Civil Proceedings Benchbook

Content Formerly Part of the Original MJI Circuit Court Benchbook

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Michigan Supreme Court

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- The Honorable David F. Viviano, *MJI Supervising Justice*
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Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the justices of the Michigan Supreme Court. This revised edition was initially published in 2009. The text has been revised, reordered, and updated through January 1, 2016.

Acknowledgments

The *Civil Proceedings Benchbook* derives from the *Michigan Circuit Court Benchbook: Civil Proceedings*. The *Michigan Circuit Court Benchbook* was originally authored by Judge J. Richardson Johnson, 9th Circuit Court. In 2009, the *Michigan Circuit Court Benchbook* was revised and broken into three volumes: *Circuit Court Benchbook: Civil Proceedings—Revised Edition*; *Circuit Court Benchbook: Criminal Proceedings—Revised Edition*; and *Evidence Benchbook*. The three volumes were revised by MJI Research Attorneys Sarah Roth and Lisa Schmitz.

Using This Benchbook

The purpose of this benchbook is to provide a single source to address civil issues that may arise while the judge is on the bench. The benchbook is designed to be a quick reference, not an academic discussion. In that context, one of the most difficult challenges is organizing the text so that the user can readily find any topic as it arises.

This book has underlying themes that may assist the user to understand the overarching concepts around which the book is organized. This book is based upon the following concepts:

- The focus is on process rather than substantive law although substantive law is discussed when important or necessary to decision-making and the process as a whole.
- The text covers the routine issues that a judge may face and non-routine issues that require particular care when they arise.
- The text is intended to include the authority the judge needs to have at his or her fingertips to make a decision.
- The text is designed to be read aloud or incorporated into a written decision.
- The text identifies whether the court's decision is discretionary (note the standard of review language provided for most sections).

With these concepts in mind, the text is organized as follows:

- The format generally follows the sequence of the Michigan Court Rules and the Michigan Rules of Evidence.
- The format generally follows the typical sequence in which issues arise during the course of a case.
- At the beginning of each chapter is a table of contents that lists what is covered in the chapter.
- Sections in each chapter are identified by the word or phrase typically used to identify the topic (a keyword concept).

- The discussion of each topic is designed to move from the general to the specific without undue elaboration.
- If the court is required to consider particular factors when making a decision, every effort has been made to identify the necessary elements.
- Every effort has been made to cite the relevant Michigan law using either the seminal case or the best current authority for a body of law. United States Supreme Court decisions are cited when Michigan courts are bound by that authority and they are the original source. There are references to federal decisions or decisions from other states when no applicable Michigan authority could be located.
- Every effort has been made to cite the source for each statement. If no authority is cited for a proposition, then the statement is the committee's opinion.
- If a proceeding or rule of evidence is based upon a statute, reference to that authority is given in the text.
- If a model or standard jury instruction addresses an issue, it is referenced in the text.

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Civil Proceedings Benchbook

Summaries of Updates: September 2, 2015–January 1, 2016

Updates have been issued for the *Civil Proceedings Benchbook*. A summary of each update appears below. The updates have been integrated into the website version of the benchbook. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 1: Common Issues Arising in Trial Court

1.1(E) Access to Court Proceedings and Records

- "[A] gag order precluding all potential trial participants from making any extrajudicial statement regarding the case to the media or to any person for the purpose of dissemination to the public[is] . . . overbroad and vague . . . [and] constitute[s] a prior restraint on the freedom of speech and the freedom of the press[.]" *People v Sledge*, ___ Mich App ___, ___ (2015).

- "[A] newspaper interested in publishing articles regarding . . . criminal charges stemming from [a] failed" county construction project "had standing . . . [both] as a recipient of speech and as a news gatherer[]" to challenge the trial court's "gag order precluding all potential trial participants [in the cases pending against the defendants] from making any extrajudicial statement regarding the case to the media or to any person for the purpose of dissemination to the public." *Sledge*, ___ Mich App at ___ (citations omitted).

Chapter 2: Jurisdiction, Process, and Pleadings

2.6(B) Civil Pleadings

- Effective January 1, 2016, 2015 PA 230, 2015 PA 231, 2015 PA 232, and 2015 PA 233 added Chapter 19A to the Revised Judicature Act of 1961 to expand and fund electronic access to courts.

2.6(D)(3) Civil Pleadings

- "[A]n affirmative defense is [not] adequately preserved [under MCR 2.111(F)(3)] by raising it in a response to a motion for leave to amend the complaint[]" because a defendant's "response to [a] motion to amend [is] not a responsive pleading." *Dell v Citizens Ins Co of America*, ___ Mich App ___, ___ (2015), citing MCR 2.110(A).

2.16(B) Res Judicata and Collateral Estoppel

- The same transaction test for res judicata is "'whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit[.]'" *Marketplace of Rochester Hills Parcel B, LLC v Comerica Bank*, ___ Mich ___, ___ (2015), quoting *Adair v Michigan*, 470 Mich 105, 125 (2004) and vacating in part ___ Mich App ___ (2015).

Chapter 3: Pretrial Procedures

3.8(B)(3) Default and Default Judgments

- "[A] default is merely an admission of liability and not an admission regarding the proper amount of damages." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 554 (2015). Thus, "[i]f the amount of damages is in dispute, a defaulting defendant is nonetheless entitled to a hearing, at which [the defendant] may challenge the plaintiff's alleged damages amount, if the trial court determines that a hearing is necessary." *Id.* at 555.

3.9(B) Setting Aside Judgments

- "[W]here a bill makes a joint charge against several defendants, and one of them makes default, . . . if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 555-556 (2015) (noting that the default against a defaulting party "would need to be set aside[]" as to a claim if that claim failed on the merits against the non-defaulting defendant) (quotation marks and citations omitted).

3.10(B)(10) Summary Disposition

- "[I]t is the moving party–whether the plaintiff or the defendant–who bears the initial burden of production in a motion for summary disposition[under MCR 2.116(C)(10)]; the moving party must not only 'specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact,' but must also support the motion 'as provided in [MCR 2.116].'" *Lowrey v LMPS & LMPJ, Inc*, ___ Mich App ___, ___ (2015). "[A] [party] who moves for summary disposition [under MCR 2.116(C)(10)] does not satisfy [his or her] initial burden of production [under MCR 2.116(G)(3) and MCR 2.116(G)(4)] by asserting his or her mere belief that the [nonmoving party] will be unable to make his or her case at trial[; r]ather, the moving party must present evidence that, if left unrebutted, would permit a reasonable finder of fact to find in the moving party's favor on the element at issue." *Lowrey*, ___ Mich App at ___ (citations omitted).

- "It is only when the moving party properly supports the motion that the burden shifts to the nonmoving party to present evidence sufficient to establish that there is a genuine issue for trial." *Lowrey*, ___ Mich App at ___.

Chapter 4: Discovery

4.8(B) Privileged Materials

- The Michigan Supreme Court vacated the remainder of the Court of Appeals opinion in *Harrison v Munson Healthcare, Inc*, 304 Mich App 1 (2014). *Harrison v Munson Healthcare, Inc*, ___ Mich ___ (2015).

Chapter 5: Resolution Without Trial

5.3(H)(2) Case Evaluation

- Effective January 1, 2016, ADM File No. 2015-09 amended MCR 2.403(O)(6)(b) to expand the definition of "actual costs" to include "legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR 2.626."

Chapter 7: Postjudgment Proceedings

7.3(D) Costs

- Effective January 1, 2016, 2015 PA 233 added MCL 600.1990 to provide that "[a]ny electronic filing system fee paid by a party is a recoverable taxable cost."

7.4(A) Attorney Fees

- The framework established in *Smith v Khouri*, 481 Mich 519 (2008), for determining a reasonable attorney fee as part of case-evaluation sanctions under MCR 2.403(O) "applies to [an] award of attorney fees" under the fee-shifting provisions of "both the MCPA and the MMWA[.]" *Kennedy v Robert Lee Auto Sales*, ___ Mich App ___, ___ (2015).

7.4(A)(1) Attorney Fees

- The trial court erred where it limited attorney fees to the flat rate allowed for plea cases under the county's fee schedule without consideration of "the reasonableness of the fee in relation to the actual services rendered[.]" *In re Ujlaky*, ___ Mich ___, ___ (2015). "Although the expenditure of any amount of time beyond that contemplated by the schedule for the typical case does not, *ipso facto*, warrant extra fees, spending a significant but reasonable number of hours beyond the norm may." *Id.*

7.4(A)(5) Attorney Fees

- A party cannot contest the other party's entitlement to attorney fees when payment of attorney fees is part of the settlement agreement. *Kennedy v Robert Lee Auto Sales*, ___ Mich App ___, ___ (2015).

7.4(C) Attorney Fees

- The trial court erred by failing to award attorney fees where the corporate bylaws, which constituted a contract between the parties, permitted the recovery of attorney fees. *Great Lakes Shores, Inc v Bartley*, ___ Mich App ___, ___ (2015).

7.5(D) Sanctions

- The Michigan Supreme Court vacated the remainder of the Court of Appeals opinion in *Harrison v Munson Healthcare, Inc*, 304 Mich App 1 (2014). *Harrison v Munson Healthcare, Inc*, ___ Mich ___ (2015).

7.6(E) Judgments

- Effective January 1, 2016, ADM File No. 2013-26 amended MCR 2.614(A)(1) to clarify that "[e]xcept as provided in [MCR 2.614], execution may not issue on a judgment and proceedings may not be taken for its enforcement until 21 days after a final judgment (as defined in MCR 7.202(6)) is entered in the case."

Chapter 8: Rules in Particular Actions

8.9(B) Mandamus

- "Mandamus is an extraordinary remedy that may lie to compel the exercise of discretion, but not to compel its exercise in a particular manner." *Hayes v Parole Bd*, ___ Mich App ___, ___ (2015).

- "A clear legal duty, like a clear legal right, is one that 'is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.'" *Hayes*, ___ Mich App at ___, quoting *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518-519 (2014).

8.11(A) Medical Malpractice

- The Supreme Court reversed the Court of Appeals' decision in *Zwiers v Growney*, 286 Mich App 38, 49 (2009), holding that "[a] medical malpractice complaint filed before the expiration of the 182-day notice period is ineffective to toll the statute of limitations." *Zwiers v Growney*, ___ Mich ___, ___ (2015).

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Chapter 1: Common Issues Arising in Trial Court

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1.1 Access to Court Proceedings and Records

A. Record of Proceedings

MCR 8.108(B)(1) states that a "court reporter or recorder shall attend the court sessions under the direction of the court and take a verbatim record of the following:

> "(a) the voir dire of prospective jurors;
>
> "(b) the testimony;
>
> "(c) the charge to the jury;
>
> "(d) in a jury trial, the opening statements and final arguments;
>
> "(e) the reasons given by the court for granting or refusing any motion made by a party during the course of a trial; and
>
> "(f) opinions and orders dictated by the court and other matters as may be prescribed by the court."

MCR 8.108(E) states in part that "[t]he court reporter or recorder shall furnish without delay, in legible English, a transcript of the records taken by him or her (or any part thereof) to any party on request."

MCR 8.109(A) indicates that a trial court is authorized to use audio or video recording equipment for making the record of court proceedings as long as the equipment meets the standards published by the State Court Administrative Office (SCAO)[1] or is analog equipment that SCAO has approved for use. In addition, trial courts that use audio or video recording equipment "must adhere to the audio and video recording operating standards published by [SCAO]." MCR 8.109(B).

Occasionally, proceedings occur without a court reporter present, or with a recording system that was not turned on or did not function correctly. MCR 7.210(B)(2) provides specific steps for an appellant to follow "[w]hen a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder. . . to settle the record and to cause the filing of a certified settled statement of facts to serve as a substitute for the transcript." If a settled statement of facts is made and certified as prescribed by MCR

[1] See SCAO's Standards for Digital Audio Recording Systems and Standards for Digital Video Recording Systems.

7.210(B)(2), it controls the timing of the appellant's brief in the same manner as would a transcript. MCR 7.212(A)(1).

B. Open or Closed Trial

All trials must be open to the public. MCL 600.1420. However, "for good cause shown, [the court may] exclude from the courtroom other witnesses in the case when they are not testifying and may, in actions involving scandal or immorality, exclude all minors from the courtroom unless the minor is a party or witness. This section shall not apply to cases involving national security." *Id.*

In addition, the Constitution affords certain public trial rights in civil cases: "[A] member of the public can invoke the right to a public trial under the First Amendment. *People v Vaughn*, 491 Mich 642, 652 (2012) (distinguishing between the public's right to a public trial under the First Amendment and a criminal defendant's right to a public trial under the Sixth Amendment).

The requirements for *total* closure are: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) it must make findings adequate to support the closure. *People v Kline*, 197 Mich App 165, 170 (1992).

A *partial* closure occurs where the public is only partially excluded, such as when family members or members of the press are allowed to remain, or when the closure order is narrowly tailored to specific needs. *Kline*, 197 Mich App at 170 n 2. Because the effect of a partial closure does not rise to the level of a total closure, only a substantial (rather than a compelling) reason for the closure is necessary. *People v Russell (Fred)*, 297 Mich App 707, 720 (2012) (holding that limited courtroom capacity constituted a substantial reason for the partial closure of voir dire proceedings and did not deny the defendant his right to a public trial); see also *People v Gibbs (Phillip)*, 299 Mich App 473, 481-482 (2013) (no error occurred where, before jury selection began, the trial court stated that spectators were welcome to enter, "but [the courtroom was] then closed once jury selection began[]" because the trial court found it "'too confusing' to allow individuals to come and go during jury selection[;]" furthermore, even if error occurred, the defendant was "not entitled to a new trial or evidentiary hearing[] . . . [where] both parties engaged in vigorous voir dire, there were no objections to either party's peremptory challenges, . . . each side expressed satisfaction with the jury[, and] . . . the venire itself was present[]"); *Kline*, 197 Mich App at 170.

A court has statutory authority to exclude certain persons from the courtroom or to limit the disclosure of information in the courtroom. See, e.g., MCL 600.1420 (court may exclude minors who are not parties or witnesses in cases of scandal or immorality).

"The parties may not, by their mere agreement, empower a judge to exclude the public and press." *Detroit Free Press v Macomb Circuit Judge*, 405 Mich 544, 549 (1979).

The right to a public trial extends to pretrial hearings, *Waller v Georgia*, 467 US 39, 43-47 (1984), and the jury selection process, *Presley v Georgia*, 558 US 209, 212-216 (2010).[2]

"[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller*, 467 US at 48. See *Presley*, 558 US at 215 ("[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course[]"). "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials[,]" e.g., "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members." *Id.* at 215-216 (trial court improperly excluded public from courtroom during jury selection process without considering alternatives to closure).

C. Limitations on Access to Court Proceedings

Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless

> "(a) a party has filed a written motion that identifies the specific interest to be protected, or the court sua sponte has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;

[2] "[T]he right to a public trial also encompasses the right to public voir dire proceedings[.]" *Vaughn (Joseph)*, 491 Mich at 650-652, citing *Presley*, 558 US 209.

> "(b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
>
> "(c) the court states on the record the specific reasons for the decision to limit access to the proceeding." MCR 8.116(D)(1).

Any person may file a motion to set aside an order entered under MCR 8.116(D)(1) or object to its entry. MCR 2.119[3] governs the proceedings for motions or objections under MCR 8.116(D)(1). MCR 8.116(D)(2).

The court must forward a copy of the order to the State Court Administrative Office. MCR 8.116(D)(3).

D. Media Access to Court Proceedings

The press has no greater right of access to court proceedings than does the public. *In re Midland Publishing Co, Inc*, 420 Mich 148, 162 (1984).

See Administrative Order No. 1989-1,[4] 432 Mich cxii (1989), regarding film or electronic media coverage of court proceedings.

E. "Gag Orders"

The term "gag order" refers to a court order directed to attorneys, witnesses, and parties prohibiting them from discussing a case with reporters, or to a court order prohibiting reporters from publishing information related to a case. A court order prohibiting reporters from publishing information related to a case is unconstitutional. *Nebraska Press Ass'n v Stuart*, 427 US 539, 556 (1976) ("The [United States Supreme] Court has interpreted [First Amendment] guarantees to afford special protection against orders that [impose a prior restraint on speech by] prohibit[ing] the publication or broadcast of particular information or commentary"). "[A] gag order precluding all potential trial participants from making any extrajudicial statement regarding the case to the media or to any person for the purpose of dissemination to the public[is] . . . overbroad and vague . . . [and] constitute[s] a prior restraint on the freedom of speech and the freedom of the press[.]" *People v Sledge*, ___ Mich App ___, ___ (2015) (noting that "the vague and overbroad scope of people

[3] See Section 3.1 for information on filing a motion under MCR 2.119.

[4] Available at http://courts.michigan.gov/Courts/MichiganSupremeCourt/PublicInfoOffice/Documents/Administrative%20Order%201989-1.pdf, pp 55-57.

covered by the gag order indicate[d] that it [was] an impermissible prior restraint on . . . freedom of expression[]" and that "[a]lthough the gag order [did] not directly prohibit the media from discussing the case, it prohibit[ed] the most meaningful sources of information from discussing the case with the media[,]" thereby impairing "the right of the [intervening newspaper] to obtain information from all potential trial participants") (citations omitted).

MCR 8.116(D)(1) should be followed in assessing whether to grant a gag order prohibiting discussion of the case with reporters. A gag order that is reasonable and serves a legitimate purpose that overrides any limited incidental affects on First Amendment rights is permissible. *In re Detroit Free Press*, 463 Mich 936 (2000). "A prior restraint on a First Amendment right will be upheld only if there is a clear showing that the exercise of the right will interfere with the right to a fair trial." *Sledge*, ___ Mich App at ___. "In order to determine whether the right to a fair trial justified the prior restraint, a court 'must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important.'" *Id.*, quoting *Nebraska Press Ass'n*, 427 US at 562.

Standing to Challenge a Gag Order. "[A] newspaper interested in publishing articles regarding . . . criminal charges stemming from [a] failed" county construction project "had standing . . . [both] as a recipient of speech and as a news gatherer[]" to challenge the trial court's "gag order precluding all potential trial participants [in the cases pending against the defendants] from making any extrajudicial statement regarding the case to the media or to any person for the purpose of dissemination to the public." *Sledge*, ___ Mich App at ___ (citations omitted). The newspaper "identified at least one willing speaker who felt restrained because of the gag order[,]" and "the gag order cut the [newspaper] off from access to important sources of information since it prohibited any potential trial participant from speaking with the news media regarding the case." *Id.* at ___ (citations omitted).

F. Access to Court Files and Records

1. Records

"For purposes of [MCR 8.119(A)], records are as defined in MCR 1.109, MCR 3.218, MCR 3.903, and MCR 8.119(D)-(G)." MCR 8.119(A).[5] In general, "[c]ourt records are recorded information of any kind that has been created by the court or filed with the

court in accordance with Michigan Court Rules." MCR 1.109(A)(1). MCR 1.109(A)(1)(a) provides that "[c]ourt records include, but are not limited to:

> "(*i*) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,
>
> "(*ii*) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records."[6]
>
> > **Note:** "Discovery materials that are not filed with the clerk of the court are not court records. Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930[7] during the pendency of a proceeding are not court records." MCR 1.109(A)(2).

The clerk of the court is required to "maintain a paper and/or electronic file for each action," including "all pleadings, process, written opinions and findings, orders, and judgments filed in the action[]" and "all other materials prescribed by court rule, statute, or as ordered by the court to be filed with the clerk of the court." MCR 8.119(D)(1)(d).

2. Access to Records

MCR 1.109(E) provides that "[r]equests for access to public court records shall be granted in accordance with MCR 8.119(H)." MCR 8.119(H) provides, in part:

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[5] "Court records are defined by MCR 8.119 and [MCR 1.109(A), and] . . . are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules." MCR 1.109(A)(1). "Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and the[] court rules." MCR 1.109(A)(1).

[6] "A document [is] a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to paper." MCR 1.109(B). See also MCR 1.109(C)(1), providing that "pleadings and other documents prepared for filing in the courts" must be "transmitted through an approved electronic means or created electronically by the court and maintained in a digital image."

[7] MCR 3.930 governs exhibits in juvenile proceedings. See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21, for discussion of court records in juvenile proceedings.

> "Except as otherwise provided in [MCR 8.119](F),[8] only case records as defined in [MCR 8.119](D)[9] are public records, subject to access in accordance with these rules. The clerk may not permit any case record to be taken from the court without the order of the court. A court may provide access to the public information in a register of actions through a publicly accessible website and business court opinions may be made available as part of an indexed list as required under MCL 600.8039; however, all other public information in its case records may be provided through electronic means only upon request."

Additionally, MCR 8.119(H)(1) provides that "[u]nless access to a case record or information contained in a record as defined in [MCR 8.119](D) is restricted by statute, court rule, or an order [sealing a record] pursuant to [MCR 8.119](I),[10] any person may inspect that record and may obtain copies as provided in [MCR 8.119](J)."[11]

MCR 8.119(G) provides, in part, that "[a]ll court records not included in [MCR 8.119(D)-(F)] are considered administrative and fiscal records or nonrecord materials and are not subject to public access under [MCR 8.119](H)."

Supreme Court Administrative Order No. 2006-2[12] addresses the confidentiality of social security numbers and management of non-public information contained within public documents.

"[A] court is prohibited from sealing court orders and court opinions under [the plain language of MCR 8.119(I)(5)[13]][.]" *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(I)(5)] does not

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[8] MCR 8.119(F) provides that "[c]ourt recordings, log notes, jury seating charts, and all other records such as tapes, backup tapes, discs, and any other medium used or created in the making of a record of proceedings and kept pursuant to MCR 8.108 are court records and are subject to access in accordance with [MCR 8.119](H)(2)(b)." MCR 8.119(H)(2)(b), in turn, requires every court, by administrative order, to "establish a policy for whether to provide access for records defined in [MCR 8.119](F) and if access is to be provided, outline the procedure for accessing those records[.]"

[9] See Section (F)(1)for discussion of records.

[10] See Section (H) for discussion of sealing records under MCR 8.119(I).

[11] MCR 8.119(J) governs access and reproduction fees.

[12] Available at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/Documents/collections/2006-2.pdf, pp 139-140.

[13] Effective January 1, 2013, ADM File No. 2006-47 relettered MCR 8.119(F) (governing sealed records) as MCR 8.119(I), but the rule is otherwise unchanged. MCR 8.119(I)(5) provides that "[a] court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record." See Section (H) for discussion of sealing records under MCR 8.119(I).

allow a court the authority to exercise discretion in deciding whether to seal [a court order or opinion], unlike the limited discretion that [MCR 8.119(I)(1)] allows when a motion involves other court records." *Jenson*, *supra* at 342-347 (trial court properly held that it did not have the authority to seal a personal protection order (PPO) pursuant to MCR 8.119(I)(5)).

