on the discoverability of insurance limits, and applying the general standard for discovery under rule 26 federal courts have reached differing conclusions.\(^{56}\) In Cuellar v. Hamer,\(^{57}\) Judge Fox held that in all future cases coming before him policy limits would be discoverable. Judge Fox noted that an amendment had been proposed to rule 26 which would permit such discovery and then summarized the reasons given why disclosure of insurance coverage should be distinguished from disclosure of general financial status; (1) insurance is an asset created specifically to satisfy the claim, (2) the insurance company ordinarily controls the litigation, (3) the information about coverage is available only from defendant or his insurer, and (4) disclosure does not involve a significant invasion of privacy. The first reason would seem to be irrelevant; the second equally true for a private, uninsured individual; and the third equally true with respect to an individual's bank account unless he has disclosed its contents to a credit agency. The fourth reason is probably the best reason to distinguish this discovery from attempts to pry into the assets of an uninsured individual.

Perhaps more interesting than the rule is the procedural device used by Judge Fox to implement the proposed but unadopted federal rule. He found that "[r]ule 26(b) does not specifically authorize discovery of insurance limits. But neither does that rule specifically prohibit such discovery." Federal rule 83 provides "[i]n all cases not provided for by rule [FRCP or local court rule], the district courts may regulate their practice in any manner not inconsistent with these rules." Since the matter was not covered by the FRCP or by local


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rule, Judge Fox held a federal judge was authorized under this provision to promulgate rules of practice in his court. The difficulty lies in resolving when a federal rule would be inconsistent with a judge's proposed rule. Rule 26 does not expressly state that only matters which fall within its ambit may be discovered, yet such a limitation may very well have been the intent of the draftsmen. Where a rule of the FRCP deals only with a matter of housekeeping and orderly dispatch of judicial business, a district judge should feel free to conclude that one of his rules supplementing an existing rule is not inconsistent with it, but where a rule evidences a very broad policy and has been the product of considerable study, the more logical conclusion is that the draftsmen intended to go as far as they did and no further. Since rule 26(b) is of the latter variety, a local rule granting more discovery exceeds the ambit of rule 26 and should be considered in conflict therewith.

Although it denied doing so, the court of appeals in Chapman v. Buder, expanded on the leading Michigan case, Ruhala v. Roby, on use of depositions at trial. The Chapman court held that a deposition of a co-defendant could be used as substantive evidence against the other defendant, citing the language in GCR 302.4(2) that a deposition of a party "may be used by an adverse party for any purpose." Since the issue was not presented, the Ruhala case did not reach it, but did hold that a prior inconsistent statement of a party could not be used as substantive evidence against a co-party even if in the deposition the declarant admits making the statement.

58. In Link v. Wabash R.R., 370 U.S. 626 (1962), the Court held that although FRCP 41(b) did not by its terms provide for sua sponte dismissal of a case for failure to attend a pretrial conference, still the court had inherent power to do so. The Court then in a footnote pointed out that the dismissal might be looked on as a local rule and, if so, it was not inconsistent with the FRCP. Id. at 633 n.8. A similar and as yet unresolved question is whether local rules providing for impartial medical experts are in conflict with FRCP 35. C. Wright, Federal Courts 392 (2d ed. 1970).

In Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968), a local rule limiting the number of pro hac vice appearances an out of state attorney could make was struck down as unnecessarily restrictive of a litigant's choice of counsel in civil rights cases. The method of review was by writ of mandamus brought by the excluded attorneys.


61. 5 J. Wigmore, Evidence § 1416 (3d ed. 1940).
The *Chapman* issue would have been squarely presented in *Ruhala* had the deponent adopted the prior inconsistent statement as true.

Unless a deponent were unavailable, the traditional rules of evidence have never qualified a deposition of a witness for substantive use, even though the party had an opportunity to cross-examine at the deposition.\(^2\) If a party's deposition vis-a-vis a co-party is to be treated as substantive evidence, there is little reason for treating the deposition of a witness differently unless it is to avoid the anomaly of an inconsistent verdict on the same issue.\(^3\) The mere joinder of a witness as a party makes his deposition statements no more reliable than if he retained his status as a witness—indeed his self-interest as a party would probably make them less reliable. Nevertheless, GCR 302.4(1) allows the use of an available witness' deposition only "for purpose of impeaching the testimony of deponent as a witness." In light of the restrictive use of a witness' deposition, the "any purpose" language of the rule should be interpreted as merely codifying the admission exception to the hearsay rule which always allowed use of a prior relevant statement of a party as substantive evidence against that party, but not against a co-party.\(^4\) This rule would, of course, be qualified by such

\(^2\) This result might follow if the only evidence for a proposition were the deposition of a co-party. The jury could find the proposition to be true vis-a-vis the deposed party because the deposition qualifies as an admission, but a directed verdict would have to be granted for the other defendant since the deposition could not be used against him. This possible result did not bother the Michigan Supreme Court in *Ruhala*. It held that prior inconsistent statements could not be used substantively against the non-declarant defendant even though the party conceded having made them in a deposition.