Access to court records can be restricted by the Legislature. *In re Midland Publishing Co*, *Inc*, 420 Mich at 159. For example, MCL 750.520k allows a court, in a criminal sexual conduct case, to order the suppression of the victim's and actor's names and details of the alleged offense until after the preliminary examination. For a partial listing of statutes, court rules, and cases that restrict public access to court records, see the State Court Administrative Office's Case File Management Standards.[14]

To determine whether a right of access exists regarding a document, a court should ask whether the document has historically been open to the public and press, and whether access "'plays a significant positive role in the function of the particular process in question.'" *In re People v Atkins*, 444 Mich 737, 740 (1994), quoting *Press-Enterprise Co v Superior Ct of California*, 478 US 1, 8 (1986) (after the defendant was found competent to stand trial, the court provided newspapers with an edited (as opposed to full text) version of the psychiatrist's written report; because competency reports that have not been admitted into evidence have traditionally been viewed as confidential, and public access would not play a significant positive role in the functioning of the particular process in question, the court's denial of full access to the report was affirmed).

"[T]he press has a qualified right of postverdict access to jurors' names and addresses, subject to the trial court's discretion to fashion an order that takes into account the competing interest of juror safety and any other interests that may be implicated by the court's order." *In re Disclosure of Juror Names (People v Mitchell)*, 233 Mich App 604, 630-631 (1999). If a court determines that jurors' safety concerns are "legitimate and reasonable," the court may deny media access to jurors' names and addresses. *In re Disclosure of Juror Names*, *supra* at 630. Jurors' privacy concerns alone are insufficient to deny access to jurors' names. *Id*.

[14] Available at http://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

Committee Tips:

- *Reports and records may be privileged or confidential and their treatment should be scrutinized in each case. Examples are substance abuse evaluations and treatment records, medical records and reports, and psychological/ psychiatric records and reports.*
- *Consider whether the document can be removed from the file pursuant to the court's authority to strike pleadings or parts of pleadings under MCR 2.115(B).*

Consider whether a filed document can be removed from the file by court order. See MCR 8.119(H).

For other information parties wish to keep confidential, consider having the document marked as an exhibit, reviewed by the court on the record, and then returned to the parties at the conclusion of the proceeding. See MCR 1.109(A)(2); MCR 2.518(A) (exhibits received and accepted into evidence under MCR 2.518 are not court records).

G. Access and Reproduction Fees[15]

Where a court is required by law or court rule to provide free case record access to a person or entity, it cannot charge an access or reproduction fee for that record. MCR 8.119(J)(1). "If a court maintains its public records in electronic format only,

> "(a) the court may not charge a fee to access those case records when access is made on-site through a public terminal or when a verbal request for public information is made on-site to the clerk.
>
> "(b) the court or a contracted entity may charge a fee, in accordance with Supreme Court order, to access those case records when the access is made off-site through a document management, imaging, or other electronic records management system." MCR 8.119(J)(2).

[15]See Memorandum regarding Court Rule Amendments Pertaining to Court Records, December 6, 2012, for highlights of the comprehensive set of court rule revisions designed to update and clarify various rules pertaining to court records, available at: http://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cf_Adoption_of_2006-47.pdf.

"Reproduction of a case record means the act of producing a copy of that record through any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to [MCL] 24.403.

> "(a) A court may charge only for the actual cost of labor and supplies and the actual use of the system, including printing from a public terminal, to reproduce a case record and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce a case record.
>
> "(b) If a person wishes to obtain copies of documents in a file, the clerk shall provide copies upon receipt of the actual cost of reproduction.

"(c) Except as otherwise directed by statute or court rule, a standard fee may be established, pursuant to [MCR 8.119(H)(2)], for providing copies of documents on file." MCR 8.119(J)(3).

H. Limitations on Access to Court Records

MCR 8.119(I)(1)-(3) provide as follows:

> "(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts [sic] records, in whole or in part, in any action or proceeding, unless
>
> > "(a) a party has filed a written motion that identifies the specific interest to be protected,
> >
> > "(b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
> >
> > "(c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.
>
> "(2) In determining whether good cause has been shown, the court must consider,
>
> > "(a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
> >
> > "(b) the interest of the public.

> "(3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records."

MCR 8.119(I) is not intended to limit a court's authority to issue protective orders under MCR 2.302(C) for trade secrets, etc. MCR 8.119(I)(4).

"[A] court is prohibited from sealing court orders and court opinions under [the plain language of MCR 8.119(I)(5)[16]][.]" *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(I)(5)] does not allow a court the authority to exercise discretion in deciding whether to seal [a court order or opinion], unlike the limited discretion that [MCR 8.119(I)(1)] allows when a motion involves other court records." *Jenson*, *supra* at 342-347 (trial court properly held that it did not have the authority to seal a personal protection order (PPO) pursuant to MCR 8.119(I)(5)[17]).

"Any person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order. MCR 2.119[18] governs the proceedings on such a motion or objection." MCR 8.119(I)(6).

If a court grants a motion to seal a court record, the court must send a copy of the order to the Clerk of the Michigan Supreme Court and to the State Court Administrative Office. MCR 8.119(I)(7).

When a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed file will be referred to the trial court. *Id*. MCR 8.119(I) also governs the procedure for sealing a Court of Appeals file. MCR 7.211(C)(9)(c). "Materials that are subject to a motion to seal a Court of Appeals file in whole or in part shall be held under seal pending the court's disposition of the motion." MCR 7.211(C)(9)(c).

MCR 8.119(D) provides, in part:

> "Documents and other materials made confidential by court rule, statute, or order of the court [sealing a record] pursuant to [MCR 8.119](I) must be designated

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[16] Effective January 1, 2013, ADM File No. 2006-47 relettered MCR 8.119(F) (governing sealed records) as MCR 8.119(I), but the rule is otherwise unchanged. MCR 8.119(I)(5) provides that "[a] court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record."

[17] Effective January 1, 2013, ADM File No. 2006-47 relettered MCR 8.119(F) (governing sealed records) as MCR 8.119(I), but the rule is otherwise unchanged. MCR 8.119(I)(5) provides that "[a] court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record."

[18] See Section 3.1 for more information on filing a motion under MCR 2.119.

> as confidential and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court pursuant to [MCR 8.119](I) that makes a document or other materials in that case confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed."

See also MCR 2.518(C), which provides:

> "Confidentiality. If the court retains discovery materials filed pursuant to MCR 1.109(C) or an exhibit submitted pursuant to [MCR 2.518] after a hearing or trial and the material is confidential as provided by law, court rule, or court order pursuant to MCR 8.119(I), the court must continue to maintain the material in a confidential manner."

I. Record Retention[19]

"The state court administrative office shall establish and maintain records management policies and procedures for the courts, including a records retention and disposal schedule, in accordance with supreme court rules." MCL 600.1428(1). "The record retention and disposal schedule shall be developed and maintained as prescribed in . . . MCL 399.5." MCL 600.1428(1). *Record*, as used in MCL 600.1428, means "information of any kind that is recorded in any manner and that has been created by a court or filed with a court in accordance with supreme court rules." MCL 600.1428(4).

"Subject to the records reproduction act, [MCL 24.401 to MCL 24.406], a court may dispose of any record as prescribed in [MCL 600.1428(1)]." MCL 600.1428(2).

"A record, regardless of its medium, shall not be disposed of until the record has been in the custody of the court for the retention period established under [MCL 600.1428(1)]." MCL 600.1428(3).

"For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case records, (3) and nonrecord material. The records of the trial courts shall be retained in the medium prescribed by MCR 1.109. The records of a trial court may not be destroyed except upon order by the chief judge of that court. Before destroying records subject to the order, the court shall first

[19]See Memorandum regarding Court Rule Amendments Pertaining to Court Records, December 6, 2012, for highlights of the comprehensive set of court rule revisions designed to update and clarify various rules pertaining to court records, available at: http://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cf_Adoption_of_2006-47.pdf.

transfer to the Archives of Michigan any records specified as such by State Archives in the Michigan trial courts approved records retention and disposal schedule. An order of destruction shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, and Archives and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.5."[20] MCR 8.119(K).

"Michigan law (MCL 399.5 and [MCL] 750.491) requires that all public records be listed on an approved Retention and Disposal Schedule that identifies the minimum amount of time that records must be kept to satisfy administrative, legal, fiscal, and historical needs." General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, p ii (2006).[21] Accordingly, trial courts are required to comply with General Records Retention and Disposal Schedule #16 - Michigan Trial Courts ("Schedule #16"), which "lists the records that are created and maintained by Michigan trial courts, for what period they are to be retained, and when those records can be disposed of." General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, *supra* at p ii. Schedule #16 "**must be used in conjunction with the Michigan Trial Court Case File Management Standards**."[22] *Id.* at p ii (emphasis in original).

"Courts may destroy [public] records or transfer them to the Archives of Michigan for permanent preservation at the end of the assigned retention period.[23] Unless a statute or court rule prescribes otherwise, a court may retain records longer than the specified period of time. Any record not [listed in Schedule #16] or not having a statutory retention period may not be disposed of without first submitting a list or schedule required by MCL 399.5 or securing an amendment to this schedule." General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, *supra* at p ii.

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[20] The established retention periods can be found in the SCAO's General Records Retention Disposal Schedule #16 - Michigan Trial Courts, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_schd.pdf.

[21] General Records Retention and Disposal Schedule #16 - Michigan Trial Courts is available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_schd.pdf.

[22] The Michigan Supreme Court Case File Management Standards may be accessed at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

[23] "Destruction of a file does not negate, rescind, or set aside an adjudication." MCR 3.925(E)(1).

J. Access to Judge

1. Ex Parte Communications

"A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . ." except for the limited exceptions set out in the Michigan Code of Judicial Conduct 3.A(4). The exceptions include communications for scheduling, consulting with court personnel, and, with the consent of the parties, conferring separately with the parties and their attorneys in an effort to reach resolution. Michigan Code of Judicial Conduct 3.A(4)(a), (c), and (d). The prohibition on ex parte communications may also apply to nonparties such as probation agents. See *People v Black*, 103 Mich App 109, 115 (1981) ("[w]here the trial court has communicated with the probation officer ex parte, [the reviewing court] must presume that th[e] right [to the effective assistance of counsel] has been denied"); *People v Crawford (Alvin)*, 115 Mich App 516, 520 (1982) ("when a trial court holds an ex parte conversation with a presentence investigator, there is a rebuttable presumption of prejudice to the defendant that, if not rebutted, requires reversal").

However, "not all communications between a judge and *jury* are critical stages—meaning a stage at which there is a 'reasonable probability that [a defendant's] case could suffer significant consequences from his [or her] total denial of counsel.'" *Bourne v Curtin*, 666 F3d 411, 412-414 (CA 6, 2012) (emphasis supplied; citation omitted) (trial court did not reversibly err by failing to consult with the parties before denying the jury's request to review trial testimony; the court's ex parte communication with the jury concerning its request did not constitute a per se unconstitutional denial of counsel at a critical stage of the proceedings, and the petitioner did not contend that he suffered actual harm as a result of the ex parte communication).

Committee Tip:

The prohibition on ex parte communications precludes a judge from obtaining or seeking substantive information without both parties having the opportunity to participate. It is recommended that court staff be carefully trained to intercept prohibited ex parte communications. These communications can include efforts by the parties or other persons

interested in the case to contact the judge, contacts with or from police or other agencies, and communications with jurors. The judge also should not view the scene without notifying the parties, who should have the opportunity to be present.

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2. Judge's Appearance by Video Communication Equipment

The State Court Administrative Office is authorized to approve the use of two-way interactive video technology in the trial courts to allow judges to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes. Administrative Order No. 2012-7.

Remote participation is limited to specific situations, including judicial assignments and circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district. Administrative Order No. 2012-7.

A judge who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area. Administrative Order No. 2012-7.

K. Standard of Review

A trial court's decision to permit public access to court proceedings and documents is reviewed for an abuse of discretion, in light of the facts and circumstances of the particular case. *Int'l Union, United Auto, Aerospace and Agricultural Implement Workers of America v Dorsey*, 268 Mich App 313, 329 (2005), rev'd in part on other grounds 474 Mich 1097 (2006), citing *Nixon v Warner Communications, Inc*, 435 US 589, 599 (1978).

1.2 Attorney Conduct

A. Attorney's Duty to the Court

An attorney is responsible for aiding the administration of justice. An attorney has a duty to uphold the legal process and act in conformity with standards imposed on members of the bar. These standards

include the rules of professional responsibility and judicial conduct adopted by the Michigan Supreme Court. MCR 9.103(A). Grounds for discipline include conduct that is prejudicial to the proper administration of justice or that violates the Michigan Rules of Professional Conduct (MRPC). See MCR 9.104(1), ("conduct prejudicial to the proper administration of justice") and MCR 9.104(4) ("conduct that violates the standards or rules of professional conduct adopted by the Supreme Court").

The authority to supervise and discipline Michigan attorneys derives from the state constitution and rests with the Michigan Supreme Court. *Schlossberg v State Bar Grievance Bd*, 388 Mich 389, 394 (1972). This constitutional responsibility is discharged, in turn, by the Attorney Grievance Commission (acting as the Supreme Court's prosecution arm) and the Attorney Discipline Board (acting as the Supreme Court's adjudicative arm). MCR 9.100 *et seq*.

"Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 194 (2002). All Michigan judges have an independent responsibility to supervise the ethical conduct of attorneys who appear in their courtrooms. *Attorney Gen v Michigan Pub Svc Comm*, 243 Mich App 487, 491-492 (2000). This tradition is reflected in the Michigan Code of Judicial Conduct. Canon 3(B)(3) provides that "[a] judge should take or institute appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Judges, as well as lawyers, are obliged by the Michigan Rules of Professional Conduct to report attorney misconduct. *Grievance Administrator v Fieger*, 476 Mich 241 (2006); MRPC 8.3.

B. Attorney's Duty to the Client

An attorney must represent and advocate on behalf of his or her client. In doing so, the attorney must not make inflammatory remarks with the intent to prejudice the jury. Each party is entitled to a fair trial uninfluenced by appeals to passion. *Wayne Co Rd Comm'rs v GLS LeasCo, Inc*, 394 Mich 126, 131 (1975). The Michigan Court of Appeals explained how it handles cases alleging improper comments by an attorney:

"When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. *Wilson v General Motors Corp*, 183 Mich App 21, 26 (1990). An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* Reversal is required only where the prejudicial statements of an attorney reflect a studied

purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunt v Freeman*, 217 Mich App 92, 95 (1996).

The severity and repetitiveness of prejudicial remarks are considered when determining if a new trial is warranted. *Wayne Co Rd Comm'rs*, 394 Mich at 131. The harmful effects of prejudicial remarks can often be corrected through the court's instruction to the jury. See *Wilson v Stilwill*, 411 Mich 587, 605 (1981). The judge may prevent a miscarriage of justice by explaining to the jurors that attorneys' comments are not evidence. *Id*.

C. Motion to Disqualify Attorney

Although not specifically addressed by court rule, case law suggests that the court has the authority to consider a motion to disqualify counsel. *Rymal v Baergen*, 262 Mich App 274, 316-322 (2004); *Evans & Luptak*, 251 Mich App at 193-203. Typically, a motion to disqualify is based on an alleged conflict of interest. See MRPC 1.7 (General Rule), 1.8 (Prohibited Transactions), and 1.9 (Former Client). Another potential ground for disqualification may arise if the lawyer is a potential witness. MRPC 3.7.

To disqualify an attorney based on MRPC 1.7(a) (prohibiting a lawyer from representing two clients with directly adverse interests), the court must undertake a two-step analysis. *Avink v SMG*, 282 Mich App 110, 116 (2009). First, it must "determine whether a lawyer's representation of a client will be 'directly adverse' to the interest of another client." *Avink*, *supra* at 117. The Court explained that "[c]lients' interests are directly adverse when one client sues another client." *Id*. If the court concludes that a directly adverse interest exists, it must disqualify the lawyer unless "(a) the attorney reasonably believes the dual representation will not adversely affect the attorney-client relationship with the other client *and* (b) both clients consent after consultation." *Id*. at 118.

Although the Attorney General may be disqualified under the rules of professional conduct from participating in a case, his or her "unique status 'requires accommodation,' . . . and such accommodation is particularly apt where no evidence has been presented of any prejudice that would be suffered by the defendant." *People v Waterstone (Waterstone II)*, 486 Mich 942, 942-943 (2010),[24] quoting *Attorney General v Public Service Comm'n*, 243 Mich App 487, 506 (2000). In *Waterstone*, the defendant (a judge) claimed that the prosecutor (the Attorney General) should be disqualified because an

[24] Reversing *People v Waterstone (Waterstone I)*, 287 Mich App 368 (2010).

associate in the Attorney General's office formerly represented the defendant in a related federal civil matter. *People v Waterstone (Waterstone I)*, 287 Mich App 368, 377 (2010), rev'd 486 Mich 942 (2010). Both the present case and the former, federal civil case involved the defendant's role in a perjury case where she was the presiding judge. *Waterstone I*, *supra* at 379. The Court of Appeals found that the Attorney General should have been disqualified because his participation in the case violated MRPC 1.9 and MRPC 1.10. *Waterstone I*, *supra* at 398. However, the Michigan Supreme Court disagreed and held that the Attorney General could act as special prosecutor in the case because no evidence was presented to suggest that doing so would prejudice the defendant. *Waterstone II*, *supra* at 942-943.

D. Standard of Review

Whether a conflict of interest exists is a question of fact that is reviewed for clear error. *Avink*, 282 Mich App at 116. The application of "ethical norms" to a decision whether to disqualify counsel is reviewed de novo. *Id.*

1.3 Contempt of Court

"Michigan courts have, as an inherent power, the power at common law to punish all contempts of court." *In re Contempt of Dougherty*, 429 Mich 81, 91 n 14 (1987). "This contempt power inheres in the judicial power vested in th[e Michigan Supreme Court], the Court of Appeals, and the circuit and probate courts by Const 1963, art 6, § 1." *Dougherty*, *supra* at 91 n 14. MCL 600.1701 defines a court's power to punish contempt by fine or imprisonment or both. Contempt may be either civil or criminal and either direct or indirect. Direct contempt occurs in the immediate view and presence of the court; indirect contempt is outside of the immediate view and presence of the court. The purpose of criminal contempt is to punish for past conduct. *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968).

For a more detailed discussion on contempt of court, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

1.4 Judicial Discretion

Many decisions of a judge are discretionary and are reviewed for an abuse of that discretion. It is prudent for the judge to recognize his or her discretion when making those types of decisions. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Banbcock*, 469

Mich 247, 269 (2003). See also *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006), which held that *Babcock's* analysis of what constitutes an abuse of discretion is also applicable to civil cases. "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Babcokc*, *supra* at 269. "An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Id*.

1.5 Judicial Disqualification

Due process requires an unbiased and impartial decisionmaker. *Cain v Dep't of Corrections*, 451 Mich 470, 497 (1996). "A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B)." Michigan Code of Judicial Conduct, Canon 3(C). However, the Supreme Court has cautioned that an objective standard applies and that, under the court rule, recusal is not required based on an "appearance of impropriety." *Adair v State of Michigan*, 474 Mich 1027, 1038-1041 (2006). The Court also discussed with approval the federal "duty to sit" doctrine—an obligation to remain on a case absent good grounds for recusal. *Adair*, *supra* at 1040-1041. MCR 2.003(C) sets out the grounds for disqualification of a judge.

For a more detailed discussion on judicial disqualification, see the Michigan Judicial Institute's publication, *Judicial Disqualification in Michigan*.

1.6 Pro Se Litigants

In both civil and criminal cases, a party has a right to represent himself or herself. Const 1963, art 1, § 13. See also MCL 600.1430 and MCL 763.1.

Individuals who represent themselves are held to the same standards as members of the state bar. *Baird v Baird*, 368 Mich 536, 539 (1962); *Totman v Royal Oak School Dist*, 135 Mich App 121, 126 (1984). An appellate court will not overlook a party's tactical errors or consider documentary evidence that was not submitted ot the trial court merely because a party acted in propria persona. *Amorello v Monsanto Corp*, 186 Mich App 324, 330-331 (1990); *Bachor v Detroit*, 49 Mich App 507, 512 (1973). When a litigant elects to proceed without counsel, the litigant is "bound by the burdens that accompany such election." *Hoven v Hoven*, 9 Mich App 168, 174 (1967).

Practice Note: Committee Tips:

No special warnings or cautions are required. However, it is good practice to caution the pro se

litigant that he or she has a right to consult with and be represented by an attorney and that he or she should not expect special treatment because he or she is a pro se litigant.

The court may reference particular statutes, court rules, or rules of evidence that may have significance in a particular case.

Explain to a pro se litigant that he or she does not have to testify, but if testifying, he or she may be subjected to cross-examination.

Although a party has a right to represent himself or herself, an individual may not represent another person or entity. For example, a corporation can only appear through an attorney. *Peters Production, Inc v Desnick Broadcasting Co*, 171 Mich App 283, 287 (1988). Also, a minor's next friend cannot act as the minor's attorney unless he or she is an attorney. *Marquette Prison Warden v Meadows*, 114 Mich App 121, 124 (1982). Finally, a personal representative may not represent an estate. *Shenkman v Bragman*, 261 Mich App 412, 416 (2004).

"[A] person who represents himself or herself cannot recover actual attorney fees even if the pro se individual is a licensed attorney." *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 432 (2007). This is because the phrase "actual attorney fees" requires that an agency relationship exist between an attorney and the attorney's client and that a fee for the attorney's services be a sum of money actually paid or charged. *Omdahl*, *supra* at 432. An award of actual attorney fees requires that an attorney be acting on behalf of a client separate from the attorney. *Id.*

1.7 Waiver of Fees

A. Generally

MCR 2.002 authorizes a trial court to relieve an indigent person of his or her obligation to pay filing fees and assures that a complainant will not be denied access to the courts on the basis of indigence. *Wells v Dep't of Corrections*, 447 Mich 415, 419 (1994); *Lewis v Dep't of Corrections*, 232 Mich App 575, 579 (1998).

MCR 2.002(D) places the initial burden of establishing indigence on the individual requesting a waiver of filing fees.

For instances in which fees are not required, see MCL 722.727 (in proceedings under the paternity act, no fees are required for commencement of suit, filing, decree or judgment, or stenographer),

MCL 722.904(2)(f) (no fee for minors regarding self-consent to an abortion), and MCR 3.703(A) (no fees for filing a personal protection action).

Fee waiver issues frequently arise in the context of litigation initiated by prisoners. MCL 600.2963 addresses claims of indigency in connection with prisoners' civil actions. MCL 600.2963(1) requires the prisoner to include a certified copy of his or her institutional account showing the current balance and a 12-month history of deposits and withdrawals. See also MCL 791.268, requiring withdrawal from prisoner accounts if installment payments are ordered under MCL 600.2963. MCL 600.2963(8) provides that "[a] prisoner who has failed to pay outstanding fees and costs as required under this section shall not commence a new civil action or appeal until the outstanding fees and costs have been paid."

"If payment of fees and costs has been waived or suspended for a party and service of process must be made by an official process server or by publication, the court shall order the service fees or costs of publication paid by the county or funding unit in which the action is pending, if the party submits an ex parte affidavit stating facts showing the necessity for that type of service of process." MCR 2.002(F).

B. Reinstatement of Fees

The court may reinstate the fees and costs previously waived if, at the conclusion of the litigation, the reason for the waiver or suspension no longer exists. MCR 2.002(G).

If fees and costs were previously waived due to the litigant's indigency, the trial court, before reinstating the fees and costs, must determine whether the litigant is presently indigent. *Martin v Dep't of Corrections (On Remand)*, 201 Mich App 331, 335 (1993). However, a litigant's indigency is not required to be established in any particular manner. *Lewis*, 232 Mich App at 582.

Where fees were suspended "due to the court process," and there was no determination that the petitioner would be unable to pay the fees indefinitely, the trial court did not abuse its discretion in reinstating the fees. *Koss v Dep't of Corrections*, 184 Mich App 614, 617 (1990).

Where fees were suspended to ensure timely review of the prisoner petitioner's complaint, the trial court did not abuse its discretion in reinstating the fees once the review had occurred. *Langworthy v Dep't of Corrections*, 192 Mich App 443, 445-446 (1992).

C. Standard of Review

A trial court's decision to reinstate previously waived fees and costs is reviewed for an abuse of discretion. See *Lewis*, 232 Mich App at 580, and *Koss*, 184 Mich App at 617.

1.8 Appointment of Foreign Language Interpreters[25]

Effective September 11, 2013, ADM File No. 2012-03 adopted MCR 1.111 to "provide court-appointed foreign language interpreters for . . . [limited English proficient (LEP)] persons to support their access to justice[.]"[26] MCR 1.111, which "focuses on the critical legal requirement[of] *meaningful access*[,]" requires the court "to provide an interpreter for a party or witness if the court determines one is needed for either the party or the witness to meaningfully participate." ADM File No. 2012-03.[27] See MCR 1.111(B)(1).

"'Limited English proficient' person means a person who does not speak English as his or her primary language, and who has a limited ability to read, write, speak, or understand English, and by reason of his or her limitations, is not able to understand and meaningfully participate in the court process." Administrative Order No. 2013-8.[28]

A. Determining Whether to Appoint a Foreign Language Interpreter[29]

"Any doubts as to eligibility for interpreter services should be resolved in favor of appointment of an interpreter." MCR 1.111(F)(6). "At the time of determining eligibility, the court shall inform the party or witness of the penalties for making a false statement The party has the continuing obligation to inform the court of any change in financial status and, upon request of the court, the party must submit financial information." MCR 1.111(F)(7).

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[25] For information on Language Access, see http://courts.mi.gov/administration/scao/officesprograms/fli/pages/default.aspx.

[26] For a summary of MCR 1.111, see http://courts.mi.gov/Administration/SCAO/OfficesPrograms/FLI/Documents/MCR_%201_111_RuleSummary.pdf.

[27] Additionally, ADM FIle No. 2012-13 rescinded MCR 2.507(D), which formerly provided that "[t]he court may appoint an interpreter of its own selection and may set reasonable compensation for the interpreter. The compensation is to be paid out of funds provided by law or by one or more of the parties, as the court directs, and may be taxed as costs, in the discretion of the court." ADM File No. 2012-13 also added MCR 8.127 to establish a Foreign Language Board of Review for regulation of foreign language interpreters.

[28] Effective September 11, 2013, Administrative Order No. 2013-8 was adopted as part of ADM File No. 2012-03.

[29] See Section 1.8(C) for information on the various types of foreign language interpreters, including when it is appropriate to appoint each one.

1. Appointment for Witness or Party

"If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding,[30] or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party."[31] MCR 1.111(B)(1).

2. Appointment for Person Other than Witness or Party

"The court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

3. Determining Whether Services are Necessary for Meaningful Participation

"In order to determine whether the services of a foreign language interpreter are necessary for a person to meaningfully participate under [MCR 1.111(B)(1)], the court shall rely upon a request by an LEP individual (or a request made on behalf of an LEP individual) or prior notice in the record." MCR 1.111(B)(3). "If no such requests have been made, the court may conduct an examination of the person on the record to determine whether such services are necessary." *Id*.

"During the examination, the court may use a foreign language interpreter." MCR 1.111(B)(3). "For purposes of this examination, the court is not required to comply with the requirements of [MCR 1.111(F)] and the foreign language interpreter may participate remotely." MCR 1.111(B)(3).

4. Denying Request for Interpreter

"Any time a court denies a request for the appointment of a foreign language interpreter . . . , it shall do so by written order." MCR 1.111(H)(1). "An LEP individual may immediately request

[30] "'Case or Court Proceeding' means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

[31] "'Party' means a person named as a party or a person with legal decision-making authority in the case or court proceeding." MCR 1.111(A)(2).

review of the denial of appointment of a foreign language interpreter." MCR 1.111(H)(2). "A request for review must be submitted to the court within 56 days after entry of the order." *Id.*

B. Waiver of Right to Interpreter

"A person may waive the right to a foreign language interpreter established under [MCR 1.111(B)(1)] unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding."[32] "The court must find on the record that a person's waiver of an interpreter is knowing and voluntary." *Id.* "When accepting the person's waiver, the court may use a foreign language interpreter." *Id.* "For purposes of this waiver, the court is not required to comply with the requirements of [MCR 1.111(F)] and the foreign language interpreter may participate remotely." MCR 1.111(C).

C. Classifications of Foreign Language Interpreters

1. Certified Foreign Language Interpreters

"When the court appoints a foreign language interpreter under [MCR 1.111(B)(1)], the court shall appoint a certified foreign language interpreter whenever practicable." MCR 1.111(F)(1).

A *certified foreign language interpreter* is a person who has:

> "(a) passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,
>
> (b) met all the requirements established by the state court administrator for this interpreter classification, and
>
> (c) registered with the State Court Administrative Office." MCR 1.111(A)(4).

2. Qualified Foreign Language Interpreters

"If a certified foreign language interpreter is not reasonably available, and after considering the gravity of the proceedings

[32] "'Case or Court Proceeding' means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

and whether the matter should be rescheduled, the court may appoint a qualified foreign language interpreter who meets the qualifications in [MCR 1.111(A)(6)]." MCR 1.111(F)(1). "The court shall make a record of its reasons for using a qualified foreign language interpreter." *Id*.

A *qualified foreign language interpreter* is:

> "(a) A person who provides interpretation[33] services, provided that the person has:
>
> > (*i*) registered with the State Court Administrative Office; and
> >
> > (*ii*) met the requirements established by the state court administrator for this interpreter classification; and
> >
> > (*iii*) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or
>
> (b) A person who works for an entity that provides in-person interpretation services provided that:
>
> > (*i*) both the entity and the person have registered with the State Court Administrative Office; and
> >
> > (*ii*) the person has met the requirements established by the state court administrator for this interpreter classification; and
> >
> > (*iii*) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or
>
> (c) A person who works for an entity that provides interpretation services by telecommunication equipment, provided that:
>
> > (*i*) the entity has registered with the State Court Administrative Office; and

[33] "'[I]nterpretation' mean[s] the oral rendering of spoken communication from one language to another without change in meaning." MCR 1.111(A)(5).

> (*ii*) the entity has met the requirements established by the state court administrator for this interpreter classification; and
>
> (*iii*) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services[.]" MCR 1.111(A)(6).

3. Other Capable Person

"If neither a certified foreign language interpreter nor a qualified foreign language interpreter is reasonably available, and after considering the gravity of the proceeding and whether the matter should be rescheduled, the court may appoint a person whom the court determines through voir dire to be capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct the proceeding without prejudice to the limited English proficient person." MCR 1.111(F)(2).

4. Court Employee As Foreign Language Interpreter

"A court employee may interpret[34] legal proceedings as follows:

> (a) The court may employ a person as an interpreter. The employee must meet the minimum requirements for [certified foreign language] interpreters established by [MCR 1.111(A)(4)]. The state court administrator may authorize the court to hire a person who does not meet the minimum requirements established by [MCR 1.111(A)(4)] for good cause including the unavailability of a certification test for the foreign language and the absence of certified interpreters for the foreign language in the geographic area in which the court sits. The court seeking authorization from the state court administrator shall provide proof of the employee's competency to act as an interpreter and shall submit a plan for the employee to meet the minimum requirements established by [MCR 1.111(A)(4)] within a reasonable time.

[34] "'Interpret' . . . mean[s] the oral rendering of spoken communication from one language to another without change in meaning." MCR 1.111(A)(6).

> (b) The court may use an employee as an interpreter if the employee meets the minimum requirements for interpreters established by [MCR 1.111] and is not otherwise disqualified." MCR 1.111(E)(2).

D. Appointing More Than One Interpreter

In general, "[t]he court shall appoint a single interpreter for a case or court proceeding." MCR 1.111(F)(3). However, "[t]he court may appoint more than one interpreter after consideration of[:]

- the nature and duration of the proceeding;
- the number of parties in interest and witnesses requiring an interpreter;
- the primary languages of those persons; and
- the quality of the remote technology that may be utilized when deemed necessary by the court to ensure effective communication in any case or court proceeding." MCR 1.111(F)(3) (bullets added).

E. Avoiding Potential Conflicts of Interest

"The court should use all reasonable efforts to avoid potential conflicts of interest when appointing a person as a foreign language interpreter and shall state its reasons on the record for appointing the person if any of the following applies:

> (a) The interpreter is compensated by a business owned or controlled by a party or a witness;
>
> (b) The interpreter is a friend, a family member, or a household member of a party or witness;
>
> (c) The interpreter is a potential witness;
>
> (d) The interpreter is a law enforcement officer;
>
> (e) The interpreter has a pecuniary or other interest in the outcome of the case;
>
> (f) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;
>
> (g) The interpreter does have, or may have, a perceived conflict of interest;

> (h) The appointment of the interpreter creates an appearance of impropriety." MCR 1.111(E)(1).

F. Recordings

"The court may make a recording of anything said by a foreign language interpreter or a limited English proficient person while testifying or responding to a colloquy during those portions of the proceedings." MCR 1.111(D).

G. Interpreter Oath or Affirmation

"The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following:

> 'Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?'" MCR 1.111(G).

H. Interpreter Costs

"The court may set reasonable compensation for interpreters who are appointed by the court." MCR 1.111(F)(4). "Court-appointed interpreter costs are to be paid out of funds provided by law or by the court." *Id*.

"If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for all or a portion of interpretation costs." MCR 1.111(F)(5). "A person is 'financially able to pay for interpretation costs' if the court determines that requiring reimbursement of interpretation costs will not pose an unreasonable burden on the person's ability to have meaningful access to the court." MCR 1.111(A)(3). "For purposes of [MCR 1.111], a person is financially able to pay for interpretation costs when:

> (a) The person's family or household income is greater than 125% of the federal poverty level[35]; and
>
> (b) An assessment of interpretation costs at the conclusion of the litigation would not unreasonably impede the person's ability to defend or pursue the claims involved in the matter." MCR 1.111(A)(3).

"Any time a court . . . orders reimbursement of interpretation costs, it shall do so by written order." MCR 1.111(H)(1). "An LEP individual

[35]See http://aspe.hhs.gov/poverty/13poverty.cfm for the federal poverty guidelines.

may immediately request review of . . . an assessment for the reimbursement of interpretation costs." MCR 1.111(H)(2). "A request for review must be submitted to the court within 56 days after entry of the order." *Id.*

1.9 Videoconferencing

Effective January 1, 2015, ADM File No. 2013-18 added MCR 2.407, which allows videoconferencing in certain situations.

A. Definitions

MCR 2.407(A) includes the following definitions:

> "(A) Definitions. In this subchapter:
>
> > (1) 'Participants' include, but are not limited to, parties, counsel, and subpoenaed witnesses, but do not include the general public.
> >
> > (2) 'Videoconferencing' means the use of an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio microphones, and audio speakers."

B. Deciding Whether to Permit Videoconferencing

1. Application

Videoconferencing may be used subject to the following requirements:

> "(1) Subject to standards published by the State Court Administrative Office and the criteria set forth in [MCR 2.407(C)], a court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any court-scheduled civil proceeding.
>
> (2) Subject to State Court Administrative Office standards, courts may determine the manner and extent of the use of videoconferencing technology.

> (3) This rule does not supersede a participant's ability to participate by telephonic means under MCR 2.402." MCR 2.407(B).

2. Participant's Request for Videoconferencing

A participant who requests videoconferencing is subject to the following requirements:

> "(1) A participant who requests the use of videoconferencing technology shall ensure that the equipment available at the remote location meets the technical and operational standards established by the State Court Administrative Office.
>
> (2) A participant who requests the use of videoconferencing technology must provide the court with the videoconference dialing information and the participant's contact information in advance of the court date when videoconferencing technology will be used.
>
> (3) There is no motion fee for requests submitted under this rule." MCR 2.407(D).

3. Factors to Consider When Deciding Whether to Permit Videoconferencing

"In determining in a particular case whether to permit the use of videoconferencing technology and the manner of proceeding with videoconferencing, the court shall consider the following factors:

> (1) The capabilities of the court's videoconferencing equipment.
>
> (2) Whether any undue prejudice would result.
>
> (3) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.
>
> (4) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.

(5) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.

(6) Whether a physical liberty or other fundamental interest is at stake in the proceeding.

(7) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

(8) Whether the use of videoconferencing technology presents the person at a remote location in a diminished or distorted sense that negatively reflects upon the individual at the remote location to persons present in the courtroom.

(9) Whether the use of videoconferencing technology diminishes or detracts from the dignity, solemnity, and formality of the proceeding and undermines the integrity, fairness, or effectiveness of the proceeding.

(10) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.

(11) Whether the parties or witness(es) have waived personal appearance or stipulated to videoconferencing.

(12) The proximity of the videoconferencing request date to the proposed appearance date.

(13) Any other factors that the court may determine to be relevant." MCR 2.407(C).

C. Objections

"The court shall rule on an objection to the use of videoconferencing under the factors set forth under [MCR 2.407(C)]." MCR 2.407(E).

D. Mechanics and Recording

"The use of any videoconferencing technology must be conducted in accordance with standards published by the State Court Administrative Office. All proceedings at which videoconferencing

technology is used must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law." MCR 2.407(F).

Chapter 2: Jurisdiction, Process, and Pleadings

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2.1 Jurisdiction in General

The court must have jurisdiction with regard to both the parties and the subject matter. *Sovereign v Sovereign*, 354 Mich 65, 71 (1958). "[O]nce a court acquires jurisdiction, unless the matter is properly removed or dismissed, that court is charged with the duty to render a final decision on the merits of the case, resolving the dispute, with the entry of an enforceable judgment." *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 562 (2013).

Courts with jurisdiction may decline to exercise it based on forum non conveniens. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 604 (2006). For factors to consider when declining to exercise jurisdiction, see *Cray v Gen Motors Corp*, 389 Mich 382, 365-396 (1973).[1]

"Courts are bound to take notice of the limits of their authority. Even if the question is not raised by either party, a court should, on its own motion, recognize its lack of jurisdiction by staying the proceedings, resolving the jurisdictional question, and dismissing the case if jurisdiction is lacking." *Smith v Smith*, 218 Mich App 727, 731 (1996) (citations omitted).

2.2 Subject-Matter Jurisdiction

"'All courts "must upon challenge, or even sua sponte, confirm that subject-matter jurisdiction exists[.]"'" *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 560 (2013) (citations omitted).

Although "a judgment entered by a court that lacks subject-matter jurisdiction is void, . . . subject-matter jurisdiction is established by the *pleadings*[.]" *Id.* at 561. Subject-matter jurisdiction exists "when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *In re Hatcher*, 443 Mich 426, 444 (1993). See also *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668 (1996). Parties may not waive defects in subject matter jurisdiction. See *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204 (2001).

Lack of subject matter jurisdiction is not waived by failure to raise it in the pleadings. MCR 2.111(F)(2). Lack of subject matter jurisdiction may be raised at any time. MCR 2.116(D)(3). Parties cannot confer jurisdiction by their conduct or action, nor can they waive the defense by not raising it. *Paulson v Sec'y of State*, 154 Mich App 626, 630-631 (1986).

[1] See Section 2.4(B)(3), which discusses the *Cray* factors.

"The existence of subject-matter jurisdiction does not depend on the correctness of the trial court's ultimate legal conclusions." *Usitalo v Landon*, 299 Mich App 222, 228 (2013). "Thus, while the lack of subject-matter jurisdiction may be collaterally attacked, a court's exercise of jurisdiction can only be challenged on direct appeal." *Id*. at 229.

Courts lacking subject matter jurisdiction may transfer the case to a Michigan court where jurisdiction is proper. MCR 2.227(A)(1). If the parties did not raise the jurisdictional issue, the court may not transfer the case "until the parties are given notice and an opportunity to be heard on the jurisdictional issue." *Id*. A trial court properly transferred a case pursuant to MCR 2.227 where there was no hearing on the jurisdictional issue, but both parties' attorneys signed the order of transfer which stated on its face that the parties had notice and an opportunity to be heard before the order was entered. *Brooks v Mammo*, 254 Mich App 486, 490 n 2 (2002). The plaintiff will be responsible for the costs and fees associated with the transfer. MCR 2.227(A)(2). Once a case is transferred to a court of proper jurisdiction, the case proceeds "'as if it had been originally filed there.'" *Ashley Ann Arbor, LLC v Pittsfield Charter Twp*, 299 Mich App 138, 157 (2012), quoting MCR 2.227(B)(1).

Committee Tip:

The residency and waiting period requirements associated with divorce cases are jurisdictional issues, not venue issues. See Smith v Smith, 218 Mich App 727, 730 (1996).

A. District Court Jurisdiction

The district court was created by Public Act 154 of 1968, MCL 600.8101 *et seq*. The district court replaced justices of the peace and circuit court commissioners as required by Const 1963, art 6, § 26. The Act also abolished municipal and police courts. MCL 600.9921.

The district court has the following jurisdiction:

- Civil claims of $25,000 or less. MCL 600.8301(1).[2]
- Civil infractions. MCL 600.8301(2).[3]

[2] See *Moody v Home Owners Ins Co*, 304 Mich App 415, 426-27 (2014) (district court did not have subject matter jurisdiction over the complaint where the "amount in controversy" exceeded the $25,000 subject matter jurisdiction of the district court; the district court should have either dismissed the action or transferred it to the circuit court).

- Summary proceedings to recover land. MCL 600.5704. But damage claims in excess of the jurisdictional limit must be brought in circuit court. *Ames v Maxson*, 157 Mich App 75, 80-81 (1987).

- Criminal. MCL 600.8311.

  - In general, state courts in Michigan, not federal courts, "have jurisdiction over a criminal prosecution in which a defendant is a non-Indian, the offense is committed on Indian lands or in Indian country, and the offense is either victimless or the victim is not an Indian." *People v Collins (Stormy)*, 298 Mich App 166, 177 (2012).

  - Misdemeanors punishable by fine or imprisonment of 1 year or less or both. MCL 600.8311(a).

  - Ordinance and charter violations punishable by fine or imprisonment or both. MCL 600.8311(b).

  - Arraignments, setting bail, and accepting bonds. MCL 600.8311(c).

  - Probable cause conferences in all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the probable cause conference under MCL 766.4. MCL 600.8311(d).

  - Preliminary examinations for all felony cases and misdemeanor cases not cognizable by the district court and all matters allowed at the preliminary examination under MCL 766.1 *et seq*. (There is no preliminary examination for any misdemeanor case that will be tried in a district court.) MCL 600.8311(e).

  - Circuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under MCL 766.13. (However, sentencing for felony cases and misdemeanor cases must be conducted by a circuit judge.) MCL 600.8311(f).[4]

---

[3] Although the district court has jurisdiction over civil infraction actions under MCL 600.8301(2), it no longer has *exclusive* jurisdiction over such cases. See 2012 PA 338, which deleted MCL 600.841(2)(d), an exception to concurrent jurisdiction that conferred on district courts exclusive jurisdiction over civil infraction actions.

[4] Effective May 20, 2014, 2014 PA 124 amended MCL 600.8311 to expand the jurisdiction of the district court to include probable cause conferences, all matters allowed at preliminary examinations under MCL 766.1 [*et seq.*], and circuit court arraignments; however, this expanded jurisdiction does not apply to cases until January 1, 2015. 2014 PA 124, Enacting Section 2.

- Small claims in which the amount claimed does not exceed the following:
  - Beginning September 1, 2012, $5,000.00.
  - Beginning January 1, 2015, $5,500.00.
  - Beginning January 1, 2018, $6,000.00.
  - Beginning January 21, 2021, $6,500.00.
  - Beginning January 1, 2024, $7,000.00. MCL 600.8401.[5]
- No general equitable jurisdiction, MCL 600.8315, except concurrent jurisdiction with circuit court pursuant to MCL 600.8302(1):
  - In small claims cases, injunctions and orders rescinding and reforming contracts. MCL 600.8302(2).
  - In summary proceedings, equitable claims regarding interests in land and equitable claims arising out of foreclosure, partition or public nuisances. MCL 600.8302(3). See *Mfrs Hanover Mortgage Corp v Snell*, 142 Mich App 548, 554 (1985).[6]
- Ordinance cases. MCL 600.8302(4)(b).

1. Removal to Circuit Court

MCR 4.002 covers the transfer of an action to circuit court when a defendant asserts a counterclaim or cross-claim seeking relief in an amount or of a nature beyond the jurisdiction of the district court.

2. Appeals from District Court to Circuit Court

Appeals from the district court to the circuit court are governed by MCL 600.8341, MCL 600.8342, and MCR 7.101 *et seq*.

---

[5] Although the district court has jurisdiction over small claims cases under MCL 600.8401, it no longer has *exclusive* jurisdiction over such cases. See 2012 PA 338, which deleted MCL 600.841(2)(d), an exception to concurrent jurisdiction that conferred on district courts exclusive jurisdiction over small claims cases.

[6] Because MCL 600.8302(3) is a more specific grant of jurisdictional power than the general grant of jurisdictional power found in [MCL 600.8301(1),it takes precedence. *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 396 (1996). See also *Clohset*, 302 Mich App at 561-562, where the Court of Appeals held that the district court had jurisdiction over the case even though the judgment was for an amount outside its jurisdictional limit under MCL 600.8301(1) "[b]ecause subject-matter jurisdiction is determined by reference to the pleadings, and because the complaint filed by the [plaintiffs] in the district court invoked the district court's specific jurisdiction under MCL 600.8302(1) and [MCL 600.8302(3)] and chapter 57 of the [Revised Judicature Act] RJA, [a] specific jurisdictional grant that takes precedence over the more general jurisdictional grant found in MCL 600.8301(1)[.]"