\(^3\) Indeed, if the deposition of a co-defendant is admissible against a defendant, there is little reason why it should not be admissible against the plaintiff. It also follows from the *Chapman* rule that a defendant should be able to use the deposition of a co-plaintiff against another joined plaintiff. See *Tomita* v. *Tucker*, 18 Mich. App. 599, 171 N.W.2d 564 (1969).

\(^4\) See *Ruhala* v. *Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967). The only federal case which research has uncovered on the point interpreted the identical language in FRCP 26(d)(2) as permitting use of a defendant's deposition against a co-defendant. *Riley* v. *Layton*, 329 F.2d 53 (10th Cir. 1964).

In *Genesee Merchants Bank & Trust Co.* v. *Payne*, 6 Mich. App. 204, 148 N.W.2d 503 (1967), the court of appeals analogized GCR 302.4(2) to the admissions exception, pointing out that admissions of a party are not admissible as substantive evidence against a co-party. Since in *Genesee* the depositions were being offered only against the parties who made the statements, the comment was not necessary to the decision. The Michigan Supreme Court in affirming the *Genesee* case said: "The question dealing with the admission of the depositions of the defendants, even though they were present in court, was correctly decided by both the trial court and the Court of Appeals. *Ruhala* v. *Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967)." 381 Mich. 234, 241, 161 N.W.2d 17, 21 (1968). From this cryptic affirmance, it is impossible to tell whether the supreme court accepted the court of appeals' comments in toto.
doctrines as vicarious admissions and statements made by a co-party in furtherance of a conspiracy.\footnote{Wayne L. Rev. 1079, 1098-1101 (1969).}

V. SEPARATE TRIALS

Applying a rule the United States Supreme Court adopted to protect the right of confrontation in criminal cases,\footnote{Bruton v. United States, 391 U.S. 123 (1968).} the Michigan Court of Appeals in \textit{Paratore v. Furst}\footnote{15 Mich. App. 568, 167 N.W.2d 126 (1969).} held that it was an abuse of discretion not to order separate, civil trials for a driver and passenger where both were accused of contributory negligence in a suit by them against the driver of another car. The reason for the ruling was that the driver could be impeached with his prior traffic convictions, whereas the driver’s traffic convictions would be admissible against the passenger only if he knew about them.\footnote{Evidently it would be possible for a passenger to be negligent in entrusting himself to a driver with multiple traffic convictions, yet it would not be possible to show that it was negligent for such a driver to drive with multiple convictions. Certainly this would be a case of infirm resolve with respect to the relevance of prior bad acts. In the next to last paragraph of the decision, the court equivocates on this issue.} In addition, the driver’s prior negligent or reckless conduct known to the passenger would be admissible against the passenger but not against the driver unless the conduct had resulted in conviction. Since these distinctions would be too subtle for a jury to draw, the court held separate trials should have been ordered. The court expressly did not preclude joint trials where evidence of a past driving record is admissible against both parties although admissible for different purposes (\textit{e.g.}, against the driver for impeachment and against the passenger to show negligent entrustment of his safety to the driver).

One can only conjecture about the mental powers of jurors, yet it seems clear that, if such situations must result in separate trials because of the rule that a litigant’s credibility can be impeached with a traffic conviction, then the rule allowing such impeachment should be scrapped. The policy underlying liberal joinder and the efficiencies...
thereby achieved would seem to far outweigh any benefit to the cause of justice by allowing impeachment with evidence bearing only the most remote relationship to credibility.69

If the rule allowing impeachment were eliminated, the only problem left in the Paratore situation, would be whether a jury could apply a rule admitting evidence of prior bad driving known to the passenger for the purpose of showing negligent entrustment by the passenger but not for the purpose of showing negligent driving. This distinction seems no more subtle or confusing than asking the jury to limit consideration of evidence admissible against both parties to specific purposes—a situation the court apparently would allow. Consequently, elimination of the impeachment rule should result in taking full advantage of the benefits of liberal joinder provisions.

VI. INTERVENTION AND CLASS ACTIONS

Three interesting cases involving intervention and class actions were decided during the Survey period. In Foster v. City of Detroit,70 the Sixth Circuit Court of Appeals allowed "one way" intervention after a favorable judgment in a class action prosecuted under FRCP 23(a)(3) prior to its amendment in 1966. The action was brought by property owners on behalf of all other property owners in a given area to recover property damages caused by a condemnation proceeding that had been pending for many years before being dropped. Although denominated a class action, since it was brought under old subdivision (a)(3), it would have been "spurious" and, therefore, binding only on those who were actually named parties. In many situations allowing such intervention would violate the traditional requirement of mutuality;71 the unnamed property owners would not be bound by an adverse judgment, but they could take advantage of a favorable one. The court said that the instant case did not fall into that category because, pending the present suit, the statute of limitations had run on all other property owners' claims. If through intervention the statute of limitations is in effect tolled for people actually not parties or bound by the judgment, it is not

70. 405 F.2d 138 (6th Cir. 1968).
71. See discussion in text at note 96 infra.
at all clear whether the filing of such a class action would toll the statute of limitations so that would-be intervenors could file independent actions if the spurious class action culminated in an unfavorable judgment.\textsuperscript{72} Although the Michigan class action rule\textsuperscript{73} remains the same as the pre-1966 federal rule, the federal class action rule adopted in 1966 has somewhat mooted this question. Under present rule 23(c)(3), all members of any authorized class action are included within the judgment, whether favorable or not.\textsuperscript{74}

Although the Advisory Committee Comments on the change make it clear that it was designed to eliminate one-way intervention,\textsuperscript{75} it may be questioned whether the new rule has entirely eliminated that possibility. If a class action proceeds under rule 23(b)(3), the class members are entitled to opt out of the action and not be bound. Having opted out the party may attempt to intervene following a favorable judgment. Although the rule does not specifically preclude such intervention, it clearly would violate the spirit of the new rule.