Jurisdiction vests in the circuit court after a claim of appeal is filed or leave to appeal is granted. MCR 7.107.

B. Circuit Court Jurisdiction

The circuit court is the court of general jurisdiction. Const 1963, art 6, § 13; MCL 600.605. It has jurisdiction over all matters not assigned to other courts, except as otherwise provided by the Legislature. Const 1963, art 6, § 13; MCL 600.605.

In 1996, the Legislature created the family division of circuit court by transferring many cases previously handled by the probate court to the circuit courts and by requiring circuit courts and probate courts to develop a plan for the family division. MCL 600.1011; MCL 600.1021. The legislation anticipated that some probate judges would serve in the family division. MCL 600.1011(6). The circuit court may share jurisdiction with other courts under a plan of concurrent jurisdiction and is subject to the requirements of MCL 600.401 *et seq*.[7]

The circuit court has jurisdiction over the following:

- Family division cases listed in MCL 600.1021, including
  - Abuse and neglect
  - Divorces, paternity, child custody, child support, adoption
    - "In general, 'the jurisdiction of a divorce court is strictly statutory and limited to determining the rights and obligations between the husband and wife, to the exclusion of third parties.'" *Souden v Souden*, 303 Mich App 406, 410 (2013), quoting *Estes v Titus*, 481 Mich 573, 582-583 (2008). "Third parties can be joined in a divorce action only if they are alleged to have conspired with one spouse to defraud the other spouse." *Souden*, 303 Mich App at 410. "Specifically, a divorce court lacks the jurisdiction to adjudicate the rights of third-party creditors." *Id*. However, "a divorce court[has] power to enforce charging liens secured by a judgment of divorce." *Id*. at 411.
  - Juvenile delinquency, name changes, emancipations
  - Personal protection orders

[7]See Section 2.2(E) on concurrent jurisdiction.

- Felony criminal cases and misdemeanor criminal cases punishable by at least 1 year imprisonment. See MCL 600.8311; Const 1963, art 6, § 13.[8]

- Civil cases involving more than $25,000. MCL 600.605.

  - "[T]he amount-in-controversy requirement is based on the damages claimed." *Souden*, 303 Mich App at 412. "The fact that [the] ultimate[] recover[y] [is] less than $25,000 does not deprive the circuit court of jurisdiction[.]" *Id*.

- Specified juvenile violations as described in MCL 600.606.

- Appeals from inferior courts and tribunals, except as otherwise provided. Const 1963, art 6, § 13.

- Appeals from state boards, commissions, or agencies. MCL 600.631.

- Extraordinary writs as limited by MCR 3.301. See also MCR 7.206(B).

- Equity. MCL 600.601.

- Condemnation cases commenced under the drain code of 1956. MCL 600.601(2).

- Superintending control over all inferior courts and tribunals. MCL 600.615.

- Authority to make rules for circuit court matters not addressed by court rule or statute. MCL 600.621.

- Headlee Amendment challenges against the imposition of a tax. Const 1963, art 9, § 32; MCL 600.308a. See also *Michigan's Adventure, Inc v Dalton Twp*, 287 Mich App 151, 154-155 (2010).

1. Removal to District Court

MCR 2.227 covers transfer of actions upon a finding of lack of jurisdiction. See also Administrative Order No. 1998-1, as amended on November 7, 2006, which provides:

[8] In general, state courts in Michigan, not federal courts, "have jurisdiction over a criminal prosecution in which a defendant is a non-Indian, the offense is committed on Indian lands or in Indian country, and the offense is either victimless or the victim is not an Indian." *Collins (Stormy)*, 298 Mich App at 177.

"A circuit court may not transfer an action to district court under MCR 2.227 based on the amount in controversy unless: (1) The parties stipulate to the transfer and to an appropriate amendment of the complaint, see MCR 2.111(B)(2); or (2) From the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court."

2. Aggregating Claims

Separate plaintiffs cannot aggregate their claims to establish circuit court minimum jurisdiction. *Boyd v Nelson Credit Centers, Inc*, 132 Mich App 774, 780-781 (1984). While MCR 2.206(A) permits the joinder of parties, it is unclear whether that rule can be used to establish jurisdiction which would not otherwise exist. The Michigan Court of Appeals concluded that in lawsuits that are not class actions, aggregating separate claims to establish circuit court jurisdiction is inappropriate. *Boyd*, *supra* at 780-781.

C. Probate Court Jurisdiction

The probate court has the jurisdiction, powers, and duties as provided by law. Const 1963, art 6, § 15. There shall be a probate court in each county organized for judicial purposes. Const 1963, art 6, § 15.

Probate courts have the following jurisdiction:

- Jurisdiction as conferred by the Estates and Protected Individuals Code, the Mental Health Code, the Revised Judicature Act, and any other law or compact. MCL 600.841(1)(a)-(d).[9]

- Concurrent jurisdiction on most matters as provided in the plan, except where the circuit court has exclusive jurisdiction. MCL 600.841(2).

1. Exclusive Jurisdiction

If a matter is brought in circuit court where exclusive jurisdiction rests in the probate court, it may be possible to appoint the circuit judge as an acting probate judge, or the matter may be removed to probate court. See MCL 600.1021 for the transfer of

[9] Note that probate courts no longer have exclusive jurisdiction over trusts and estates. See 2012 PA 338, which deleted MCL 600.8304(d), which conferred on probate courts exclusive jurisdiction over trusts and estates.

jurisdiction to the family division of the circuit court, effective January 1, 1998.

2. Removal to Probate Court

MCL 600.845 states that a circuit court with concurrent jurisdiction is not deprived of that jurisdiction when jurisdiction is granted to the probate court by MCL 600.801 *et seq*. Where concurrent jurisdiction exists between the probate court and another court, an action or proceeding may be removed from the other court to the probate court, "upon motion of a party and after a finding and order on the jurisdictional issue." MCL 600.846. See also MCL 700.1303(2).

3. Appeals from Probate Court to Circuit Court

An aggrieved party may appeal a probate order, sentence, or judgment to the circuit court, unless prohibited by statute. MCL 600.863 and MCR 7.101 *et seq*. Jurisdiction vests in the circuit court after a claim of appeal is filed or leave to appeal is granted. MCR 7.107. However, MCL 600.861 provides for an appeal as a matter of right to the Court of Appeals in certain specified situations.

D. Court of Claims Jurisdiction

MCL 600.6419 governs the Court of Claims exclusive jurisdiction. It is the nature of the claim, not the type of relief sought, that determines whether the Court of Claims has exclusive subject matter jurisdiction. *Oakland Co v DHS*, 290 Mich App 1, 9 (2010), rev'd on other grounds 489 Mich 978 (2011). According to MCL 600.6419(1)(a), the claim must either be "ex contractu" or "ex delicto" in nature. *Oakland Co*, 290 Mich App at 9. The Court of Appeals explained these two terms:

> "The term 'ex delicto' is defined as '"'[f]rom a delict, tort, fault, crime, or malfeasance,"'" and describes claims that '"'grow out of or are founded upon a wrong or tort.'"' In contrast, the term 'ex contractu' describes 'civil actions arising out of contract.' But the term 'ex contractu' does not merely describe traditional breach-of-contract claims and claims arising from express contracts; it also encompasses quasi-contract claims and causes of action arising from contracts implied in fact and law." *Oakland Co*, 290 Mich App at 11-12 (internal citations omitted).

"All actions initiated in the [C]ourt of [C]laims shall be filed in the [C]ourt of [A]ppeals." MCL 600.6419(1).[10]

"Except as otherwise provided in [MCL 600.6419], the court has the following power and jurisdiction:

> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.
>
> (b) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ that may be pleaded by way of counterclaim on the part of the state or any of its departments or officers against any claimant who may bring an action in the court of claims. Any claim of the state or any of its departments or officers may be pleaded by way of counterclaim in any action brought against the state or any of its departments or officers.
>
> (c) To appoint and utilize a special master as the court considers necessary.
>
> (d) To hear and determine any action challenging the validity of a notice of transfer described in [MCL 600.6404(2) or MCL 600.6404(3)]." MCL 600.6419(1).

The amendment[11] to MCL 600.6419(1)(a) conferring jurisdiction over statutory claims against the state or any of its departments applies retroactively to pending cases. *Fulicea v Michigan*, 308 Mich App 230, 232, 233 (2014) (reversing the Court of Claims' order granting summary disposition in favor of the defendants for lack of subject matter jurisdiction because the statutory action was brought prior to the amendment of MCL 600.6419(1)(a)).

The Court of Claims does not have jurisdiction of any claim for compensation under the worker's disability compensation act

[10]"[T]he court of claims' jurisdiction in a matter within its jurisdiction as described in [MCL 600.6419(1)] and pending in any circuit, district, or probate court on November 12, 2013 is as follows: (a) If the matter is not transferred under [MCL 600.6404(3)], the jurisdiction of the court of claims is not exclusive and the circuit, district, or probate court may continue to exercise jurisdiction over that matter[;] (b) If the matter is transferred to the court of claims under [MCL 600.6404(3)], the court of claims has exclusive jurisdiction over the matter, subject to [MCL 600.6421(1)]." MCL 600.6421(4). However, "[MCL 600.6421(4)] does not apply to matters transferred to the court of claims under [MCL 600.6404(2)]." MCL 600.6421(5).

[11]Effective November 12, 2013, 2013 PA 164.

(WDCA), MCL 418.101 *et seq*., or the Compensation of Injured Peace Officers Act, MCL 419.101 *et seq*. MCL 600.6419(3).

The Court of Claims has exclusive jurisdiction over constitutional tort claims against the state or any of its departments. *Rusha v Dep't of Corrections*, 307 Mich App 300, 305 (2014).

"The judgment entered by the court of claims upon any claim described in [MCL 600.6419(1)], either against or in favor of the state or any of its departments or officers, upon becoming final is res judicata of that claim." MCL 600.6419(2).

"The judgment entered by the court of claims upon any claim, either for or against the claimant, is final unless appealed from as provided in [MCL 600.6401 *et seq*.]." MCL 600.6419(2).

"Nothing in [MCL 600.6401 *et seq*.] eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013." MCL 600.6421(1). "Nothing in [MCL 600.6401 *et seq*.] deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law." MCL 600.6421(1). "Except as otherwise provided by [MCL 600.6421], if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue." MCL 600.6421(1).

"For declaratory or equitable relief or a demand for extraordinary writ sought by a party within the jurisdiction of the court of claims described in [MCL 600.6419(1)] and arising out of the same transaction or series of transaction with a matter asserted for which a party has the right to a trial by jury under [MCL 600.6421(1)], unless joined as provided in [MCL 600.6421(3)], the court of claims shall retain exclusive jurisdiction over the matter of declaratory or equitable relief or a demand for extraordinary writ until a final judgment has been entered, and the matter asserted for which a party has the right to a trial by jury under [MCL 600.6421(1)] shall be stayed until final judgment on the matter of declaratory or equitable relief or a demand for extraordinary writ." MCL 600.6421(2).

"With the approval of all parties, any matter within the jurisdiction of the court of claims described in [MCL 600.6419(1)] may be joined for trial with cases arising out of the same transaction or series of transactions that are pending in any of the various trial courts of the state." MCL 600.6421(3). "A case in the court of claims that has been joined with the approval of all parties shall be tried and determined by the judge even though the trial court action with which it may be

joined is tried to a jury under the supervision of the same trial judge." *Id*.

Neither MCL 600.6419 (conferring jurisdiction to Court of Claims) nor MCL 600.6437 (authorizing Court of Claims to issue orders against the state and its subunits) preclude the Court of Claims from "exercis[ing] jurisdiction over any other case, if the Legislature were to confer to it additional jurisdiction." *River Investment Group, LLC v Casab*, 289 Mich App 353, 358 (2010).

E. Concurrent Jurisdiction[12]

"A concurrent jurisdiction plan that was adopted, approved by the [S]upreme [C]ourt, and in effect on December 31, 2012, is considered valid and in compliance with the requirements of [MCL 600.401 *et seq]*." MCL 600.412.

Concurrent jurisdiction plans must be "designed to benefit the citizens utilizing the courts involved rather than the courts themselves or any judge or judges." MCL 600.413(1).

A judge voting against a plan of concurrent jurisdiction under MCL 600.401 *et seq*. may file an objection with the state court administrator. MCL 600.413(2). The objection must specifically state the reasons for the objection and may include objections based on insufficient allocation of staff or resources, inadequate training for any judge or staff, excessive assignment outside of a judge's election district, or retaliation for any action, including failing to vote for a concurrent jurisdiction plan. MCL 600.413(2). "Subject to approval of the [S]upreme [C]ourt, before the [S]upreme [C]ourt approves a concurrent jurisdiction plan under MCL 600.401 *et seq*., the state court administrator shall review objections under [MCL 600.413] and report the substance of the objections and the administrator's findings about the objections' validity to the [S]upreme [C]ourt. Subject to approval of the [S]upreme [C]ourt, the state court administrator shall forward a proposed concurrent jurisdiction plan to the [S]upreme [C]ourt for review after affirmatively finding that the proposed concurrent jurisdiction plan is in compliance with [MCL 600.401 *et seq*.] and the best interests of the people in the communities being served." MCL 600.413(3).

[12] For more information see SCAO's revised concurrent jurisdiction planning, guidelines, and application packet (January 2013), available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/ccj-planning.pdf, as well as SCAO's concurrent jurisdiction webpage, available at http://courts.michigan.gov/Administration/admin/op/Pages/Concurrent-Jurisdiction.aspx.

F. Michigan Court of Appeals Jurisdiction

MCR 7.208(A) provides:

> "After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except
>
> "(1) by order of the Court of Appeals,
>
> "(2) by stipulation of the parties,
>
> "(3) after a decision on the merits in an action in which a preliminary injunction was granted, or
>
> "(4) as otherwise provided by law . . . ."
>
> **Note:** MCL 552.17(1) and MCL 552.28, statutes authorizing a trial court to amend child and spousal support orders after entry of judgment if circumstances so require, satisfy the "otherwise provided by law" exception in MCR 7.208(A)(4). *Lemmen v Lemmen*, 481 Mich 164, 166 (2008).

Filing a claim of appeal divests the circuit court of jurisdiction to amend its final orders. *Wiand v Wiand*, 205 Mich App 360, 369-370 (1994). Generally, the trial court can still enforce its orders unless there is a stay. MCR 7.209(A)(1). The trial court must first address a motion for bond or stay of proceedings before a party can file such a motion with the Michigan Court of Appeals. MCR 7.209(A)(2).

Filing the entry fee and a claim of appeal from a final judgment in the circuit court transfers jurisdiction to the Court of Appeals. MCR 7.204(B); MCL 600.308; *Michigan State Emp Ass'n v Civil Svc Comm*, 177 Mich App 231, 245 (1989).

The lower court reacquires jurisdiction when the clerk returns the record to it. *Dep't of Conservation v Connor*, 321 Mich 648, 654 (1948); *Luscombe v Shedd's Food Products Corp*, 212 Mich App 537, 541 (1995). See MCR 7.210(H) and (I.).

"All actions initiated in the [C]ourt of [C]laims shall be filed in the [C]ourt of [A]ppeals." MCL 600.6419(1). See Section 2.2(D) for more information on Court of Claims jurisdiction.

G. Michigan Supreme Court Jurisdiction

The Supreme Court may issue, hear, and determine prerogative and remedial writs. Const 1963, art 6, § 4. It also has limited appellate

jurisdiction as provided in the court rules. *Id*. The Supreme Court does not have the power to remove a judge. *Id*. As it relates directly to circuit courts, "[t]he Supreme Court may . . . exercise superintending control over a lower court or tribunal[.][13]" MCR 7.303(B)(5); see also Const 1963, art 6, § 4.

H. Federal Court Jurisdiction

1. Removal to Federal Court

The most common grounds for federal court jurisdiction are federal question (28 USC 1331) and diversity of citizenship (28 USC 1332). An action originally filed in a state court may be removed to federal court if: (1) the case could have originally been filed in a federal court; and (2) for cases removed on the basis of diversity, no defendant is a citizen of the state where the action is filed. 28 USC 1441. Removal of a state case to federal court is governed by 28 USC 1441–28 USC 1455. Federal law controls the criteria for removal. *Grubbs v Gen Elec Credit Corp*, 405 US 699, 705 (1972). If the federal court concludes that it does not have jurisdiction, it must remand the case. 28 USC 1447(c); 28 USC 1455(b)(4).

Only a defendant may exercise the right of removal. 28 USC 1441(a); 28 USC 1455(a). In civil cases, the defendant must file a notice of removal within 30 days after receiving a copy of the initial pleading or 30 days from the time a change in the parties or claims in the state court makes the case removable. 28 USC 1446(b). In criminal cases, the defendant must file a notice of removal that contains a short and plain statement of all the grounds for removal within 30 days after the arraignment or any time before trial, whichever is earlier. 28 USC 1455(a)-(b). Prosecution in the state court may proceed, but a judgment of conviction cannot be entered unless the prosecution is first remanded. 28 USC 1455(b)(3).

The federal court in which the notice of removal is filed must examine it promptly, and "[i]f it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand." 28 USC 1455(b)(4).

If the federal court does not summarily remand the prosecution, an evidentiary hearing must be held promptly, and the federal court, after the hearing, "shall make such disposition of the

[13] See Section 8.10 on superintending control.

prosecution as justice shall require. If the [federal court] determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further." 28 USC 1455(b)(5).

Where there are multiple claims or multiple parties, a defendant may remove a whole case if it contains a separate and independent claim or cause of action within federal question jurisdiction. 28 USC 1441.

2. Bankruptcy Stay

Most state court proceedings will be automatically stayed as a result of federal bankruptcy proceedings. 11 USC 362(a). Exceptions to an automatic stay can be found at 11 USC 362(b). Relief from a stay can only be requested in the bankruptcy court. 11 USC 362(d).

The purpose of an automatic stay is to preserve the status quo of the estate, protect the debtor from other collection efforts by creating a systematic liquidation proceeding, and ensure that all creditors of equal status are treated the same. *Stackpoole v Dep't of Treasury*, 194 Mich App 112, 116 (1992).

3. Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act (formerly known as the Soldiers' and Sailors' Relief Act) governs the granting of stays to members of the military who are unable to appear at civil court proceedings. 50 USC app §§ 501-596.

Where a servicemember is the defendant in a civil action or proceeding and does not make an appearance, a stay may be granted. Upon its own motion or application of counsel, the court shall grant a stay for a minimum period of 90 days if it determines that:

> "(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or
>
> "(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists." 50 USC app § 521(d)-(f).

Where a servicemember has notice of the civil proceedings, a stay may be granted upon the court's own motion and must be

granted upon application by the servicemember if the application includes:

> "(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
>
> "(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter." 50 USC app § 522(b)(2).

I. Administrative Agencies

1. Method of Review

Const 1963, art 6, § 28 provides:

> "All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law."

Where no statute or court rule provides for appellate review of certain administrative agencies, there is no guaranteed direct appeal under Const 1963, art 6, § 28. *Watt v Ann Arbor Bd of Ed*, 234 Mich App 701, 707 (1999). In *Watt*, the appellants sought review of a decision by the State Tenure Commission. *Watt*, *supra* at 703. Neither the statutes nor court rules provided for an appeal of right for decisions made by the State Tenure Commission. *Id.* at 705. Therefore, the appellant was only able to appeal by leave of court. *Id.*

Exhaustion of remedies. In contested cases, parties must exhaust all administrative remedies before seeking judicial review. MCL 24.301. In *exhaustion* cases, "judicial interference is withheld until the administrative process has run its course." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 197 (2001). The final decision or order from the agency "is subject to direct review by the courts as provided by law." MCL 24.301. However, if a party will not receive an adequate remedy by exhausting all administrative remedies, the party may seek leave

for judicial review. *Id.* See, for example, *DAIIE v Comm'r of Ins*, 125 Mich App 702, 708 (1983), where the plaintiff's administrative remedy was inadequate because "[t]he very harm that plaintiff [sought] to avoid would inevitably occur if plaintiff were required to exhaust administrative remedies before access to judicial review." In *DAIIE*, the plaintiffs argued to the circuit court that a defendant did not have the legal authority to conduct an administrative hearing. *DAIIE*, *supra* at 707. The circuit court agreed and issued a declaratory judgment. *Id.* The defendants appealed and argued that the plaintiffs sought relief from the courts before exhausting all administrative remedies. *Id.* The Court of Appeals affirmed the circuit court and stated,

> "To require exhaustion of administrative remedies would run counter to the policies underlying the doctrine because the very harm plaintiffs seek to avoid would inevitably occur if plaintiffs are required to proceed with a potentially useless hearing before being allowed to challenge the legal authority of [the defendant] to conduct the hearing." *Id.* at 709.

Primary jurisdiction doctrine. "The doctrine of primary jurisdiction comes into play where a court and an administrative agency have concurrent original subject matter jurisdiction regarding a disputed issue." *In re Application of Int'l Transmission Co*, 304 Mich App 561, 573 (2014) (internal quotations and citations omitted). "Primary jurisdiction 'does not involve jurisdiction in the technical sense, but it is a doctrine predicated on an attitude of judicial self-restraint and is applied when the court feels that the dispute should be handled by an administrative agency created by the legislature to deal with such problems.'" *Id.*, quoting Black's Law Dictionary (6th ed, 1990), p 1191.

"'A question of "primary jurisdiction" arises when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required.'" *Travelers*, 465 Mich at 197, quoting *Dist of Columbia v Thompson*, 570 A2d 277, 288 (DC App, 1990). In primary jurisdiction cases, "'the judicial process is suspended pending referral of such issues to the administrative body for its views.'" *Travelers*, *supra* at 197-198, quoting *United States v Western Pacific R Co*, 352 US 59, 63-64 (1956). Three factors govern the applicability of the primary jurisdiction doctrine. The court must consider: (1) the extent to which the agency's specialized knowledge makes it preferable to decide the case; (2) the need for uniformity in resolving the issue; and (3) the potential that the court's decision will have an adverse affect on the agency's performance of its

regulatory duties. *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 71 (1997), citing *Davis v Pierce*, 2 Administrative Law (3rd ed), § 14.1, p 272. "[R]eferral to an agency is appropriate for '*preliminary* resort for ascertaining and interpreting the circumstances underlying legal issues,' to thereafter be decided by the courts." *Attorney General v BCBSM*, 291 Mich App 64, 87-88 (2010), quoting *Travelers*, *supra* at 199. Thus, a court may seek an agency's interpretation of a statute, but "[i]t is the court[], not the [agency], that [has] the ultimate authority over [] statutory interpretation . . . , and any statutory interpretation rendered by the [agency] is not binding on the court." *Attorney General*, *supra* at 92.

2. Scope of Review

At a minimum, the reviewing court must determine if the agency's final decision is authorized by law. Const 1963, art 6, § 28. An agency's interpretation of a statute is given deference unless it conflicts with the plain meaning of the statute. *Honeywell*, *Inc v Dep't of Treasury*, 167 Mich App 446, 450 (1988). Courts usually defer to any longstanding statutory interpretations by particular governmental agencies, unless the interpretation is clearly wrong. *Ludington Svc Corp v Acting Comm'r of Ins*, 444 Mich 481, 490-491 (1994).

Where a hearing is required, the court should determine whether the decision is "supported by competent, material and substantial evidence on the whole record." Const 1963, art 6, § 28. In *Michigan Emp Relations Comm v Detroit Symphony Orchestra*, *Inc*, 393 Mich 116, 124 (1974), the Supreme Court explained what constitutes substantial and material evidence:

> "What the drafters of the Constitution intended was a thorough judicial review of [an] administrative decision, a review which considers the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency."

J. Standard of Review

Whether a court has subject matter jurisdiction is a question of law that is reviewed de novo. *L & L Wine & Liquor Corp v Mich Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007).

2.3 Personal Jurisdiction

Parties may waive defects in personal jurisdiction. See *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204 (2001). Lack of personal jurisdiction is waived if it is not raised in the responsive pleading or first motion, whichever is filed first. MCR 2.111(F)(2) and MCR 2.116(D)(1). See *In re Slis*, 144 Mich App 678, 683 (1985). Estoppel also applies. *Dogan v Michigan Basic Prop Ins Ass'n*, 130 Mich App 313, 317-318 (1983). However, estoppel requires detrimental reliance. See *Tucker v Eaton*, 426 Mich 179, 187-188 (1986).

A. General Personal Jurisdiction

"The exercise of general jurisdiction is possible when a defendant's contacts with the forum state are of such nature and quality as to enable a court to adjudicate an action against the defendant, even when the claim at issue does not arise out of the contacts with the forum state." *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 166 (2003), citing *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 427 (2001).

The following list contains authority regarding personal jurisdiction over individuals and entities:

- Individuals – MCL 600.701.
  - Presence in the state at time of service. MCL 600.701(1).
  - Domicile in the state at time of service. MCL 600.701(2).
  - Consent, subject to MCL 600.745. MCL 600.701(3). MCL 600.745 addresses whether an agreement establishing jurisdiction will be applied.
- Corporations – MCL 600.711.
  - Incorporation or formation under Michigan law. MCL 600.711(1).
  - Consent, subject to MCL 600.745. MCL 600.711(2). MCL 600.745 addresses whether an agreement establishing jurisdiction will be applied.
  - By carrying on "a continuous and systematic part of its general business within the state." MCL 600.711(3); *Electrolines, Inc*, 260 Mich App 144, 166-167.
- Partnerships and limited partnerships – MCL 600.721.

- Partnership associations and unincorporated voluntary associations — MCL 600.731.

B. Limited Personal Jurisdiction

A long-arm statute provides "for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect." Black's Law Dictionary (8th ed).[14]

The following list contains authority regarding limited personal jurisdiction over individuals and entities.

- Individuals — MCL 600.705, which states, "[A]ny of the following relationships between an individual . . . and the state . . . enable a court . . . to exercise limited personal jurisdiction over the individual and to render personal judgments against the individual . . . arising out of an act which creates any of the following relationships":

  (1) The transaction of any business within the state;

  (2) Doing an act or causing consequences to occur within the state resulting in an action for tort;

  (3) Ownership, use, or possession of real or tangible personal property situated in the state;

  (4) Contracting to insure a person, property or risk located in the state at the time of contracting;

  (5) Entering into a contract for services or materials to be furnished within the state;

  (6) Acting as a director or other officer of a corporation incorporated under the laws of, or having its principal place of business in Michigan; or

  (7) Maintaining a domicile in Michigan while subject to a marital or family relationship which is the basis for a claim for divorce, alimony, separate maintenance, property settlement, child support, or child custody. MCL 600.705(1)-(7).

- Corporations — MCL 600.715.

- Partnerships — MCL 600.725.

[14] See Section 2.3(C) for a discussion of constitutional limits on jurisdiction.

- Voluntary associations — MCL 600.735.

C. Constitutional Limitations

Due process limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Shaffer v Heitner*, 433 US 186, 204 (1977); *Kulko v Superior Court of California*, 436 US 84, 91 (1978). Due process requirements must be met in addition to satisfying the requirements of the Michigan long-arm statutes. See *Oberlies*, 246 Mich App at 432. There must be both:

- Adequate notice that suit has been brought. *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 313 (1950); *Krueger v Williams*, 410 Mich 144, 158 (1981), and

- "Minimum contacts" between the state and the defendant. *Int'l Shoe Co v Washington*, 326 US 310, 316 (1945); *Jeffrey v Rapid American Corp*, 448 Mich 178, 185-186 (1995).

The Michigan Supreme Court used a three-part test for determining minimum contacts in *Jeffrey*, *supra* at 186:

> (1) The defendant must purposefully avail himself of the privilege of acting in the forum state;
>
> (2) The cause of action must arise from the defendant's activities in the forum state; and
>
> (3) The defendant's acts must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable.

"[Michigan's] 'long-arm' statutes extend jurisdiction to the maximum limits permitted by due process." *Northern Ins Co of New York v B Elliott, Ltd*, 117 Mich App 308, 316 (1982), citing *Sifers v Horen*, 385 Mich 195, 199 (1971).

"The plaintiff bears the burden of establishing personal jurisdiction over the defendant." *Yoost v Caspari*, 295 Mich App 209, 221 (2012) (citations and quotation marks omitted). To succeed against a pretrial motion to dismiss for lack of personal jurisdiction, a plaintiff need only make a prima facie showing. *Id*. All factual disputes are resolved in the plaintiff's favor. *Id*. In *Yoost*, the trial court erred by finding the plaintiff had established a prima facie case of abuse of process and that as a result it had jurisdiction over an out-of-state counterdefendant. "'To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences . . . , not mere speculation.'" *Id*. at 228, quoting *Skinner v Square D Co*, 445 Mich 153, 164 (1994).

Where a party's only contact with Michigan is through its advertisements, the advertising party's conduct may fall within Michigan's long-arm statute, but it may not be enough to provide personal jurisdiction over the advertising party. *Oberlies*, 246 Mich App at 439. In *Oberlies*, the plaintiff (a Michigan resident) was injured at the defendant's facility (located in Canada). *Id.* at 426. The plaintiff argued that since the defendant directed its advertisements at Michigan residents, Michigan could obtain personal jurisdiction over the defendant for purposes of a negligence suit. *Id.* The Michigan Court of Appeals disagreed and stated:

> "[I]n order for a foreign defendant to be compelled to defend a suit brought in Michigan where the defendant's contacts with Michigan are limited solely to advertising aimed at Michigan residents, the defendant's instate advertising activities must, in a natural and continuous sequence, have caused the alleged injuries forming the basis of the plaintiff's cause of action." *Id.* at 437.

Pursuant to MCL 600.701(3), "personal jurisdiction can be established by '[c]onsent, to the extent authorized by the consent and subject to the limitations provided in [MCL 600.745].'" *Lease Acceptance Corp v Adams*, 272 Mich App 209, 219 (2006). MCL 600.745(2) states that if the party's consent "provides the only basis for the exercise of jurisdiction, a court of this state shall entertain the action" if the party has satisfied all of the requirements enumerated in MCL 600.745. *Lease Acceptance Corp*, *supra* at 220. The requirements listed in MCL 600.745(2)(a)-(d) are:

> "(a) The court has power under the law of this state to entertain the action.
>
> "(b) This state is a reasonably convenient place for the trial of the action.
>
> "(c) The agreement as to the place of the action is not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> "(d) The defendant is served with process as provided by court rules."

When personal jurisdiction is authorized by MCL 600.701(3) and MCL 600.745, and the parties consent to personal jurisdiction in Michigan via a valid forum selection clause, enforcement of the forum selection clause "does not violate due process as long as a party will not be deprived of its day in court." *Lease Acceptance Corp*, 272 Mich App at 229.

Where personal jurisdiction is conferred pursuant to a forum selection clause, and where the inconvenience of litigating in another forum is apparent at the time of contracting, that inconvenience is part of the bargain negotiated by the parties and will not render the forum selection clause unenforceable. *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 350 (2006).

D. Standard of Review

Whether a court has personal jurisdiction over a party is a question of law that is reviewed de novo. *Oberlies*, 246 Mich App at 426.

2.4 Venue

A. Generally

Venue is simply the location of the trial. Its determination should only concern the selection of a fair and convenient location where the merits of a dispute can be adjudicated. *Gross v Gen Motors Corp*, 448 Mich 147, 155 (1995). "[P]laintiffs carry the burden of establishing the propriety of their venue choice, and the resolution of a venue dispute generally occurs before meaningful discovery has occurred." *Gross*, *supra* at 155-156.

In most cases, venue is proper where the *defendant* (1) resides, (2) has a place of business or conducts business, or (3) if the defendant is a corporation, where the registered office is located. MCL 600.1621(a). If no defendant meets any of these criteria, venue may be proper where the *plaintiff* (1) resides, (2) has a place of business or conducts business, or (3) has a registered office, if the plaintiff is a corporation. MCL 600.1621(b). Actions against court-appointed fiduciaries should be brought in the county where the fiduciary was appointed. MCL 600.1621(c). Specific statutes govern proper venue in actions involving replevin and real property; probate bonds; governmental units; and multiple causes of action involving a tort or involving another legal theory seeking damages for personal injury, property damage, or wrongful death. See MCL 600.1605, 1611, 1615, and 1629, and 1641 respectively.

B. Change of Venue

1. Generally

Once a court enters an order granting a change of venue, it loses jurisdiction over any subsequent proceedings, including the jurisdiction to "entertain [a] motion for reconsideration or any

other substantive issue other than the costs and expenses relative to the transfer." *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 662 (2012). To avoid any "serious inconvenience" to the parties, the Court of Appeals suggested that a good practice "might be to make orders changing venue effective as of some reasonable time thereafter[.]" *Frankfurth*, *supra* at 662. Failure to do so results in an immediate loss of jurisdiction. *Id.* at 660 ("[U]nless otherwise explicitly specified, orders are effective when signed by the judge.").

The court rules distinguish between motions for change of venue when venue is proper, MCR 2.222, and when venue is improper, MCR 2.223.

Generally, parties may create contractual forum selection clauses and choice of law provisions. *Offerdahl v Silverstein*, 224 Mich App 417, 419 (1997). Subject to certain exceptions, Michigan courts will enforce an express forum selection clause. MCL 600.745(3). Similarly, subject to certain conditions, Michigan courts will enforce contractual choice of law provisions. *Chrysler Corp v Skyline Industrial Svcs*, *Inc*, 448 Mich 113, 126-127 (1995).

2. Timing

"A motion for change of venue must be filed before or at the time the defendant files an answer." MCR 2.221(A). Failure to expeditiously schedule the venue motion for hearing does not waive the venue challenge as long as the motion is timely filed. *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 19 (2011). However, a late motion can be considered "if the court is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed." MCR 2.221(B).

If a party fails to object to venue within the time limits set forth in MCR 2.221, he or she waives the right to object. MCR 2.221(C). "The failure to timely raise a claim of improper venue in the lower court precludes consideration of the claim on appeal." *Saba v Gray*, 111 Mich App 304, 307 (1981), citing *Bd of Co Rd Comm'rs of Berrien Co v Marineland Dev Co*, 17 Mich App 503 (1969). Raising improper venue as an affirmative defense will not satisfy the requirement that a change of venue motion be filed. *Bursley v Fuksa*, 164 Mich App 772, 779 (1987).

3. Change of Proper Venue

Venue of a civil action brought in a proper court may be changed to any other county on grounds permitted by court rule. MCL 600.1655. MCR 2.222 provides for a change of venue for the convenience of parties and witnesses or when an impartial trial cannot be held where the trial is pending. If venue is proper, the court may not change venue on its own initiative; a motion is required. MCR 2.222(B).

"The principle of forum non conveniens establishes the right of a court to resist imposition upon its jurisdiction although such jurisdiction could properly be invoked. It presupposes that there are at least two possible choices of forum." *Manfredi v Johnson Controls, Inc*, 194 Mich App 519, 521-522 (1992).

There are various factors to consider when determining the convenience of the forum such as the litigants' private interest, matters of public interest, and a defendant's promptness in raising the issue. *Cray v Gen Motors Corp*, 389 Mich 382, 395-396 (1973). For a comprehensive discussion of the *Cray* factors, including what constitutes a private and public interest, see *Hernandez v Ford Motor Co*, 280 Mich App 545, 560-570 (2008) (product liability action arising from an automobile accident in Mexico involving Mexican citizens and a Ford Explorer that was manufactured in Michigan but sold in Mexico).

"A plaintiff's selection of a forum is ordinarily accorded deference[]" and should not be disturbed unless the balance of the factors strongly favors the defendant. *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619, 628 (1981). However, "a foreign plaintiff's choice of forum is entitled to less deference than that accorded to a domestic plaintiff's choice of forum." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 614 (2006) (expressly modifying the Court's statement in *Anderson*, *supra*).

Where the requested transfer is for the convenience of the parties, the defendant must make a persuasive showing of inconvenience so as to overcome the deference accorded to plaintiff's choice of venue. *Huhn v DMI, Inc*, 207 Mich App 313, 319 (1994), rev'd in part on other grounds 215 Mich App 17 (1996).

A trial court is not limited to dismissing a case on the basis of the forum non conveniens doctrine only when the forum is "seriously inconvenient." *Radeljak*, 475 Mich at 615-616.

The *Radeljak* Court stated that "imposing a 'seriously inconvenient' requirement is inconsistent with [the Court's]

holding in *Cray*, *supra* at 396, that it is 'within the discretion of the trial judge to decline jurisdiction in such cases as the convenience of the parties and the ends of justice dictate.'" *Radeljak*, *supra* at 615-616.

Fees and costs. If the court grants the motion to change venue, either before the order is entered or at the same time the order is entered, the moving party must tender a negotiable instrument payable to the transferee court in the amount of the applicable filing fee. MCR 2.222(D)(1). Additionally, the transferring court must send to the transferee court the negotiable instrument, case documents, and the jury fee if it has been paid. MCR 2.222(D)(1)-(2).

4. Change of Improper Venue

MCR 2.223 addresses change of venue when venue is improper. To determine whether venue is improper, the court should consult MCL 600.1621.

If venue is improper, the court:

> "(1) shall order a change of venue on timely motion of a defendant, or
>
> "(2) may order a change of venue on its own initiative with notice to the parties and opportunity for them to be heard on the venue question." MCR 2.223(A).

Upon a timely motion to change venue and a finding that venue is improper, it is mandatory that the trial court transfer the case to a county with proper venue. MCL 600.1651; *Miller v Allied Signal*, *Inc*, 235 Mich App 710, 716-717 (1999). It is the plaintiff's burden to establish that the county chosen is the proper venue. *Karpinski v St John Hosp - Macomb Ctr Corp*, 238 Mich App 539, 547 (1999).

Fees and costs. Because a transfer of venue under MCR 2.223 necessarily relies on a finding that the plaintiff's choice of venue was improper from the outset, MCR 2.223(B)(1) mandates that the transfer be at "the plaintiff's cost."

No further proceedings are allowed until the costs and expenses have been paid, and if they are not paid within 56 days of the transfer, the court to which the case was transferred must dismiss the action. MCR 2.223(B)(2).

5. Standard of Review

A trial court's dismissal of an action pursuant to a contractual forum selection clause is reviewed de novo. *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 344-345 (2006).

The trial court's decision to dismiss an action on the basis of forum non conveniens is reviewed on appeal for an abuse of discretion. *Miller*, 235 Mich App at 713.

A ruling on a motion for change of improper venue is reviewed for clear error. *Massey v Mandell*, 462 Mich 375, 379 (2000).

2.5 In Rem and Quasi In Rem

"[A]ctions in personam differ from actions in rem in that actions or proceedings in personam are directed against a specific person, and seek the recovery of a personal judgment, while actions or proceedings in rem are directed against the thing or property itself, the object of which is to subject it directly to the power of the state, to establish the status or condition thereof, or determine its disposition, and procure a judgment which shall be binding and conclusive against the world. The distinguishing characteristics of an action in rem [are] its local rather than transitory nature, and its power to adjudicate the rights of all persons in the thing." *Detroit v 19675 Hasse*, 258 Mich App 438, 448 n 15 (2003), quoting 1A CJS, Actions, § 69, pp 463-464.

In rem— "Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing." Black's Law Dictionary (8th ed).

Quasi in rem— "Involving or determining the rights of a person having an interest in property located within the court's jurisdiction." Black's Law Dictionary (8th ed).

The following list of statutes provides authority for determining the appropriate jurisdiction of the piece of property in question:

- MCL 600.751 — Land in Michigan.
- MCL 600.755 — Chattels (movable or transferable property) in Michigan.
- MCL 600.761 — Documents in Michigan.
- MCL 600.765 — Corporate stock of Michigan corporations and other stock with a specified relationship to Michigan.

- MCL 600.771 – Obligations owed by persons subject to the jurisdiction of Michigan courts.

Standard of review. A trial court's jurisdictional rulings and statutory interpretations are reviewed de novo. *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 152 (2003).

2.6 Civil Pleadings

A. Generally

The Michigan Court Rules recognize the following civil pleadings:

- Complaint;
- Cross-claim;
- Counterclaim;
- Third-party complaint;
- Answer to a complaint, cross-claim, counterclaim, or third-party complaint; and
- Reply to an answer. MCR 2.110(A).

Affirmative defenses are not pleadings for purposes of MCR 2.110(A), and therefore, do not require a response. *McCracken v City of Detroit*, 291 Mich App 522, 523 (2011).

Responsive pleadings are required in response to a complaint, counterclaim, cross-claim, third-party complaint, or an answer demanding a reply. MCR 2.110(B).

MCR 2.113 governs the format of pleadings. MCR 2.111(C) governs the content of responsive pleadings. A party or a party's attorney must sign any pleading. MCR 2.114(C). "An electronic signature is acceptable provided it complies with MCR 1.109(D)." MCR 2.114(C)(3).

B. Electronic Filing[15]

"Beginning March 1, 2016, if a fee for commencing a civil action is authorized or required by law, in addition to that fee, the clerk shall

[15] A memorandum, issued on January 4, 2016 by the Supreme Court Administrative Office, answering frequently asked questions about electronic filing is available at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/TCS-2016-01.pdf.

also collect an electronic filing system fee, subject to [MCL 600.1993[16]], as follows:

> (a) For civil actions filed in the [S]upreme [C]ourt, [C]ourt of [A]ppeals, circuit court, probate court, and [C]ourt of [C]laims, $25.00.
>
> (b) Except as provided in subdivisions (c) and (d), for civil actions filed in the district court, including actions filed for summary proceedings, $10.00.
>
> (c) For civil actions filed in district court if a claim for money damages is joined with a claim for relief other than money damages, $20.00.
>
> (d) For civil actions filed in the small claims division of district court, $5.00." MCL 600.1986(1).

"Except for an automated payment service fee collected under [MCL 600.1986(5)[17]], and except as provided in [MCL 600.1987(2)[18]], the electronic filing system fee authorized under [Chapter 19A of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*] is the only fee that may be charged to or collected in a civil action specifically for electronic filing." MCL 600.1987(1).

A person is not required to file a document electronically, and courts or their funding units "shall not require or permit a person to file a document electronically except as directed by the [S]upreme [C]ourt." MCL 600.1992.

1. Collection of Electronic Filing System Fee

> "Subject to [MCL 600.1991[19]], the clerk shall collect the electronic filing system fee listed under [MCL 600.1986(1)] from the party at the time the civil action is commenced, whether or not the document commencing the civil action was filed electronically." MCL 600.1986(2).

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[16] MCL 600.1993 provides that "[a]n electronic filing system fee shall not be collected under [MCL 600.1986(1)] after February 28, 2021."

[17] See Section 2.6(B)(3).

[18] MCL 600.1987(2) provides that "[i]f, pursuant to a [S]upreme [C]ourt order, a court or court funding unit is collecting a fee for electronic filing other than the electronic filing system fee on September 30, 2015, the court or court funding unit may continue to collect $2.50 for filing or service or $5.00 for filing and service, in addition to the electronic system filing fee until December 31, 2016.

[19] MCL 600.1991 permits courts to apply to the Supreme Court for access to and use of the electronic filing system. MCL 600.1991(1). "If the [S]upreme [C]ourt accepts a court under [MCL 600.1991(1)], the [S]tate [C]ourt [A]dministrative [O]ffice shall use money from the judicial electronic filing fund established under [MCL 600.176] to pay the costs of technological improvements necessary for that court to operate electronic filing." MCL 600.1991(2).

"An electronic filing system fee collected shall be remitted by the clerk to the state treasurer for deposit into the judicial electronic filing fund created under [MCL 600.176] and shall be used to establish an electronic filing system and supporting technology as provided in [Chapter 19A of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*]." MCL 600.1989.

2. Waiver and Exceptions

"If the court waives payment of a fee for commencing a civil action because the court determines that the party is indigent or unable to pay the fee, the court shall also waive payment of the electronic filing system fee." MCL 600.1986(3).

"A party that is a governmental entity is not required to pay an electronic filing system fee." MCL 600.1986(4).

3. Automated Payment

"The clerk may accept automated payment of any fee being paid to the court. If the bank or other electronic commerce business charges the court or court funding unit a merchant transaction fee, the clerk may charge the person paying the fee an additional automated payment service fee as authorized by the [S]tate [C]ourt [A]dministrative [O]ffice. The amount of the automated payment service fee shall not exceed the actual merchant transaction fee to be charged to the court or court funding unit for accepting an automated payment by a bank or other electronic commerce business, or 3% of the automated payment, whichever is less." MCL 600.1986(5).

4. Definitions

MCL 600.1985 defines several terms for purposes of Chapter 19A of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*

- *Authorized court* "means a court accepted by the [S]tate [C]ourt [A]dministrative [O]ffice under [MCL 600.1991] for access to the electronic filing system." MCL 600.1985(a).

- *Automated payment* "means an electronic payment method authorized by the [S]tate [C]ourt [A]dministrative [O]ffice at the direction of the [S]upreme [C]ourt, including, but not limited to, payments made with credit and debit cards." MCL 600.1985(b).

- *Civil action* "means an action that is not a criminal case, a civil infraction action, a proceeding commenced in the probate court under . . . MCL 700.3982, or a proceeding involving a juvenile under [the Juvenile Code, MCL 712A.1 *et seq.*]" MCL 600.1985(c).