\textsuperscript{72} In York v. Guaranty Trust Co., 143 F.2d 503, 528-29 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945), Frank, J., held that filing such an action should toll the statute of limitations because, quoting from another case, "It would be a strange anomaly in the law, if it should allow an action to be brought for a party, and he should thus be encouraged to rely upon it, and not seek legal redress otherwise than by it, and yet when he came, in the course of his action, to prove his debt, and share in the fund, to treat him as having, by such reliance, lost it by the lapse of time, happening after the bringing of the action." Although the case did involve intervention, the court went on to say: "As the suit comes within Rule 23 (a)(3), so that a judgment will not be res judicata as to noteholders who do not intervene, there is no necessity for a searching inquiry concerning the adequacy of her representation of others in the class." Id. at 528 n.52. It would seem to follow that, if adequacy of representation is not important, members of the class should be entitled to rely on the filing of the action to toll the statute of limitations since a requirement that they file separate actions to protect themselves would undercut the rationale of allowing such actions. Members of the class also should be permitted to file independent actions within a reasonable time if the first action is concluded adversely to them. For a good discussion of the policy reasons underlying tolling or not tolling the statute of limitations in class actions, compare the majority opinion with the concurrence of Friendly, J., in Escott v. BarChris Constr. Corp. 340 F.2d 73 (2d Cir. 1965), cert. denied sub nom., Drexel & Co. v. Hall, 382 U.S. 816 (1966). See also Comment, Class Actions Under New Rule 23 and Federal Statutes of Limitations: A Study of Conflicting Rationale, 13 VILL. L. REV. 370 (1968).

For the effect of filing a class action under present rule 23, see Wright, supra note 4, at § 72; Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 42 (1967).


\textsuperscript{74} The Advisory Committee Comments make it clear, however, that it is always open for one included within the class to attack an adverse judgment on the basis of inadequacy of representation. Fed. R. Civ. P. 23(e)(3), Advisory Committee Comment, 39 F.R.D. at 106.

\textsuperscript{75} Id.
if someone who had opted out were allowed to intervene. Moreover, such an attempt should be considered "untimely" under FRCP 24.

The second case on intervention, *Mullinix v. City of Pontiac*, involved the question of a citizen's right to intervene under GCR 209 in a suit against the city. Upon the city's adoption of an income tax, appellant circulated petitions and gleaned enough signatures to compel a referendum on the issue. When the city commission took steps to hold the election, another group of citizens sought an injunction on the ground that appellant's petitions were defective. The city answered the complaint, admitting that the petitions were defective. Appellant, whose referendum had been so facilely cashiered, attempted to intervene and defend the sufficiency of the petitions. The trial court denied intervention, but the court of appeals held appellant was entitled to intervention as of right, noting the otherwise bizarre result that one group of citizens could attack the petition while its proponents could not defend. The primary importance of the decision is the effect it should have on interpretation of GCR 209. As with class actions, the Michigan rule is practically the same as the pre-1966 federal rule. Under the unamended rule 24 some federal courts had found themselves in a conundrum when passing on questions of intervention as of right. One of the criterion for intervention was that "the representation of the applicant's interest by existing parties is or may be inadequate and the applicant may be bound by a judgment ... ." Since a party could not be bound by res judicata unless adequately represented, some courts denied intervention because the intervenor must either be adequately represented or not "bound." To avoid the use of res judicata as the touchstone for intervention as of right, the federal rule was amended in 1966, and, among other things, the phrase "may as a practical matter impair or impede his ability to protect" his interest was substituted for the word "bound." Although the Michigan rule does not contain the federal amendment, *Mullinix* adopted the new federal rule as the standard by which the present Michigan rule is to be interpreted. Thus, an attorney with a Michigan intervention problem should consider

GCR 209 as if amended to read like FRCP 24, and federal cases interpreting the new rule should be persuasive authority in arguing the problem. Of course, rather than proceeding by such indirection GCR 209 should be amended to read as FRCP 24.

In *Northview Construction Co. v. City of St. Clair Shores*, plaintiffs brought a class action to recover fees paid for building permits under an ordinance later declared invalid. The case is only noteworthy for the following aside by the court:

> The allegations of plaintiffs' complaint are sufficient to constitute it a class action under [GCR 208.1(3)], but the record does not contain proof of service of adequate notice on the members of the class, and no binding relief for or against members of the class can possibly be granted on the present record nor can a determination be made of the adequacy of the representation.

The remark is curious because notice, although authorized under GCR 208.4, is not required as the court seems to intimate. With respect to the binding effect of any possible judgment, the court does not discuss the fact that the class action is of the spurious variety which traditionally is binding only on named parties. By speaking as if the judgment would be binding after notice, the court seems to *sub silentio* equate GCR 208.1(3) with present FRCP 23(b)(3) which does require notice and binds everyone within the class who does not opt out.

When the court says that no binding relief for the class can be granted, it must be rejecting by implication the possibility of one-way intervention even though the Michigan rule is identical with the old federal rule under which intervention after judgment had been permitted. This case is too cryptic to read much into, but it is not

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81. *Id.* at 106, 162 N.W.2d at 298.
82. See text and the following discussion at note 73 *supra*. It might be possible that a "spurious" class action can be converted into a "true" one by serving notice and an order to show cause why they should not be bound on the absent members. *Cf.* United States v. American Optical Co., 97 F. Supp. 66 (N.D. Ill. 1951); 76 HARV. L. REV. 1675, 1678-79 (1963). To juxtapose some of the confusion surrounding whether notice is constitutionally compelled, *compare* Steelman v. City of Portage, 12 Mich. App. 334, 162 N.W.2d 837 (1968) (notice preferred but not required in GCR 208.1(1) action), with Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968) ("[W]e hold that notice is required in all representative actions" under FED. R. CIV. P. 23.).
the first time that Michigan courts have failed to distinguish between class actions that bind all and those that do not.83

VII. RES JUDICATA, BAR, MERGER, JOINDER

Chunko v. LeMaitre84 involved the common pattern of auto accident litigation in which the plaintiff's car carried collision insurance. The insurance company settled with its insured for the damages to the insured's car and then proceeded in a common pleas court action as the subrogee of the insured at the same time the insured pursued his personal injury claim in circuit court. The common pleas action came to judgment for the defendant first; the defendant in the circuit court action then pleaded this judgment as res judicata.

A number of approaches could be taken to this situation. Those favoring bar or merger argue that the subrogee is in privity with the defendant or that the plaintiff has "split" his cause of action by making the partial assignment.85 Those not favoring bar or merger argue that judgments of inferior courts are not res judicata;86 that the cause of action is not split because the primary rights invaded are different, either because they are different in nature or because the real parties in interest are not identical;88 or that, even though split, the defendant must make timely objection in order that steps such as joinder might be taken to both protect the defendant from multiple litigation and the insured from the rigors of res judicata.

86. See text at note 113 infra.
judicata when his insurance company loses its litigation. There was clear precedent in Michigan that separate suits would constitute splitting a cause of action, so the court adopted the last approach and held that the judgment was not a bar since the defendant had not objected to the failure to join the plaintiff in the common pleas suit.

Since the right to be free from multiple suits is primarily a benefit to the defendant, it is only reasonable that he timely demand joinder or waive his right to object. This is the scheme of GCR 201.2 and 205, as explained in the lengthy Committee Comments dealing with joinder of insured and insurer. The same result should obtain in Detroit Common Pleas Court under common pleas rule 39, which adopts the GCR to fill hiatuses in the common pleas rules.

It would not be out of place to treat partial assignments or subrogation in automobile accident cases as sui generis. The court hints at this approach when it says that barring the second suit "would be contrary to the logic and reality of automobile accident subrogation law . . . ." Although there are exceptions, automobile insurance is practically mandatory today, and most suits are defended by an insurance company. Whenever the claim for damage to the car is assigned, it will be to the insurance company carrying the collision insurance. Since the adversaries are really insurance companies and both, no doubt write the same kind of insurance, take the same kind of assignments, and prosecute the same kind of suits, there is hardly any equity in the defendant insurance company worth protecting. Indeed, as an institutional litigator it would probably be unwise for the defendant insurance company to object to splitting the cause of action since the plaintiff company would reciprocate in kind when their roles were reversed in a subsequent case, thus precluding either from taking advantage of the expedited common plea court proceeding.

Another road to the same conclusion would be to analogize the automobile covered with collision insurance to an automobile owned

92. 10 Mich. App. at 496, 159 N.W.2d at 880.
by one person and driven by another. In such cases the car owner can prosecute his suit independent of the driver’s suit for personal injuries. There is no splitting of a cause of action because the interests of two separate individuals were injured. Since it must bear the loss of the damage to the car, the insurance company in a very real sense has an interest much like that of the non-driver owner.93

A somewhat related problem was considered in Schuhardt v. Jensen.94 Prior to the principal action, defendants had sued plaintiff in common pleas court for rent allegedly due, and plaintiff had successfully urged the defense that any rent due was offset by interest owed him on a loan made by him to the defendants. In the second action, plaintiff sued for the principal amount of the loan, and the court of appeals held that, since in the prior action the court found that the loan existed, plaintiff’s claim for the principal merged in his defense and was, therefore, barred. The holding that plaintiff was attempting to split a cause of action is unfortunate because it makes no mention of GCR 203.1 and 301.2. These rules provide that “failure by motion or at the pretrial conference to object . . . to a failure to join claims required to be joined constitutes a waiver of the required joinder rules and the judgment shall not merge more than the claims actually litigated.” Although the phrase “claims actually litigated” is somewhat ambiguous, it was the clear intent of these rules to ameliorate the harsh results of the doctrine of merger unless the defendant made timely objection; thus, unless the plaintiff in the prior action objected to the defendants’ failure to sue for both principal and interest, the claim should not have been considered merged. These rules do not change the collateral estoppel


CIVIL PROCEDURE

The effect of factual issues actually litigated in the prior proceeding.\textsuperscript{95} Since the \textit{Schuhardt} court found that the existence of the loan was a finding essential to the decision of the common pleas court in the prior action, the proper result, assuming that actions in common pleas court should be accorded res judicata in subsequent actions beyond its jurisdiction, should have been summary judgment for the plaintiff on the issue of the existence of the loan.