- *Clerk* "means the clerk of the court referenced in the rules of the [S]upreme [C]ourt and includes the clerk of the [S]upreme [C]ourt, chief clerk of the [C]ourt of [A]ppeals, county clerk, probate register, district court clerk, or clerk of the [C]ourt of [C]laims where the civil action is commenced, as applicable." MCL 600.1985(d).

- *Court funding unit* "means 1 of the following, as applicable:

  (*i*) For circuit or probate court, the county.

  (*ii*) For district court, the district funding unit as that term is defined in [MCL 600.8104].

  (*iii*) For the [S]upreme [C]ourt, [C]ourt of [A]ppeals, or [C]ourt of [C]laims, the state." MCL 600.1985(e).

- *Electronic filing system* "means a system authorized [January 1, 2016[20]] by the [S]upreme [C]ourt for the electronic filing of documents using a portal contracted for by the [S]tate [C]ourt [A]dministrative [O]ffice for the filing of documents in the [S]upreme [C]ourt, [C]ourt of [A]ppeals, circuit court, probate court, district court, and [C]ourt of [C]laims." MCL 600.1985(f).

- *Electronic filing system fee* "means the fee described in [MCL 600.1986]." MCL 600.1985(g).

- *Party* "means the person or entity commencing a civil action." MCL 600.1985(h).

- *Qualified vendor* "means a private vendor selected by the [S]tate [C]ourt [A]dministrative [O]ffice by a competitive bidding process to effectuate the purpose of [MCL 600.1991(3)]." MCL 600.1985(i).

[20] See 2015 PA 230.

C. Complaint

A civil action is commenced by filing a complaint with a court. MCR 2.101(B). It must set forth specific factual allegations stating a claim upon which relief can be granted and contain a demand for judgment. MCR 2.111(B). Statutes, court rules, and case law contain requirements for particular types of claims. See MCR 2.112.

"Before filing a civil action, including an action for superintending control or another extraordinary writ, the party filing the action shall pay a fee of $150.00."[21] MCL 600.2529(1)(a).

The statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." MCL 600.5856(a). See also *Gladych v New Family Homes, Inc*, 468 Mich 594, 595, 598-605 (2003).

D. Responsive Pleading

A responsive pleading to a complaint is required. MCR 2.110(A)(5) and MCR 2.110(B)(1). An answer is the typical responsive pleading.

1. Appearance

Filing an appearance entitles a party to receive copies of all pleadings and papers as provided by MCR 2.107(A). MCR 2.117(A)(2). MCR 2.117 addresses appearances by parties and by attorneys representing parties. An appearance by an attorney for a party is deemed an appearance by the party. MCR 2.117(B)(1). An appearance by a law firm is deemed an appearance of the individual attorney and every member of the law firm. MCR 2.117(B)(3); *Plunkett & Cooney, PC v Capitol Bancorp, Ltd*, 212 Mich App 325, 329 (1995). An attorney's appearance continues until a final judgment or final order is entered and the time for an appeal of right has passed. MCR 2.117(C)(1). An attorney who has entered an appearance may withdraw or be substituted for only on order of the court. MCR 2.117(C)(2).

An appearance, for purposes of the default rules, may be based upon written and oral communications with opposing counsel. *Ragnone v Wirsing*, 141 Mich App 263, 265-266 (1985).

MCR 8.126 addresses the temporary appearance of attorneys from other jurisdictions. The out-of-state attorney (as defined in the court rule) must be eligible to practice in at least one

[21] See Section 1.7 on waiver of fees.

jurisdiction and cannot be disbarred or suspended in any jurisdiction. MCR 8.126(A). Each out-of-state attorney is limited to five appearances in a 365-day period. *Id.*

The out-of-state attorney "may be permitted to appear and practice in a specific case in a court or before an administrative tribunal or agency in this state when associated with, and on motion of, an active member of the State Bar of Michigan who appears of record in the case." MCR 8.126(A). MCR 8.126(A)(1)(a)(i)-(iii) contain the requirements for the motion and affidavit that must be filed. Both documents must be submitted to the Attorney Grievance Commission, and "the Attorney Grievance Commission must notify the court or administrative tribunal or agency and both attorneys whether the out-of-state attorney has been granted permission to appear temporarily in Michigan within the past 365 days, and, if so, the number of such appearances." MCR 8.126(A)(1)(b). If the out-of-state attorney has been granted such permission fewer than five times in the past 365 days, the court, tribunal, or agency has discretion whether to grant the request. MCR 8.126(A)(1)(c). If permission to appear is granted, the court must send a copy of the order to the Michigan attorney and to the out-of-state attorney. *Id.* It is the Michigan attorney's responsibility to forward the information to the Attorney Grievance Commission. *Id.*

2. Form of Responsive Pleading

A responsive pleading must respond to each allegation that is stated in the complaint. MCR 2.111(C). "[A] responsive pleading must:

> "(1) state an explicit admission or denial;
>
> "(2) plead no contest; or
>
> "(3) state that the pleader lacks knowledge or information sufficient to form a belief as to the truth of an allegation, which has the effect of a denial." *Id.*

3. Affirmative Defense

An affirmative defense is any defense that seeks to foreclose relief for reasons unrelated to the plaintiff's prima facie case. *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312 (1993). In other words, an affirmative defense accepts the plaintiff's allegations, but would deny relief for a reason not disclosed in the pleadings. *Id.* at 312. The list of affirmative defenses in MCR 2.111(F)(3) is not exclusive. *Citizens Ins Co of*

America v Juno Lighting, Inc, 247 Mich App 236, 241 (2001), citing *Campbell v St John Hosp*, 434 Mich 608, 616 (1990). The party asserting an affirmative defense has the burden of presenting evidence to support it. *Palenkas v Beaumont Hosp*, 432 Mich 527, 548, 550 (1989).

"An affirmative defense must be stated in a party's responsive pleading or in a motion for summary disposition made before the filing of a responsive pleading, or the defense is waived." *Citizens Ins Co*, 247 Mich App at 241, citing MCR 2.111(F)(3) and *Chmielewski v Xermac, Inc*, 216 Mich App 707, 712 (1996), aff'd 457 Mich 593 (1998). "[A]n affirmative defense is [not] adequately preserved by raising it in a response to a motion for leave to amend the complaint[]" because a defendant's "response to [a] motion to amend [is] not a responsive pleading." *Dell v Citizens Ins Co of America*, ___ Mich App ___, ___ (2015), citing MCR 2.110(A) (holding that the defendant failed to adequately preserve its affirmative defense where the defense was raised in response to the plaintiff's motion for leave to amend the complaint).

"[D]espite the language in MCR 2.111(F)(3) that affirmative defenses should be part of the responsive pleadings, affirmative defenses do not amount to a pleading by themselves nor do affirmative defenses demanding a reply count as a pleading requiring a response." *McCracken v City of Detroit*, 291 Mich App 522, 528 (2011). "Although affirmative defenses are not 'pleadings,' the Court Rules unambiguously permit them to be amended in the same manner as pleadings." *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 213 (2013), overruled in part on other grounds 498 Mich 68, 74 (2015). (internal citation omitted). "[A] defendant may move to amend their affirmative defenses to add any that become apparent at any time, and any such motion should be granted as a matter of course so long as doing so would not prejudice the plaintiff." *Id.* If a defense is based on a written instrument, a copy of the instrument must be attached to the pleading as an exhibit, subject to exceptions listed in the court rule. MCR 2.113(F)(1). Additionally, affirmative defenses must be listed under a separate heading and must include the facts constituting such defense. MCR 2.111(F)(3). "The purpose of this requirement is to provide the opposing party with sufficient notice of the alleged affirmative defenses to permit that party to take a responsive position, and a stated affirmative defense that does so will not be deemed insufficient." *Tyra*, 302 Mich App at 213-214, overruled in part on other grounds 498 Mich 68, 74 (2015). "[A] statement of an affirmative defense must contain facts setting forth *why and*

how the party asserting it believes the affirmative defense is applicable." *Id*. at 214.

4. Time for Filing and Serving Responsive Pleadings

If complaint served in Michigan. The defendant must serve and file an answer or take other action, as permitted, within 21 days of being served with notice. MCR 2.108(A)(1).

If complaint served outside Michigan or manner of service required was by registered mail. The defendant must serve and file an answer or take other action, as permitted, within 28 days of being served with notice. MCR 2.108(A)(2).

If complaint served via substituted service (posting or publication). The court must allow the defendant a reasonable time to answer or take other action as permitted. The time prescribed must not be less than 28 days after publication or posting is complete. MCR 2.108(A)(3).

If served with a pleading stating a cross-claim or counterclaim against the defendant. The served party must serve and file a reply within 21 days after service of the pleading to which the reply is directed. MCR 2.108(A)(4).

If served with a pleading to which a reply is required or permitted. The served party may serve and file a reply within 21 days of being served with the pleading to which the reply is directed. MCR 2.108(A)(5).

If the action alleges medical malpractice and is filed on or after October 1, 1986. Unless the defendant responded pursuant to MCR 2.108(A)(1) or (2), he or she "must serve and file an answer within 21 days after being served with the notice of filing the security for costs or the affidavit in lieu of such security as required by MCL 600.2912d." MCR 2.108(A)(6).

A motion raising a defense or an objection to a pleading must be filed and served within 21 days of service or the time for filing a responsive pleading. MCR 2.108(B).

E. Counterclaims and Cross-Claims

1. Designation of Cross-Claim or Counterclaim

A cross-claim or counterclaim may be combined with an answer if it is clearly designated as such. MCR 2.110(C). If it is not clearly designated in the answer, no responsive pleading is required to the cross-claim or counterclaim. MCR 2.110(C)(1).

When there is no designation, the court has discretion to declare the pleading as "properly designated and require the party to amend the pleading, direct the opposing party to file a responsive pleading, or enter another appropriate order." MCR 2.110(C)(2). If a cross-claim or counterclaim is designated as a defense or vice versa, the court may declare the designation proper and enter an appropriate order. MCR 2.110(C)(3).

2. Counterclaim Against Opposing Party

"A counterclaim may, but need not, diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." MCR 2.203(C).

3. Counterclaim Excepted From Operation of Periods of Limitations

Pursuant to MCL 600.5823, to the extent of the amount established as the plaintiff's claim, the periods of limitations prescribed in chapter 58 do not bar a counterclaim, unless it was barred at the time the plaintiff's claim accrued. See, generally, *Wallace v Patterson*, 405 Mich 825 (1979), rev'g 85 Mich App 266 (1978); *Warner v Sullivan*, 249 Mich 469 (1930).

4. Cross-Claim Against Co-Party

A party may file a cross-claim against a co-party. MCR 2.203(D). "A pleading may state as a cross-claim a claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or that relates to property that is the subject matter of the original action. The cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." MCR 2.203(D).

5. Time for Filing Counterclaim or Cross-Claim

Generally, a counterclaim arising out of the same transaction or occurrence as the principal claim must be joined in one action. MCR 2.203(A). However, if leave to amend to state a counterclaim or cross-claim is denied, and the ruling court does not expressly preclude a separate action, the party is not bound by the compulsory joinder rule and is free to raise the claim in another action. MCR 2.203(E). In other words, a counterclaim or cross-claim may be litigated in a separate action to the extent allowed by the rules of collateral estoppel and res judicata, and

as long as the court did not specifically preclude a separate action when it denied a party's request for leave to amend. *Salem Industries, Inc v Mooney Process Equip Co*, 175 Mich App 213, 216 (1988).

F. Extending Time for Serving and Filing Pleading

MCR 2.108(E) states:

> "A court may, with notice to the other parties who have appeared, extend the time for serving and filing a pleading or motion or the doing of another act, if the request is made before the expiration of the period originally prescribed. After the expiration of the original period, the court may, on motion, permit a party to act if the failure to act was the result of excusable neglect. However, if a rule governing a particular act limits the authority to extend the time, those limitations must be observed. MCR 2.603(D) applies if a default has been entered."

A motion to stay proceedings does not extend the time for filing an answer as does a motion made under MCR 2.108(E) because "nothing in the motion notifies the trial court of the defendant's desire to extend the time, as a motion under MCR 2.108(E) does." *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 382 (2011). The only way a party may request an extension of time for filing an answer is by filing a motion under MCR 2.108(E). *Huntington Nat'l Bank*, *supra* at 382-383.

G. Standard of Review

Whether a cause of action is barred by a statute of limitations is a question of law that is reviewed de novo. *Moll v Abbott Laboratories*, 444 Mich 1, 26 (1993); *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341 (1997).

"Whether a particular ground for dismissal is an affirmative defense under MCR 2.111(F) is a question of law that is reviewed de novo[.]" *Citizens Ins Co*, 247 Mich App at 241.

2.7 Standing

Legal actions must be prosecuted in the name of the real party in interest. MCL 600.2041; MCR 2.201(B). "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *BCBSM v Eaton Rapids Community Hosp*, 221 Mich App 301, 311 (1997). See also MCL 600.2041 and MCR 2.201(B)(1).

MCR 2.201(C) governs an individual's or an entity's capacity to sue or be sued. Where the individual is a minor or incompetent person, MCR 2.201(E) controls.

"[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605 [(declaratory judgments)], it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010), overruling *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001).

Standard of review. Standing is a question of law that is reviewed de novo. *Lee*, 464 Mich at 734, rev'd on other grounds *Lansing Schools Ed Ass'n*, 487 Mich 349 (2010).

2.8 Joinder

A. Joinder of Claims

Compulsory Joinder. A party stating a claim against an opposing party in a pleading must "join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction." MCR 2.203(A).

Permissive Joinder. A party may join any other claims that it has against an opposing party. MCR 2.203(B). Anyone who is or may be interested in the subject matter of the action, but whose names cannot be established, may be joined as parties and should be described as:

> "(a) unknown claimants;
>
> "(b) unknown owners; or
>
> "(c) unknown heirs, devisees, or assignees of a deceased person who may have been interested in the subject matter of the action." MCR 2.201(D)(1).

If it cannot be determined, upon diligent inquiry, (1) whether a person who is or may be interested in the subject matter of the action is alive

or dead, (2) how the person would have disposed of his or her interest, or (3) where the person resides if alive, then "the person and everyone claiming under him or her may be made parties by naming the person and adding the words 'or [his or her] unknown heirs, devisees, or assignees.'" MCR 2.201(D)(1).

B. Joinder of Parties

Necessary Joinder. A party must join "persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief[.]" MCR 2.205(A). The court is required to summon such parties into the action if they have not been joined. MCR 2.205(B). If the court cannot obtain jurisdiction, it may still proceed as provided by MCR 2.205(B).

Permissive Joinder. A person may join other people as co-parties if the party asserts a right to joint or several relief or relief arising out of the same transaction or transactions and all parties share a common question of law or fact, or "if their presence in the action will promote the convenient administration of justice[.]" MCR 2.206(A)(1)-(2).

The court has the authority to add or drop parties. MCR 2.207.

Joining Parties to a Counterclaim or Cross-Claim. "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim, subject to MCR 2.205 and [MCR 2.206]." MCR 2.203(G)(1). "On the filing of a counterclaim or cross-claim adding new parties, the court clerk shall issue a summons for each new party in the same manner as on the filing of a complaint, as provided in MCR 2.102(A)-(C). Unless the court orders otherwise, the summons is valid for 21 days after the court issues it." MCR 2.203(G)(2).

C. Nonparties

In a personal injury, property damage, or wrongful death action, the court may not assess the fault of a nonparty until notice has been given as provided in MCR 2.112(K)(3). See also MCL 600.2957. "[A] defendant's failure to give the notice required under [MCR 2.112(K)] amounts to a procedural waiver of the right to have a nonparty assigned fault as provided under MCL 600.6304 and MCL 600.2957." *Taylor v Mich Petroleum Technologies, Inc.*, 307 Mich App 189, 199 (2014). Further, the identification of an alleged nonparty at fault within the notice of affirmative defenses in a defendant's answer does not satisfy the requirements of MCR 2.112(K); rather, affirmative defenses and a notice of nonparty at fault "must be separately stated under a distinct heading, if not in a separate document." *Taylor*, 307 Mich App at 202 (noting that, "even if [the defendant] could properly

give notice of nonparty at fault along with its notice of affirmative defenses," its notice was deficient where it "did not identify [the nonparty] as a nonparty at fault, did not cite MCR 2.112(K), and did not otherwise state that [the defendant] was asserting its right to have the finder of fact allocate fault to [the nonparty,]" and concluding that "because proper notice . . . is a prerequisite to the application of MCL 600.2957(2), the trial court could not apply that statute to save [the plaintiffs'] otherwise untimely claims against [the nonparty]").

Once a party has been served with the notice, the served party "may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty." MCR 2.112(K)(4). See also MCL 600.2957(2), which adds, "A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action." The Court of Appeals concluded that no conflict exists between the statute and the court rule and that the statute of limitations is extended to nonparties added pursuant to the statute. *Bint v Doe*, 274 Mich App 232, 234-235 (2007).

If a nonparty is found to be at fault, the nonparty is not subject to liability in that action, and the determination of fault may not be introduced as evidence of liability in any subsequent action. MCL 600.2957(3); *Rinke v Potrzebowski*, 254 Mich App 411, 415 (2002).

D. Standard of Review

A trial court's decision whether to add parties to an action is reviewed for an abuse of discretion. *Wiand v Wiand*, 205 Mich App 360, 369 (1994).

2.9 Summons

A. First Summons

The clerk issues a summons when the complaint is filed. MCR 2.102(A). The form of the summons is prescribed in MCR 2.102(B). The summons expires 91 days after the date the complaint is filed. MCR 2.102(D).

If a defendant is not served before the expiration of the summons, the action is deemed dismissed without prejudice as to that defendant, unless the defendant has submitted to the court's jurisdiction. MCR 2.102(E)(1). If the defendant was added after the first complaint was filed, time begins to run from the date of the first pleading naming that defendant as a party. MCR 2.102(E)(1). The court may set aside

the dismissal based on the stipulation of the parties or on a motion as provided by MCR 2.102(F). The motion must be filed within 28 days after notice of the order of dismissal was given, or if notice was not given, promptly upon learning of the dismissal. MCR 2.102(F)(3). In addition, the moving party must establish that proof of service was in fact made or that the defendant submitted to the court's jurisdiction, MCR 2.102(F)(1), and that "proof of service of process was filed or the failure to file is excused for good cause shown," MCR 2.102(F)(2).[22]

B. Second Summons

A request to extend the summons must be made before the summons expires. MCR 2.102(D). The court may "order a second summons to issue for a definite period not exceeding 1 year from the date the complaint is filed." MCR 2.102(D). If the order allowing the second summons is entered within the time period of the original summons, the second summons is effective even if it was issued after the expiration of the original summons. *Moriarity v Shields*, 260 Mich App 566, 575 (2004).

The request for a second summons must be supported by "a showing of due diligence by the plaintiff in attempting to serve the original summons[.]" MCR 2.102(D). See also *Bush v Beemer*, 224 Mich App 457, 462 (1997). "[D]ue diligence under MCR 2.102(D) means diligent efforts in *trying to serve process*, not diligence in matters logically preceding the decision to serve process." *Bush*, *supra* at 464.

The issuance of a third summons is not permitted under MCR 2.102(D). *Hyslop v Wojjusik*, 252 Mich App 500, 506-507 (2002).

Practice Note: Committee Tip:

Where the motion for a second summons requests an unreasonable amount of time within which to complete service, and the request seems unnecessary or designed to protract the litigation, the court may set a shorter time for service.

C. Failure to Serve Summons

Service of a valid summons is a necessary part of service of process. *Holliday v Townley*, 189 Mich App 424, 425-426 (1991). Dismissal is

[22] See Section 2.10(A)on service of process.

automatic if service is not made and can only be set aside as provided in MCR 2.102(F). MCR 2.102(E).

2.10 Service

A. Service of Process

1. Generally

Any legally competent adult who is not a party or an officer of a corporate party may act as a process server. MCR 2.103(A). If the service of process requires the taking of property, only the following people may act as the server:

- a sheriff,
- a deputy sheriff,
- a bailiff (appointed by the court for that purpose),
- a court officer (appointed by the court for that purpose),
- a state police officer where the State is a party, or
- a city or village police officer where the city or village is a party. MCR 2.103(B)(1)-(3).

MCR 2.104 requires a party to show proof of service. A party may show proof of service by providing:

> "(1) written acknowledgment of the receipt of a summons and a copy of the complaint, dated and signed by the person to whom the service is directed or by a person authorized under these rules to receive the service of process;
>
> "(2) a certificate stating the facts of service, including the manner, time, date, and place of service, if service is made within the State of Michigan by
>
> > "(a) a sheriff,
> >
> > "(b) a deputy sheriff or bailiff, if that officer holds office in the county in which the court issuing the process is held,

"(c) an appointed court officer,

"(d) an attorney for a party; or

"(3) an affidavit stating the facts of service, including the manner, time, date, and place of service, and indicating the process server's official capacity, if any.

"The place of service must be described by giving the address where the service was made or, if the service was not made at a particular address, by an other description of the location." MCR 2.104(A)(1)-(3).

The validity of the service is not affected by a party's failure to file the proof of service. MCR 2.104(B).

"[A] process server[23] who is on the land or premises of another while in the process of attempting, by the most direct route, to serve process upon any of the following: (a) [a]n owner or occupant of the land or premises[;] (b) [a]n agent of the owner or occupant of the land or premises[;] (c) [a] lessee of the land or premises[,]" is exempt from the prohibition on trespassing set out in MCL 750.552(1). MCL 750.552(2).

2. Manner of Service

Generally. A plaintiff may serve process on a resident or nonresident individual by personally delivering or sending a summons and a copy of the complaint via "registered or certified mail, return receipt requested, and delivery restricted to the addressee." MCR 2.105(A)(1)-(2). "By restricting delivery to a specifically identified person, [MCR 2.105(A)] avoids disputes about whether a *defendant* has deliberately refused service." *Bullington v Corbell*, 293 Mich App 549, 557 (2011). In *Bullington*, *supra* at 557, the plaintiff violated MCR 2.105(A)(2) by failing to attempt service by certified mail without restricting delivery to the defendant.

Substituted Service. MCR 2.105(I) addresses when and how substituted service can be made. The court may enter an order permitting substituted service if the plaintiff files a verified motion dated not more than 14 days before it is filed. MCR 2.105(I).

[23] *Process server* means "a person authorized under [MCL 600.101 to MCL 600.9947], or supreme court rule to serve process." MCL 750.552(4).

The motion must meet all procedural requirements set forth in MCR 2.105(I)(2). The court may direct a hearing on the motion, but it is not required. MCR 2.105(I)(2). Substituted "[s]ervice of process may not be made . . . before entry of the court's order permitting it." MCR 2.105(I)(3).

The order must include all of the information specified in MCR 2.106(C). The court may order substituted service via posting or publication. MCR 2.106(A). See MCR 2.106(D) and (E) on how to accomplish these service via posting or publication.