In \textit{Mackris v. Murray},\textsuperscript{96} the Sixth Circuit examined the extent to which Michigan still requires mutuality before a non-party or one not in privity with a party can use a prior adjudication as collateral estoppel. The situation was again a familiar one: the owner of an automobile had successfully concluded a common pleas court suit for damages to his automobile, and the non-owner driver attempted to establish this judgment as res judicata on the issue of the defendant's negligence in his separate suit for personal injuries. The court held that lack of mutuality precluded such use of the prior judgment. It would seem the case was correctly decided both from the point of view of assessing the present state of Michigan law and from the point of view of good policy. Many of the reasons the court gives for the result, however, simply do not stand up in the context of this fact situation.

The court relied on the common classroom example of the mass tort—the train wreck, plane wreck, bus wreck, or ship wreck. If the carrier successfully defended the first ten cases but lost the eleventh, it seems anomalous and unjust to hold the defendant liable in all succeeding cases on the basis of one adverse verdict when the carrier would not be permitted to take advantage (other than by way of experience) of the first ten victories.\textsuperscript{97} But such an anomaly is not


\textsuperscript{96} 397 F.2d 74 (6th Cir. 1968).

\textsuperscript{97} Such an anomaly did not bother the New York Supreme Court in Hart v. American Airlines, Inc., Misc. 1 Misc. 304 N.Y.S.2d 810 (Sup. Ct. 1969). An American Airlines aircraft crashed in Kentucky, and the first case arising therefrom to be brought to a conclusion was won by the plaintiff in the United States District Court for the Northern District of Texas. The Hart court held that representatives of New York domiciled decedents (but not decedents domiciled elsewhere) could plead the Texas judgment as res judicata in New York actions, even though Texas would have applied the doctrine of mutuality to its own judgment. Aside from the doctrine of mutuality, the decision raises problems of choice of law, due process, full faith and credit, and privileges and immunities.

The Hart decision comes at the end of a long line of New York Court of Appeals decisions which have eroded the doctrine of mutuality to such an extent that the doctrine is
possible in the present situation where there can be no more than two plaintiffs.98

The court also argues that permitting collateral estoppel would mean that the defendant would be induced to litigate the first case to the utmost when otherwise (although he would not settle) he would do a poorer job or let the case go by default. This result, the court states, is counter to the policy of minimizing litigation. This argument is questionable. It seems far more likely that the multiple, fully litigated suits resulting from failure to give collateral estoppel effect to the first suit will consume more judicial time and energy than would the one well-litigated suit. The court adds its own observation as to a bizarre consequence of collateral estoppel with the example of the defendant who takes a fifty dollar law suit casually and defends sloppily by hiring his nephew, new to the bar, as counsel. Of course, it seems unfair to hold that defendant has foregone his defense of non-negligence in a subsequent $100,000 law suit for his passenger’s wrongful death if the issue was not properly tried in the fender-bender suit. The argument, though, is circular. The only reason the first suit was taken so casually was that it would


98. The various possible permutations and combinations are explored and analyzed in Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281, 310-11 (1957). Professor Currie reasoned that abandonment of the mutuality requirement was sound except “where the result would be to create an anomaly such as would occur in the railroad type of situation, where the party against whom the plea is asserted faces more than two successive actions,” or where “by reason of his former adversary’s possession of the initiative” he has not “had a full and fair opportunity to litigate the issue effectively.” This approach was approved in Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964) (defendant who lost in suit by five employees for breach of contract held bound in subsequent class action brought by approximately 160 other employees). See also Maryland ex rel. Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967); United States v. United Airlines, Inc., 216 F. Supp. 709 (D. Nev. 1962).

Professor Currie’s assertion that the mass accident anomaly does not arise when there are only two possible plaintiffs is criticized by Greenebaum, In Defense of the Doctrine of Mutuality of Estoppel, 45 IND. L.J. 1, 13 (1969).

not be collateral estoppel in a second suit if the defendant lost. If the rule were otherwise and the potential claimants apparent, the first case would be tried fully and completely.

The better reason for denying collateral estoppel effect to a judgment against a defendant when there are no more than two plaintiffs is that the quality of adjudication is not likely to be as good in the first case as in the second because (a) the court, if a lower one, is less competent to decide the case, (b) the plaintiff had a strategic advantage in picking the time and place of suit, (c) the fact-finder may not give the suit its deserved attention because unaware of the extensive consequences of its findings, or (d) the plaintiffs can bring their most appealing case first in hopes of inducing a compromise verdict.