Service by Mail. "The proper addressing and mailing of a letter creates a legal presumption that it was received. This presumption may be rebutted by evidence, but whether it was received is a question for the trier of fact." *Stacey v Sankovich*, 19 Mich App 688, 694 (1969).

3. Defects in Proof of Service

Amendment. "Service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses." *Hill v Frawley*, 155 Mich App 611, 613 (1986).

MCL 600.1905(3) and MCR 2.102(C) permit amendments to correct defects in proof of service.

Effect. Defects in the service of process are not necessarily fatal to the cause of action. "An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." MCR 2.105(J)(3); *In re Gosnell*, 234 Mich App 326, 344 (1999).

Challenge. Summary disposition[24] may be granted where "[t]he service of process was insufficient." MCR 2.116(C)(3). Affidavits, together with any other documentary evidence submitted by the parties, must be considered by the trial court. MCR 2.116(G)(5). All factual disputes for the purpose of deciding the motion are resolved in favor of the nonmoving party. See *Jeffrey v Rapid American Corp*, 448 Mich 178, 184 (1995). If the defendant actually receives service of process within the life of the summons, the fact that the manner of service was improper is not grounds for

[24] See Section 3.10 on summary disposition.

dismissal. MCR 2.105(J)(3); *Hill*, 155 Mich App at 613. See also *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669 (1987) (dismissal was not warranted where the defendant was properly served, but under an incorrect name). It is only where there is a failure of service of process that dismissal is warranted. *Holliday v Townley*, 189 Mich App 424, 425-426 (1991).

MCR 2.116(I)(3) does not require a jury trial to determine whether service of process was sufficient. *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 283 (2007). MCR 2.116(I)(3) permits the court to order an immediate trial for summary motions based on MCR 2.116(C)(1)-(6), (7). Where a jury trial has been demanded, and the summary motion is based on MCR 2.116(C)(7), the court must allow a jury trial on issues that include "a right to trial by jury." MCR 2.116(I)(3).

MCR 2.116(D)(1) "provides that a defendant waives the ability to object to service of process under MCR 2.116(C)(3) unless the objection is raised in the defendant's first motion or responsive pleading[.]" *Al-Shimmari*, 477 Mich at 291-293, overruling *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178 (1993), to the extent that *Penny* conflicts with MCR 2.116(D)(1). A general appearance does not waive a challenge to the sufficiency of service of process under MCR 2.116(C)(3). *Al-Shimmari, supra* at 293.

B. Service of Pleading and Other Papers

"Unless otherwise stated in this rule, every party who has filed a pleading, an appearance, or a motion must be served with a copy of every paper later filed in the action." MCR 2.107(A)(1). Except as provided in MCR 2.603, this requirement ends "after a default is entered against a party," unless the party "file[s] an appearance or a written demand for service of papers." MCR 2.107(A)(2).

Service must generally be made on the attorney for a represented party; however, the party must be served the original summons and complaint, the notice or order in contempt proceedings for disobeying a court order, all papers after entry of final judgment or final order and after the time for an appeal of right has passed,[25] and in instances where the court orders service on the party. MCR 2.107(B)(1).

All papers served to a party or a party's attorney may be served via delivery, first-class mail, or e-mail. MCR 2.107(C). Parties who choose

[25] Service must be made on the party in this circumstance "unless the rule governing the particular postjudgment procedure specifically allows service on the attorney." MCR 2.107(B)(1)(c).

to use e-mail as their manner of service must file a stipulation and comply with the requirements in MCR 2.107(C)(4).

2.11 Motion for More Definite Statement

A. Generally

The remedy for a deficient pleading is a motion for a more definite statement. MCR 2.115(A). Pursuant to MCR 2.115(A), "If a pleading is so vague or ambiguous that it fails to comply with the requirements of these rules, an opposing party may move for a more definite statement before filing a responsive pleading." The motion must point out the defects complained of and the details desired. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90 (1995). "If the motion is granted and is not obeyed within 14 days after notice of the order, or within such other time as the court may set, the court may strike the pleading to which the motion was directed or enter an order it deems just." MCR 2.115(A).

"[A] failure to move for a more definite statement is not proof that the filing was adequate to begin with." *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 216 (2013), overruled in part on other grounds 498 Mich 68, 74 (2015). "[F]ailing to move for a more definite statement *may* mean that the other party was not confused, but it may also mean that the other party was so confused that it was not aware that it was confused." *Id*.

B. Timing

A motion for a more definite statement must be filed before the responsive pleading. *Hofmann*, 211 Mich App at 90. The motion comes too late if made after answering the complaint. MCR 2.115(A); *Hofmann*, *supra* at 90. As a motion that raises a defense or an objection to a pleading, it must be filed and served within the time for filing a responsive pleading. MCR 2.108(B). If no responsive pleading is required, the motion must be filed and served within 21 days after service of the pleading to which it is directed. MCR 2.108(B).

C. Standard of Review

A trial court's decision whether to grant a motion for a more definite statement is reviewed for an abuse of discretion. *Woods v SLB Prop Mgt*, 277 Mich App 622, 625 (2008).

2.12 Motion to Strike

A. Generally

"On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules." MCR 2.115(B).

B. Timing

"[A] motion to strike should be allowed at any reasonable time." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 471 (2003). Generally, MCR 2.108(B) limits the time for filing a motion in response to a pleading to within the time limits for filing a responsive pleading or within 21 days of being served with a pleading that requires no response. However, "the time limit imposed under MCR 2.108(B) should not be interpreted to control motions under MCR 2.115(B)." *Belle Isle*, *supra* at 471.

C. Standard of Review

A trial court's decision regarding a motion to strike a pleading, is reviewed for an abuse of discretion. *Jordan v Jarvis*, 200 Mich App 445, 452 (1993).

2.13 Amendment of Pleadings

A. Amendments of Right

Under MCL 600.2301, the court is authorized "to amend any process, pleading or proceeding." The practice of amendment is governed by court rule. A party may amend a pleading once without the consent of an opponent and without the permission of the court if the amendment is made within 14 days of being served with a responsive pleading. MCR 2.118(A)(1). If the pleading does not require a response, it must be amended within 14 days after serving it. *Id.*

B. Amendments by Consent and by Leave of Court

A pleading may be amended at any time with the written consent of the opposing parties. MCR 2.118(A)(2).

A pleading may also be amended by leave of the court. Leave to amend must be freely given when justice so requires. MCR 2.118(A)(2). In *Fyke & Sons v Gunter Co*, 390 Mich 649 (1973), the

Michigan Supreme Court discussed the former court rule, GCR 1963, 118.1, which is identical to MCR 2.118(A)(2). The Court stated that the rule is "'designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result.'" *Fyke*, *supra* at 656, quoting *United States v Hougham*, 364 US 310, 316 (1960).

Generally, a motion to amend should be granted. The motion should be denied only for particularized reasons, such as (1) undue delay, (2) bad faith, (3) dilatory motive, (4) repeated failure to cure deficiencies, (5) undue prejudice, or (6) futility. *Weymers v Khera*, 454 Mich 639, 658-660 (1997). When leave to amend is denied, the court must specify the reasons for the ruling on the record. *Franchino v Franchino*, 263 Mich App 172, 190 (2004). If the court fails to specify its reasons for denying a motion to amend, reversal is required unless amendment would be futile. *Kincaid v Flint*, ___ Mich App ___, ___ (2015).

"The fact that an amended complaint would present issues at odds with [a] trial court's decision does not appear to be an accepted particularized reason[]" for denying a motion to amend a complaint under MCR 2.118(A). *Kincaid*, ___ Mich App at ___ (citations omitted).

Inexcusable (or undue) delay, by itself, is not sufficient to deny a motion to amend. *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 321 (1993). In *Stanke*, the Court stated that "there must always be some delay associated with an amendment of a pleading." *Stanke*, *supra* at 321. Leave to amend should be granted unless the delay occurred as a result of bad faith or created actual prejudice. *Id.* The proper remedy for inexcusable delay is to impose sanctions under MCR 2.118(A)(3). *Stanke*, *supra* at 321.

"'Prejudice' refers to matter[s] which would prevent a party from having a fair trial, or matter[s] which he [or she] could not properly contest, e.g. when surprised. It does not refer to the effect on the result of the trial otherwise." *Fyke*, 390 Mich at 657. See also *Franchino*, 263 Mich App at 191-192 (where the plaintiff was denied his third application to amend when its contents would have unjustifiably surprised the defendant so close to trial), and *Weymers*, 454 Mich at 659.

"An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Tolbert v US Truck Co*, 179 Mich App 471, 473 (1989), citing *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 783 (1988).

C. Amendments Must Be Submitted in Writing

Proposed amendments to a pleading must be submitted in writing. MCR 2.118(A)(4); *Anton, Sowerby & Assoc, Inc v Mr. C's Lake Orion, LLC*, 309 Mich App 535, 551 (2015).

The trial court did not abuse its discretion by denying the plaintiff's motion to amend its complaint where the plaintiff sought to add the receiver as a party defendant after summary disposition was granted pursuant to MCR 2.116(C)(10) because the plaintiff, in its motion to amend, only "cursorily discussed the contents of its claim against the receiver[.]" *Anton, Sowerby & Assoc, Inc.*, 309 Mich App at 551 (holding that "[i]f a plaintiff does not present its proposed amended complaint to the court, there is no way to determine whether amendment is justified[,]" and finding no abuse of discretion "[a]bsent the submission of the proposed complaint or a clear statement of claim[]").

D. Amendment After Summary Judgment

"Where a summary judgment has been entered against a party he can only amend his complaint by leave of the court." *Steele v Cold Heading Co*, 125 Mich App 199, 203 (1983). However, where summary disposition is granted pursuant to MCR 2.116(C)(8), (C)(9), or (C)(10), "the opportunity for the nonprevailing party to amend its pleadings pursuant to MCR 2.118 should be freely granted, unless the amendment would not be justified. An amendment, however, would not be justified if it would be futile." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53 (2004), citing *Weymers*, 454 Mich at 658. See also MCR 2.116(I)(5).

E. Amendments to Conform to Evidence

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings." MCR 2.118(C)(1) .

Where evidence is objected to at trial because it concerns issues not raised in the pleadings, an amendment of the pleadings to conform to the offered proof may be permitted under MCR 2.118(C)(2). However, an amendment must not be allowed "unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits." MCR 2.118(C)(2). See also *Dacon v Transue*, 441 Mich 315, 328 (1992). Prejudice may be reduced by granting an adjournment to a party surprised by the attempt to introduce issues not raised in the pleadings. See MCR 2.118(C)(2). An adjournment is not required under MCR 2.118(C)(2).

F. The "Relation-Back" Rule

Generally, amendments to pleadings relate back to the date of the original pleading "if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. "In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit." MCR 2.118(D). Amended pleadings can introduce new facts, theories, or causes of action, as long as the amendment arises from the same transactional setting that was set forth in the original pleading. *LaBar v Cooper*, 376 Mich 401, 406 (1965).

The relation-back rule is used to determine whether the statute of limitations has run if the complaint is amended. See *LaBar*, 376 Mich at 406. The relation-back rule does not apply to a contractual limitations period. *Ulrich v Farm Bureau Ins*, 288 Mich App 310, 322 (2010). In *Ulrich*, the plaintiff amended her complaint to include an uninsured motorist claim, which was considered untimely under her insurance policy. *Ulrich*, *supra* at 312-314. The Court concluded that a claim for uninsured motorist benefits is governed by the insurance policy, a contract. *Id.* at 322. Thus, "to apply the relation-back doctrine in this context would be inconsistent with the principle of applying private contracts in accordance with their terms as stated in unambiguous language." *Id.* For purposes of a statute of limitations, an action is commenced when the complaint is filed. *Scarsella v Pollak*, 461 Mich 547, 549 (2000).

The relation-back doctrine expressly applies to an amendment that adds a claim or defense arising from the same circumstances described in the original complaint; the relation-back doctrine does not apply to an amendment that adds a party to the complaint. *Miller v Chapman Contracting*, 477 Mich 102, 107 (2007). "MCR 2.118(D) specifies that an amendment relates back to the date of the original pleading only if it 'adds a claim or a defense'; it does not specify that an amendment to add a new party also relates back to the date of the original pleading." *Miller*, *supra* at 107. However, the doctrine may apply to a closely connected new party where no one is detrimentally misled. See *Arnold v Schecter*, 58 Mich App 680, 683-684 (1975) (where the plaintiff misnamed the defendant as corporate officers rather than the actual corporation in her complaint and (1) served the proper representative of the corporation at the corporation's legal address, (2) the officers and corporation were in the same business and represented by the same law firm, and (3) the officers were informed of the fact that the plaintiff intended to sue the corporation, the trial court improperly denied the plaintiff's request to amend). See also *Estate of Tice v Tice*, 288 Mich App 665, 670 (2010), where the Court of Appeals concluded that the relation-back doctrine applies to an

amended complaint where "a plaintiff has brought an action in the wrong capacity . . . if the original plaintiff had an interest in the subject matter of the controversy." In *Estate of Tice*, the original plaintiff was the decedent's heir who filed a complaint in his own name and subsequently amended the complaint so that the named plaintiff was the decedent's estate. *Estate of Tice*, *supra* at 667. The Court concluded that "the estate should have been allowed to take advantage of the original filing because [the original plaintiff], as [the decedent's] heir, had an interest in the subject matter of the controversy." *Id.* at 671.

G. Standard of Review

A trial court's decision whether to allow amendments to pleadings is reviewed for an abuse of discretion. *Ormsby*, 471 Mich at 53.

H. Response to Amendments

If a party is served with a proper amended pleading of a type requiring a responsive pleading, the party has two choices: (1) serve and file a pleading in response to the amended pleading; or (2) serve and file a notice that the pleading filed in response to the pre-amendment pleading will also stand as a response to the amended pleading. MCR 2.118(B).

2.14 Third Party Practice

A. Generally

Both a defendant and a plaintiff may serve a complaint against a third party (implead) who may be liable to the complainant for a claim asserted against the complainant. MCR 2.204(A) and (B). A court should be liberal in exercising its discretion to join third parties, weighing factors such as the probability of delay, complications of the trial, timeliness of the motion, similarity of the evidence, and possibility of prejudice. *Caldwell v Fox*, 394 Mich 401, 415 (1975).

B. Timing

Leave is not required to serve a third-party's complaint if it is filed within 21 days after the third-party plaintiff's original answer was filed. MCR 2.204(A)(1). After 21 days, leave on motion is required. MCR 2.204(A)(1).

C. Standard of Review

A trial court's decision regarding whether to grant or deny a motion to file a third-party complaint is reviewed for an abuse of discretion. *Morris v Allstate Ins Co*, 230 Mich App 361, 368 (1998).

2.15 Intervention

Intervention is the act of a third party who attempts to become a party in a lawsuit that is already pending between others. *Hill v L F Transportation, Inc*, 277 Mich App 500, 508 (2008).

A. Intervention of Right

A person has the right to intervene in an action by filing a timely application, when:

> (1) a Michigan statute or court rule provides an unconditional right to intervene;
>
> (2) all parties stipulate to the intervention; or
>
> (3) the applicant claims an interest in the property or transaction which is the subject of the action, and without intervention, the applicant may not be able to adequately protect his or her interest, unless the applicant's interest is adequately represented by existing parties. MCR 2.209(A).

B. Permissive Intervention

A person may intervene in an action by filing a timely application, when:

> (1) a Michigan statute or court rule provides a conditional right to intervene; or
>
> (2) when an applicant's claim or defense and the main action share a common question of law or fact. MCR 2.209(B).

"In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." MCR 2.209(B)(2).

C. Timing

A right to intervene should be asserted within a reasonable time. *D'Agostini v City of Roseville*, 396 Mich 185, 188 (1976). "Laches or unreasonable delay by the intervenors is a proper reason to deny intervention." *D'Agostini*, *supra* at 188.

To be considered a timely application for permissive intervention, the application must be made before an adjudication of the case on the merits. *Dean v Dep't of Corrections*, 208 Mich App 144, 152 (1994).

D. Decision and Effect

MCR 2.209 should be liberally construed to allow intervention in situations where the intervenor's interests may not be adequately represented. *Neal v Neal*, 219 Mich App 490, 492 (1996). It may not be proper in cases "where it will have the effect of delaying the action or producing a multifariousness of parties and causes of action." *Precision Pipe & Supply*, *Inc v Meram Constr*, *Inc*, 195 Mich App 153, 157 (1992).

It is within the trial court's discretion to determine whether a motion to intervene *as of right* is timely when the moving party had knowledge of the action, and the motion was not filed until after the circuit court issued its decision. *Davenport v Grosse Pointe Farms Zoning Bd*, 210 Mich App 400, 408 (1995).

Once permitted to intervene, either as of right or by leave, the intervenor becomes a party and is bound by the judgment. *BCBSM v Eaton Rapids Community Hosp*, 221 Mich App 301, 307 (1997).

E. Costs

A party who intervenes in an action as a plaintiff hoping to recover damages from the defendant, but who does not actively participate in the prosecution of the action, is a party in interest for the limited purposes of recovering damages from the defendant and subjecting itself to the taxation of costs in the defendant's favor, where the defendant is the prevailing party in the action. See *BCBSM*, 221 Mich App at 309-312, and MCR 2.625(A).

F. Standard of Review

A trial court's decision to grant or deny a motion to intervene is reviewed for an abuse of discretion. *Hill*, 277 Mich App at 507.

2.16 Res Judicata and Collateral Estoppel

A. Definitions

The concepts of res judicata and collateral estoppel are designed to prevent the relitigation of claims that have already been litigated or that should have been litigated in a prior case. See, generally, *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485 (2004). The terms res judicata and collateral estoppel are often used without distinction. *Topps-Toeller, Inc v Lansing*, 47 Mich App 720, 726 (1973). The *Topps-Toeller* Court defined the two theories:

- Res judicata "bars the reinstitution of the same cause of action by the same parties in a subsequent suit." *Topps-Toeller*, *supra* at 727.

- Collateral estoppel "bars the relitigation of issues previously decided when such issues are raised in a subsequent suit by the same parties based upon a different cause of action." *Id*.

The above "two principles fulfill the judicial policy of providing the parties with a *final* decision upon litigated questions." *Id*.

B. Prerequisites for Applying Res Judicata

"There are three prerequisites to the application of the res judicata doctrine: (1) there must have been a prior decision on the merits; (2) the issues must have been resolved in the first action, either because they were actually litigated or because they might have been presented in the first action; and (3) both actions must be between the same parties or their privies. . . . Michigan courts apply the res judicata doctrine broadly so as to bar claims that were actually litigated as well as claims arising out of the same transaction which a plaintiff could have brought, but did not." *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 464 (1988) (internal citations omitted). The same transaction test for res judicata is "'whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit[.]'" *Marketplace of Rochester Hills Parcel B, LLC v Comerica Bank*, ___ Mich ___, ___ (2015), quoting *Adair v Michigan*, 470 Mich 105, 125 (2004) (additional citation and quotation omitted).

A party may not unilaterally elect to present only a portion of its case at trial and, at the same time, reserve its right to litigate the remaining portion at a separate proceeding in the future. "Unlike collateral estoppel, which bars relitigation of only those issues actually decided, res judicata bars relitigation of claims . . . actually litigated and those claims arising out of the same transaction that could have been

litigated, but were not." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 92 (1995). Where a plaintiff was able to file a supplemental complaint under MCR 2.203(A), but did not, res judicata prevents him or her from relying on any of those facts which could have been brought in the supplemental complaint. *Buck v Thomas M Cooley Law School*, 597 F3d 812, 817-818 (CA 6, 2010).

The burden of proving the application of res judicata is on the party asserting it. *Baraga Co v State Tax Comm'n*, 466 Mich 264, 269 (2002), citing *Sloan v Madison Hts*, 425 Mich 288, 295 (1986).

The defense of a prior judgment, or res judicata, must be raised in the party's first responsive pleading, unless the defense is stated in a motion filed under MCR 2.116 before the party's first responsive pleading. MCR 2.116(D)(2). However, "MCR 2.116(D)(2) does not foreclose a party from adding a defense in an amended responsive pleading." *Leite v Dow Chem Co*, 439 Mich 920 (1992).

A plaintiff may assert res judicata as a ground for judgment against a defendant. *Marketplace of Rochester Hills Parcel B, LLC v Comerica Bank*, 309 Mich App 579, 588-589 (2015), vacated in part on other grounds ___ Mich ___, ___ (2015). Although "[p]arties typically use the doctrine of res judicata as a shield rather than as a sword[,] . . . nothing precludes a plaintiff from asserting res judicata as a ground for judgment if the plaintiff has asserted a ripe claim." *Id.* (holding that the trial court erred by "determining that res judicata is a defense that . . . only [a defendant may] assert in a successive action against it by [a plaintiff]") (citations omitted).

Res judicata applies if there was a prior federal case. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575 (2001). The Michigan Supreme Court requires the application of federal law to res judicata claims when determining whether the prior federal suit bars the state action under the doctrine. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381 (1999). The federal law on determining whether the doctrine of res judicata applies can be found at *Becherer v Merrill Lynch, Pierce, Fenner, & Smith, Inc*, 193 F3d 415, 422 (CA 6, 1999). The elements include the three prerequisites that Michigan analyzes in addition to "an identity of the causes of action." *Becherer*, *supra* at 422, citing *Bittinger v Tecumseh Products Co*, 123 F3d 877, 880 (CA 6, 1997).

"The doctrine of res judicata applies to workers' compensation awards . . . ." *Banks v LAB Lansing Body Assembly*, 271 Mich App 227, 229-230 (2006).

Because an involuntary dismissal operates as an adjudication on the merits under MCR 2.504(B)(3), res judicata barred a successor personal representative of a decedent's estate from filing a complaint after the initial personal representative's complaint was dismissed

because the statute of limitations had expired. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 414 (2007).

> **Note:** MCR 2.504(B)(3) states that "[u]nless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits."

C. Prerequisites for Applying Collateral Estoppel

In order for collateral estoppel to apply, there are three general requirements:

> "(1) '[A] question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment';
>
> "(2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and
>
> "(3) 'there must be mutuality of estoppel.'" *Monat v State Farm Ins Co*, 469 Mich 679, 682-684 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3 (1988).

To satisfy mutuality of estoppel, the party attempting to estop the other party from relitigating an issue must have been a party or in privy to a party in the previous action. *Monat*, 469 Mich at 684, quoting *Lichon v American Universal Ins Co*, 435 Mich 408, 427 (1990). "A party is one who was directly interested in the subject matter, and had a right to defend or to control the proceedings and to appeal from the judgment, while a privy is one who, after the judgment, has an interest in the matter affected by the judgment through one of the parties, as by inheritance, succession, purchase." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 529-530 (2014). However, "the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit." *Monat*, 469 Mich at 691-692.