The Mackris court distinguished each case put before it that did not require mutuality on the basis that collateral estoppel was urged defensively by a non-party to the prior suit. That the plea was raised defensively is not, in and of itself, a valid distinction since a defensive plea can result in the same unfairness and anomaly as can an offensive plea.\(^9\) As an example, assume plaintiff successfully sues ten defendants but loses the eleventh case because found to be contributorily negligent. If there is a distinction between this case and the affirmative use of an adverse judgment against a defendant, it must be that the plaintiff controls the action and is responsible in the first instance for the piece-meal pursuit of the litigation. The leading case, Bernhard v. Bank of America National Trust & Savings Association,\(^100\) holding that a plaintiff should be barred by such an adverse holding, has been stated as the law of Michigan by the Sixth Circuit Court of Appeals\(^101\) but has not yet been expressly adopted by the Michigan Supreme Court. Clark v. Naufe\(^102\) clearly stands for the proposition that a non-party to a prior proceeding subsequently sued by the defendant may not use defensively the fact that the defendant was found negligent in the prior proceeding. In the later case of Depolo v. Grieg,\(^103\) the Michigan Supreme Court allowed an agent to use defensively a finding in a prior suit against

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100. 19 Cal. 2d 807, 122 P.2d 892 (1942).
101. Davis v. McKinnon, 266 F.2d 870 (6th Cir. 1959).
the principal that the agent was not liable even though a finding that
the principal was liable would not have bound the agent unless a
party. The court expressly reasoned that, since a principal is
exonerated if a plaintiff loses a suit against the agent, the converse
should also follow. The converse, however, does not follow. The
reason for dispensing with mutuality in the first situation is to avoid
the anomaly of either forcing the principal to forego his right of
indemnification against the agent without having been a party to the
first proceeding or preserving his right of indemnity even though the
agent has successfully defended himself. In the converse situation to
exonerate the principal and still allow the agent to be found negligent
is no more anomalous than the inconsistent judgments which the rule
of mutuality fosters. 104 Thus, if there is a distinction between Clark
and Depolo, it must be that in Clark the judgment was being used
against a prior defendant, while in Depolo it was being used
defensively against a prior plaintiff who, because he controlled the
litigation, should not be permitted to complain. 105 Even this is a
tenuous distinction in the context of Depolo because Depolo did not
have any choice of time, place, or forum in the prior action since it
consisted of the filing and disallowance of his claim in bankruptcy
proceedings already instituted. Thus, if the true basis for Depolo be
known, it probably goes as far or further than Bernhard. 105.1

104. But see Restatement of Judgments § 96(2), Illustration 9 (1942).
105. It has been suggested that the doctrine of mutuality should not apply when the first
suit exonerates the master, and the second suit seeks recovery against the agent because
separate suits may be unduly harassing to the agent, who certainly would have been involved
at least as a witness in the first suit against the master based on his alleged misconduct. See
Greenebaum, supra note 98, at 6. If this were the true basis of the Depolo decision, then it
would be strong authority for allowing the driver in Mackris v. Murray to rely on the prior
victory of the car owner, since most likely the driver was intimately involved in the prior suit.

105.1. On February 9, 1970, the Michigan Court of Appeals released for publication
Although this case came down too late to be treated at length in this Survey, if sustained
by the supreme court it will work a substantial revision in Michigan’s approach to mutuality.
Note particularly the following language:

Collateral estoppel is essentially a procedural tool designed to conserve judicial
resources and to insure consistent decisions on the same issues and facts.

In our view the application of estoppel is best left to the discretion of the trial
judge, who guided by “broad principles of justice,” would weigh the interests of the
litigants and the efficient administration of justice.

We hold that he [the trial judge] was free to do so [to preclude a defendant from
Following the pattern of a common pleas court adjudication preceding an action in the circuit court, *Cook v. Kendrick*\(^{106}\) grappled with another knotty problem of res judicata. The owner of a parked car filed a common pleas court action to recover for damages done to his automobile in a collision between the two defendants. Each defendant contended that the responsibility for the accident was the other's. The judgment went against one defendant who subsequently was the plaintiff in a circuit court action against the other defendant. The defendant in the circuit court action attempted to plead the common pleas judgment as res judicata on the issue of plaintiff's negligence. The court held that decisions of lower courts in Michigan can be res judicata in the higher courts, thus presenting the issue whether defendants in the common pleas court action were adverse parties such that the judgment would be res judicata in any other action between them. Both the trial and appellate courts concluded that, since no cross-claim had been filed between them, the common pleas action only adjudicated the rights of the plaintiff against the defendants, and not the rights of the defendants between themselves.

While the question is novel in Michigan and the law in other jurisdictions is hardly settled on the subject, one author has found a growing trend to hold that in such a situation the judgment should be considered res judicata between the co-defendants."\(^{107}\) In fact, the New York Court of Appeals recently held for the first time that collateral estoppel should apply in the subsequent suit between the

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\(^{107}\) F. JAMES, CIVIL PROCEDURE § 11.25, at 589 (1965). If there was a trend, examination of the most recent collection of cases indicates it has not gone very far. Those jurisdictions that do not apply collateral estoppel still greatly outnumber those that do. Annot., 24 A.L.R.3d 318, 360-71 (1969).

For other considerations of the problem, see Ordway v. White, 14 App. Div. 498, 217 N.Y.S.2d 334 (1961) (opinion of Halpern, J.); 36 N.Y.U.L. Rev. 1158, 1169-70 (1961); 1961 DUKE L.J. 167, criticizing Park v. McCoy, 251 N.C. 590, 112 S.E.2d 118 (1960), which applied collateral estoppel even though the former action was terminated by a consent judgment and under North Carolina procedure no opportunity to file cross-claims was available to the litigants.
co-defendants. Had the judgment gone against both defendants, there would have been a right of contribution between them regardless of the lack of a cross-claim. Furthermore, all parties were in court and had an opportunity to present their evidence. Although there may be some problems with respect to cross-examination, admissions, and the use of depositions, a rule that the judgment would be res judicata should adequately dispose of any argument that the co-defendants are not "opposite," "adverse,"


Should a judgment in favor of a passenger in an action against the operators of two colliding vehicles give rise to an estoppel, which would bar a subsequent action by one of the drivers against the other for his own personal injuries or property damage?

24 N.Y.2d at 69, 298 N.Y.S.2d at 958, 246 N.E.2d at 727. The court answered the question "yes" so long as the issue was the same and the drivers had a full and fair opportunity in the prior action to establish their non-negligence. The court listed the following factors as bearing on whether the drivers had a full and fair hearing in the prior action:

[T]he size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation.

24 N.Y.2d at 72, 298 N.Y.S.2d at 961, 246 N.E.2d at 729.

Although the Schwartz case involved a suit by a passenger against the drivers, and the Cook case involved a suit by a bystander against the drivers, the difference is immaterial. The Schwartz case is criticized in Greenebaum, supra note 98, at 15.

109. RJA § 2925(t)(1961) provides:

Whenever a money judgment has been recovered jointly against two or more defendants in an action for bodily injury or death resulting therefrom, or property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share is entitled to contribution with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment. Joint tortfeasors who are summoned in as third party defendants pursuant to court rule may likewise be liable for contribution. No person may be compelled to pay to any other defendant an amount greater than his pro rata share of the entire judgment.


111. 4 J. MOORE, FEDERAL PRACTICE § 26.29, at 1653-54 (2d ed. 1961).

112. RJA § 2161 (1961) provides:

In any suit or proceeding in any court in this state, either party, if he shall call as a witness in his behalf, the opposite party, employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding grew, was an employee or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party . . .

Mich. GLN. CT. R. 507.4 (1963) provides:

Parties or persons who were their employees or agents at the time of the happening of
or "hostile." Even though the defendants would be ad idem in their opposition to the plaintiff on damage questions, they are the real adversaries on the question of negligence. Since the plaintiff had the initiative in bringing the action he might have enjoyed an advantage, but there is no reason to assume that one defendant had an advantage over the other.

There are several contrary arguments that might be advanced against this position. One argument is that the judgment was that of a lower court, and to give it res judicata effect in a suit beyond that court's competence would both frustrate the policy underlying the restrictions on that court's jurisdiction and burden the parties with a result far beyond their expectations.\textsuperscript{113} Since the procedure in these lower courts is more streamlined, and the right to jury trial is significantly curtailed, the first point as to competence is a good one.\textsuperscript{114} It was, however, rejected by the court\textsuperscript{115} and has been rejected by a majority of jurisdictions. The second point is circular, since the expectations of the parties are a function of the res judicata rule adopted. Another argument is that since cross-claims are discretionary, not compulsory, to give res judicata effect regardless of whether such a claim was brought would frustrate the policy making such claims discretionary.\textsuperscript{116} But, if there is any strong policy underlying GCR 203.3, it is that cross-claims should be available. By making such a procedural device available, it was clearly the hope to encourage its use, which the rule of res judicata certainly does.\textsuperscript{117} It is doubtful whether there is any strong policy discouraging the use of cross-claims.\textsuperscript{118} Indeed, that joinder of transactionally related claims is permissive unless objected to by the opposite party, the transaction out of which the action arose, when called as witnesses by the opposite party, may be cross-examined by the party calling them and the testimony given by such persons may be contradicted and impeached.

\textsuperscript{113} See Annot., 83 A.L.R.2d 977, 996 (1962).

\textsuperscript{114} F. James, Civil Procedure § 11.35, at 604-05 (1965).

\textsuperscript{115} The case on which the court relied is not very strong. See Andreas v. School Dist., 138 Mich. 54, 100 N.W. 1021 (1904).


\textsuperscript{117} In Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 68 Colum. L. Rev. 1475, 1571 (1968), the author argues that the doctrine of res judicata should be administered in such a manner as to encourage the resolution through joinder of parties of all claims growing out of the same transaction.

\textsuperscript{118} F. James, Civil Procedure § 11.24, at 586-87 (1965).
and that joinder of non-transactionally related claims is completely permissive has not barred application of res judicata when the adjudicated facts are the same in successive cases between the same parties. Furthermore, one might look at the Contribution Between Joint Tortfeasors Act\textsuperscript{119} as raising a cross-claim as a matter of law since no cross-claim need be filed for one defendant to take advantage of the provisions for contribution when a joint judgment is rendered. If the plaintiff had sued only one defendant in the common pleas court, that defendant could have applied under GCR 204.1(1) for leave as a third-party plaintiff to implead the other defendant. In such a case there would have been pleading between them such that they could be considered adverse or opposite parties. Where the plaintiff chooses to sue both defendants, the situation between the defendants is substantially identical with that where a third-party complaint for contribution has been filed.\textsuperscript{120}

Since holding the findings in \textit{Cook} to be res judicata would encourage the filing of cross-claims which would require removal of the case to the circuit court, it might be argued that it would frustrate the policy of affording plaintiffs with relatively small claims a forum for the economic and expeditious adjudication which underlies the creation of the common pleas court. But, when there are potential multiple claims, the efficiency of the courts is also at stake, and it is not unreasonable to subordinate the plaintiff's interest when a contrary rule would result in double adjudication of essentially the same questions between the same parties. The availability of cross-claims and impleader belies any contention that the original plaintiff has a "right" to try his suit free from becoming embroiled in the disputes of others.

Two final arguments, the first raised by counsel but not relied on by the court and the second raised by other courts facing similar

\begin{itemize}
  \item \textsuperscript{119} RJA § 2925 (1961).
  \item \textsuperscript{120} Bunge v. Yager, 236 Minn. 245, 52 N.W.2d 446 (1952), is a leading case in which the court held that, even though a prior adjudication would be res judicata between co-defendants in a subsequent action for contribution, the prior action would not be res judicata in an action between the former co-defendants to recover for their injuries. The rationale was that the right to contribution depends on the joint liability of the defendants which was finally determined in the first trial while the rights of the defendants inter se with respect to their own injuries was not determined since they were not adversaries in the original action. The court does, however, admit that a contrary argument is plausible. What the court's argument ignores is the fact that the joint liability in these fact situations necessarily turns on the active negligence of both parties.
\end{itemize}
questions, are that identity of issues is lacking either (1) because the negligence that caused the parked car to be struck was not also the cause of the collision, or (2) because the defense of last clear chance would be available in the second action but not in the first.\textsuperscript{121} Of course the latter argument is relevant only when both defendants were found liable in the first proceeding, and even then under Michigan's peculiar formulation of the rule it may be that the defense would be available in a suit by a bystander.\textsuperscript{122} If not available, the objection still only goes to the scope of res judicata, and the second suit could proceed on the premise that both parties were negligent, and only the question of last clear chance would be litigated. The first argument is more difficult and would turn on what was actually adjudicated in the first proceeding. An example where the negligence might be different would be that of a carefully proceeding driver who, when faced with the sudden emergency of an inevitable collision with a negligently driven oncoming car, nevertheless makes an unreasonable choice under all the circumstances and steers into plaintiff's parked car. If the case presented such a possibility, it would be proper to deny res judicata effect to the judgment because it could not be said in the subsequent action that the negligence of the driver vis-à-vis the other driver was necessarily decided by the judgment. This inquiry, though difficult, is no more foreign than that necessary when applying collateral estoppel in situations where the doctrines of bar or merger are not available to foreclose relitigation of all questions that were or might have been litigated between the parties.

VIII. APPEAL

By amendment to GCR 806 the supreme court made "final orders" appealable as of right.\textsuperscript{123} The two words have had an

\textsuperscript{121} See, e.g., Creighton v. Ruark, 230 Md. 145, 186 A.2d 208 (1962).

\textsuperscript{122} In LaCroix v. Grand Trunk W.R.R., 379 Mich. 417, 152 N.W.2d 656, 658 (1967), the court said:

Such gross negligence is also sometimes called discovered negligence, wanton or wilful or reckless negligence, discovered peril, last clear chance doctrine, and the humanitarian rule . . . .

The theory of gross negligence is that the antecedent negligence of plaintiff only put him in a position of danger and was therefore only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause.

If the doctrine is based on the theory that only one of the two negligent defendants caused the collision, then it would seem to follow that only the grossly negligent defendant caused the injury to the third party.

\textsuperscript{123} 381 Mich. lviii-lx (1969).
indecisive history in the GCR. They were included in the original rule 806 but not in the new rule 806, effective on January 1, 1965, and now by amendment they have been reinserted into the present rule. Unfortunately, “final order,” is a term of great imprecision, and defining similar terms in the federal courts has proved a ubiquitous and perennial problem. The quandry in which a litigant finds himself results from the very strict time limits placed on appeals as of right. GCR 806 provides that appeals as of right must be taken within the prescribed time limits, and GCR 803 provides that the time limits there set forth are jurisdictional for appeals as of right. The result is that if a litigant fails to properly diagnose an erroneous ruling as a “final order” and lets the appeal period pass he is foreclosed from review as of right. This situation creates a substantial incentive to immediately appeal when in doubt as to the finality of an erroneous order. The result, of course, is interruption of the orderly disposition of trials, an increased burden on appellate courts, and much time wasted on the issue whether to hear a case rather than proceeding to the merits. Since considerable ink has been spilled on this and similar problems by others, the only purpose here is to alert the bar to the amendment.

124. 18 U.S.C. § 1257 (1964) limits Supreme Court review of state court decisions on appeal or certiorari to “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . .” 28 id. § 1291 provides that “[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . .”


126. See periodicals cited note 124 supra.