Crossover estoppel, which precludes a party from raising an issue in a civil proceeding after it has been raised in a criminal proceeding, and vice versa, is permissible. *People v Gates*, 434 Mich 146, 155-157 (1990); *Barrow v Pritchard*, 235 Mich App 478, 481 (1999). For example, crossover estoppel precludes a complainant from raising a legal malpractice claim in a civil forum after raising and failing to establish an ineffective assistance of counsel claim in a criminal forum against

the same attorney. *Barrow*, *supra* at 483-485. However, the Michigan Supreme Court stated that it "must hesitate to apply collateral estoppel in the reverse situation—when the government seeks to apply collateral estoppel to preclude a *criminal* defendant's claim of ineffective assistance of counsel in light of a prior *civil* judgment that defense counsel did not commit malpractice." *People v Trakhtenberg*, 493 Mich 38, 48 (2012). In *Trakhtenberg*, *supra* at 50-51, the Court determined that collateral estoppel could not be applied to preclude review of the criminal defendant's claim of ineffective assistance of counsel when a prior civil judgment held that defense counsel's performance did not amount to malpractice, because it did not provide the defendant a full and fair opportunity to litigate the ineffective assistance of counsel claim. Indeed, "collateral estoppel 'must be applied so as to strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a *full and fair* adjudication of the issues involved in their claims.'" *Id*. at 50, quoting *Storey v Meijer*, *Inc*, 431 Mich 368, 372 (1988).

Collateral estoppel may not apply to consent judgments. *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 102-103 (1985).

"Collateral estoppel applies to administrative proceedings if the determination was adjudicatory in nature, allowed for an appeal, and the Legislature intended that the decision would be final if no appeal was taken." *Holton v Ward*, 303 Mich App 718, 731-32 (2014). "An administrative agency's decision is conclusive of the rights of the parties, or their privies, in all other actions or suits in the same or any other tribunal of concurrent jurisdiction on the points and matters in issue in the first proceeding." *Id*. at 732 (internal citations and quotations omitted).

"A question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for determination, and thereafter determined." *VanDeventer*, 172 Mich App at 463, citing *Cogan v Cogan*, 149 Mich App 375, 379 (1986).

D. Standard of Review

The application of res judicata is a question of law that is reviewed de novo. *Stoudemire v Stoudemire*, 248 Mich App 325, 332 (2001).

The application of collateral estoppel is a question of law that is reviewed de novo. *Barrow*, 235 Mich App at 480.

Chapter 3: Pretrial Procedures

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3.1 Motions

A. Form

To apply for an order from the trial court, the request must be made by motion. "Unless made during a hearing or trial, a motion must

> "(a) be in writing,
>
> "(b) state with particularity the grounds and authority on which it is based,
>
> "(c) state the relief or order sought, and
>
> "(d) be signed by the party or attorney as provided in MCR 2.114." MCR 2.119(A)(1).

If a contested motion is filed after a proposed order is rejected under MCR 2.119, the party must attach a copy of the rejected order and an affidavit. MCR 2.119(A)(4).

A brief is required if the motion or response presents an issue of law. MCR 2.119(A)(2). The maximum length of the motion and brief combined is limited to 20 pages. *Id.* However, the court may authorize a party to submit a longer brief. *Id.* The party submitting the brief must provide a copy to the judge. *Id.*

B. Affidavit (If Required)

"If an affidavit is filed in support of or in opposition to a motion, it must:

> "(a) be made on personal knowledge;
>
> "(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> "(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit." MCR 2.119(B)(1).

An affidavit is valid if it is: "(1) a written or printed declaration or statement of facts, (2) voluntarily made, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Sherry v East Suburban Football League*, 292 Mich App 23, 31 (2011). An affidavit lacking notarization is invalid, and a trial court may refuse to consider it sua sponte or on motion by a party. *Sherry*, *supra* at 31.

All papers or parts of papers that are referred to in the affidavit must be attached to the affidavit as sworn or certified copies, unless the papers or copies:

> "(a) have already been filed in the action;
>
> "(b) are matters of public record in the county in which the action is pending;
>
> "(c) are in the possession of the adverse party, and this fact is stated in the affidavit or motion; or
>
> "(d) are of such nature that attaching them would be unreasonable or impracticable, and this fact and the reasons are stated in the affidavit or the motion." MCR 2.119(B)(2).

C. Notice

Unless the court rules or the trial court (for good cause) state otherwise, a written motion, notice of hearing, and brief must be served as follows:

> (a) at least 9 days before the time set for hearing if mailed.
>
> (b) at least 7 days before the time set for hearing if delivered. MCR 2.119(C)(1).

Unless the court rules or the trial court (for good cause) state otherwise, the response and accompanying brief and affidavits must be served as follows:

> (a) at least 5 days before the hearing if mailed.
>
> (b) at least 3 days before the hearing if delivered. MCR 2.119(C)(2).

The court may set different times for serving a motion or a response. MCR 2.119(C)(3). "[I]ts authorization must be endorsed in writing on the face of the notice of hearing or made by separate order." *Id.*

D. Uncontested Orders

A party may serve the opposing party with a proposed order and a request to stipulate. MCR 2.119(D)(1). Within 7 days of being served, the other party may stipulate to the entry of the proposed order or waive notice and hearing. MCR 2.119(D)(2). If neither action is taken within 7 days of being served, the order is considered rejected. *Id.* However, if the party stipulates or waives notice and hearing, the

court may either enter the order or require a hearing on the motion. MCR 2.119(D)(3). The moving party must serve a copy of the stipulated order to the opposing party or notify any parties entitled to notice under MCR 2.107 that the court requires a hearing on the motion. MCR 2.119(D)(4).

E. Contested Motions

The court should set contested motions for hearing at a designated time. MCR 2.119(E)(1). The court has authority to reset the time for hearing. *Id.*

When a motion is based on facts not in the record, it may be heard on affidavits presented by the parties or on oral testimony or deposition. MCR 2.119(E)(2). "[T]he trial court itself is best equipped to decide whether the positions of the parties (as defined by the motion and response, as well as by the background of the litigation) mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process." *Williams v Williams*, 214 Mich App 391, 399 (1995).

The court may also eliminate or limit oral arguments on motions and order briefs in support of and in opposition to the motion. MCR 2.119(E)(3).

Appearances by the moving party and nonmoving party are required pursuant to MCR 2.119(E)(4)(b). The moving party must appear unless excused by the court. *Id.* The nonmoving party must either appear at the hearing, or file a concise statement of reasons why he or she rejected the proposed order before the hearing. MCR 2.119(E)(4)(a)(i)-(ii).

"If a party violates the provisions of [MCR 2.119(E)(4)(a) or (b)], the court shall assess costs against the offending party, that party's attorney, or both, equal to the expenses reasonably incurred by the opposing party in appearing at the hearing, including reasonable attorney fees, unless the circumstances make an award of expenses unjust." MCR 2.119(E)(4)(c). The moving party may also be penalized by a fine not to exceed $100 for failing to appear at a hearing on a motion. MCR 2.119(E)(4)(b).

F. Decision

When possible, all decisions should be made from the bench or within a few days of submission. MCR 8.107(A). In all other cases, a decision should be rendered no later than 35 days after submission. MCR 8.107(A). Matters not decided within 56 days of submission must be identified on the quarterly "Report as to Matters Undecided." MCR

8.107(B). The quarterly report may also be referred to as "Delay in Matters Submitted to Judge."

G. Entry of Order

Except as otherwise provided, "all judgments and orders must be in writing, signed by the court and dated with the date they are signed."[1] MCR 2.602(A)(1). The date the judgment or order is signed is the date of entry. MCR 2.602(A)(2).

Immediately before the judge's signature, the judgment must state "whether it resolves the last pending claim and closes the case." MCR 2.602(A). "Such a statement must also appear on any other order that disposes of the last pending claim and closes the case." *Id.*

The court must enter an order using one of the following methods:

- The court may sign the judgment or order when the relief in the order or judgment is granted. MCR 2.602(B)(1).

- The court must sign the judgment or order when all parties approve of its form and as long as it is consistent with the court's decision. MCR 2.602(B)(2). For approval of an order's form, "the parties must agree regarding the order's structure or, if relevant, any procedure that it may establish for the disposition of the matter before the court." *In re Leete Estate*, 290 Mich App 647, 657 (2010).

- The court must sign a properly submitted proposed order if no written objections have been filed within 7 days after service of notice, and the judgment or order is consistent with the court's decision. MCR 2.602(B)(3). (This is commonly referred to as the "Seven-Day Rule.")

- "A party may prepare a proposed judgment or order and notice it for settlement before the court." MCR 2.602(B)(4).

H. Standard of Review

A trial court's decision whether to omit or limit oral argument is reviewed for an abuse of discretion. *Fisher v Belcher*, 269 Mich App 247, 252 (2005).

[1] See MCR 1.109(D) for more information on signature requirements.

"The decision whether to hold an evidentiary hearing under MCR 2.119(E)(2) is reviewed for an abuse of discretion." *Williams*, 214 Mich App at 399.

3.2 Reconsideration or Rehearing

A. Requirements

A motion for reconsideration or rehearing must be filed and served 21 days after entry of order disposing of the motion (unless a more specific court rule exists and states otherwise). MCR 2.119(F)(1).

Responses and oral arguments are not permitted unless ordered by the court. MCR 2.119(F)(2).

"The moving party must demonstrate palpable error by which the court and the parties have been misled" and show that correcting the error must result in a different disposition. MCR 2.119(F)(3).

"'[R]ehearing [or reconsideration] will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur.'" *Hoffman v Barrett*, 493 Mich 964 (2013), quoting *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883).

B. Decision

"A plain reading of MCR 2.119(F) provides a right to move for rehearing or reconsideration, but it does not reveal any requirement that orders remain pending for any period." *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 660 (2012). In *Frankfurth*, *supra* at 662, the Court of Appeals found that a court's order changing venue immediately divests the transferring court of jurisdiction unless the court makes the order effective at some date other than the date the order is signed. Where no effective date is specified, the "order[] [is] effective when signed by the judge." *Id.* at 660. The Court suggested that courts "make orders changing venue effective as of some reasonable time thereafter[]" to avoid any "serious inconvenience" to the parties. *Id.* at 662.

MCR 2.119(F) does not restrict the court's discretion to hear or consider motions it has already denied. *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 722-723 (1986). The rule merely provides guidance to the court on when it may deny motions for reconsideration or rehearing. *Smith*, *supra* at 723.

Generally, a motion for rehearing or reconsideration that merely presents the same issue ruled on by the court, either expressly or by

reasonable implication, will not be granted. MCR 2.119(F)(3). However, this "rule does not categorically prevent a trial court from revisiting an issue even when the motion for reconsideration presents the same issue already ruled upon; in fact, it allows considerable discretion to correct mistakes." *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754 (2014).

"The purpose of MCR 2.119 is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties. The time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously." *Bers v Bers*, 161 Mich App 457, 462 (1987) (citation omitted).

A motion for reconsideration or rehearing tolls the period of time in which a party may file a request for case-evaluation sanctions. See MCR 2.403(O)(8)(*iii*); MCR 2.405(D)(6)(*iii*); and MCR 2.625(F)(2). See also Section 5.3(H)(2).

C. Standard of Review

A court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Kokx v Bylenga*, 241 Mich App 655, 658-659 (2000). "[MCR 2.119(F)] allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx*, *supra* at 659. The court also has discretion to limit its reconsideration to the issue it believes warrants further consideration. *Id.* at 658-659.

3.3 Security for Costs

A. Basis

On motion of a party who is defending a civil claim, the court may order security for costs. MCR 2.109(A). The court on its own may also require security. *Zapalski v Benton*, 178 Mich App 398, 404 (1989). Whether to require security is discretionary and requires a substantial reason. *In re Surety Bond for Costs*, 226 Mich App 321, 331 (1997). "A 'substantial reason' for requiring security may exist where there is a 'tenuous legal theory of liability,' or where there is good reason to believe that a party's allegations are 'groundless and unwarranted.'" *In re Surety Bond for Costs*, *supra* at 331-332, quoting *Hall v Harmony Hills Recreation*, *Inc*, 186 Mich App 265, 270 (1990).

B. Timing

MCR 2.109 does not contain an express time limitation for requesting security for costs. Nevertheless, the parties should apply for security as early as practicable. *Hall*, 186 Mich App at 269. A party's delay in bringing a motion for security presumably would permit a trial court to consider laches in the exercise of its discretion whether to grant the requested relief. *Goodenough v Burton*, 146 Mich 50, 52 (1906).

C. Hearing

The trial court is not required to conduct an evidentiary hearing to set a surety bond. *Dunn v Emergency Physicians Med Grp*, *PC*, 189 Mich App 519, 523 (1991). A trial judge may set the bond in light of his or her own experience. *Belfiori v Allis-Chalmers*, *Inc*, 107 Mich App 595, 601 (1981).

D. Exceptions

MCR 2.109(B) provides several exceptions. For example, if the party's pleading states a legitimate claim, financial inability is a basis for proceeding without security. *West v Roberts*, 214 Mich App 252, 254 (1995), rev'd 454 Mich 879 (1997) (where insufficient proof of insolvency offered); MCR 2.109(B)(1). This does not necessarily require a party to be indigent. *Hall*, 186 Mich App at 272. In addition, various government entities and employees are exempt from supplying security for costs. MCR 2.109(B)(2).

Courts may consider the party's "likelihood of success" on a legal theory in determining the legitimacy of a claim. *In re Surety Bond for Costs*, 226 Mich App at 333. The "'legitimacy of the claim will [not] always be determinative. The rule clearly allows for sound trial court discretion. We can imagine few cases, however, where a discreet trial court will require an indigent plaintiff, pleading a valid theory of liability, to post security.'" *Hall*, 186 Mich App at 272, quoting *Gaffier v St Johns Hosp*, 68 Mich App 474, 478 (1976).

E. Sanction

After giving a reasonable opportunity to comply with the order requiring security, the court may dismiss the claim. *In re Surety Bond for Costs*, 226 Mich App at 332.

F. Standard of Review

A trial court's decision whether to require a security bond is reviewed for an abuse of discretion. *In re Surety Bond for Costs*, 226 Mich App at

331. "Security should not be required unless there is a substantial reason for doing so. A 'substantial reason' for requiring security may exist where there is a 'tenuous legal theory of liability,' or where there is good reason to believe that a party's allegations are 'groundless and unwarranted.'" *In re Surety Bond for Costs*, *supra* at 331-332.

The trial court's decisions regarding the legitimacy of a claim and a party's financial ability to post bond are reviewed for clear error. *In re Surety Bond for Costs*, 226 Mich App at 333.

3.4 Separate or Joint Trial

A. Court's Discretion

MCR 2.505 provides the court with discretion in deciding whether to consolidate or sever trials:

> "**(A) Consolidation.** When actions involving a substantial and controlling common question of law or fact are pending before the court, it may
>
> > "(1) order a joint hearing or trial of any or all the matters in issue in the actions;
> >
> > "(2) order the actions consolidated; and
> >
> > "(3) enter orders concerning the proceedings to avoid unnecessary costs or delay.
>
> "**(B) Separate Trials.** For convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, the court may order a separate trial of one or more claims, cross-claims, counterclaims, third-party claims, or issues."

"Consolidation should not be ordered if the substantial rights of a party would be adversely affected or if juror confusion would result." *Bordeaux v The Celotex Corp*, 203 Mich App 158, 163-164 (1993). "The decision to sever trials is within the trial judge's discretion and should be ordered only upon a most persuasive showing." *Hodgins v Times Herald Co*, 169 Mich App 245, 261 (1988).

The court rule does not prescribe time requirements.

Consolidating multiple cases for trial does not merge the cases into a single case for purposes of filing a timely appeal. *Chen v Wayne State Univ*, 284 Mich App 172, 194 (2009). In *Chen*, the plaintiff brought separate complaints against the defendant in both the circuit court and the Court of Claims, and the two cases were consolidated. *Chen*,

supra at 193. The plaintiff attempted to file a single appeal for both cases, but the time to file an appeal in the Court of Claims case had expired. *Id.* at 193-194. The Court concluded that the Court of Claims appeal had to be dismissed as untimely "[b]ecause the cases retained their separate identities, [and] the time for appeal must be determined by reference to the final judgment or order for the individual cases." *Id.* at 199. "[MCR 7.202(6)(a)] specifically defines the final judgment or order for a 'civil case'—that is, the definition of final judgment or order refers to the final judgment or order in a *single* case. [Citation omitted.] Consequently, MCR 7.202(6)(a) cannot be understood to require consolidated cases to be treated as a single case for purposes of determining the timeliness of appeals." *Chen*, *supra* at 194.

B. Standard of Review

A trial court's decision regarding consolidation is reviewed for an abuse of discretion. *Bordeaux*, 203 Mich App at 163-164.

3.5 Substitution or Withdrawal of Attorney

A. Order Required

The court should permit the withdrawal or substitution of counsel only with a stipulation and order or after a hearing on a motion to withdraw is served on the client. "An attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court." MCR 2.117(C)(2). See also *Coble v Green*, 271 Mich App 382, 386 (2006).

Where the court has ordered an attorney to continue representing a client, the attorney must continue with the representation even if good cause exists for terminating the representation. MRPC 1.16(c).

B. Standard of Review

A trial court's decision regarding a motion to withdraw is reviewed for an abuse of discretion. *In re Withdrawal of Attorney (Cain v Dep't of Corrections)*, 234 Mich App 421, 431 (1999).

3.6 Adjournments

A. Applicability

Trials, alternative dispute resolution processes, pretrial conferences, and all motion hearings may be adjourned pursuant to MCR 2.503(A).

B. Requirements

A request for an adjournment must be by motion or stipulation, in writing or on the record, and based on good cause. MCR 2.503(B). The request must include:

> (1) Which party is requesting the adjournment. MCR 2.503(B)(2)(a).
>
> (2) The reason for an adjournment. MCR 2.503(B)(2)(b).
>
> (3) Whether other adjournments have been granted and, if so, how many. MCR 2.503(B)(2)(c).
>
> (4) A caption that specifies whether it is the first or a subsequent request. MCR 2.503(B)(3).

Unavailability of a witness or evidence may be the basis for requesting an adjournment. MCR 2.503(C). According to MCR 2.503(C):

> (1) The request must be made as soon as possible after knowledge. MCR 2.503(C)(1).
>
> (2) The court must find:
>
> - The evidence is material, and
> - The party made diligent efforts in attempting to produce the witness or evidence. MCR 2.503(C)(2).
>
> (3) If the adverse party stipulates in writing or on the record to the evidence and the evidence would be admissible, an adjournment is not required. MCR 2.503(C)(3).

C. Order

The court may grant an adjournment to promote the cause of justice. MCR 2.503(D) requires the order to be in writing or on the record and to state the reason for granting the request. MCR 2.503(D)(1). The court may impose costs and conditions. MCR 2.503(D)(2). An adjournment may be vacated if nonpayment is shown by affidavit. *Id.*

The withdrawal of counsel does not give a party the absolute right to a continuance because the decision whether to grant the continuance is discretionary. *Bye v Ferguson*, 138 Mich App 196, 207 (1984). However, in *Bye*, the failure to grant the adjournment was an abuse of discretion because the defendant did not have notice of his attorney's

withdrawal or an opportunity to obtain a new attorney. *Bye*, *supra* at 207-208.

D. Reschedule

The court must either reschedule the adjourned matter for a specific date or "place the matter on a specified list of actions or other matters which will automatically reappear before the court on the first available date." MCR 2.503(E)(1)-(2).

E. Conflict With Another Court

If a conflict with another court exists with regard to scheduled trial dates, it is the attorney's responsibility to notify the court. MCR 2.501(D)(2). If the parties or their attorneys cannot resolve the conflict by consulting with the individual courts, "the judges shall consult directly to resolve the conflict." *Id*. Except where statute, court rule, or special circumstances dictate otherwise, priority is given to the trial set first. MCR 2.501(D)(3).

F. Standard of Review

The decision whether to grant a continuance or an adjournment is reviewed for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32 (1996). The court "may grant an adjournment to promote the cause of justice." *Zerillo v Dyksterhouse*, 191 Mich App 228, 230 (1991).

3.7 Dismissal

A. Generally

Dismissal of the case may occur in the following circumstances:

- Failure to serve the defendant before the expiration of the summons, MCR 2.102(E)(1) and MCR 2.504(E);
- Lack of progress based on failure to take action for more than 91 days "unless the parties show that progress is being made or that the lack of progress is not attributable to the party seeking affirmative relief," MCR 2.502(A)(1);
- Notice of dismissal filed before the adverse party serves an answer or a motion for summary disposition, or by stipulation of the parties, MCR 2.504(A)(1);

- Failure to comply with the court rules or a court order, MCR 2.504(B)(1); or

- The plaintiff has shown no right to relief at the close of his or her proofs in a bench trial, MCR 2.504(B)(2).

B. Dismissal for Failure to Serve

If a defendant is not served before the expiration of the summons, the action is deemed dismissed without prejudice as to that defendant, unless the defendant has submitted to the court's jurisdiction. MCR 2.102(E)(1) and MCR 2.504(E). See also *Hyslop v Wojjusik*, 252 Mich App 500, 510 (2002).

The court may set aside the dismissal on the stipulation of the parties or a motion as provided by MCR 2.102(F). The motion must be filed within 28 days after notice of the order of dismissal was given, or if notice was not given, promptly upon learning of the dismissal. MCR 2.102(F)(3). In addition, the moving party must establish that proof of service was in fact made or the defendant submitted to the court's jurisdiction, MCR 2.102(F)(1), and that "proof of service of process was filed or the failure to file [was] excused for good cause shown." MCR 2.102(F)(2).[2]

C. Dismissal for Lack of Progress

On a party's motion or sua sponte, a case may be dismissed for lack of progress if it appears that no steps have been taken or no proceedings have occurred within 91 days "unless the parties show that progress is being made or that the lack of progress is not attributable to the party seeking affirmative relief." MCR 2.502(A)(1). However, a notice of proposed dismissal may not be sent if:

- a scheduling order has been entered under MCR 2.401(B)(2), and the time for completing the scheduled events has not expired, or

- the case is set for a conference, an alternative dispute resolution process, a hearing, or trial. MCR 2.502(A)(2)(a)-(b).

If no showing of progress is made, the court may direct the clerk to dismiss the action for lack of progress. MCR 2.502(B)(1). The dismissal is without prejudice, unless the court orders otherwise. MCR 2.502(B)(1).

[2] See Section 2.9 on summons and Section 2.10 on service of process.

An action dismissed for lack of progress may be reinstated on motion for good cause. MCR 2.502(C). In determining whether good cause exists, a court may find one or more of the following factors relevant:

- whether the dismissal was technically or procedurally inappropriate,
- whether the movant was diligent during the pendency of the original action,
- whether the failure to make progress was justified,
- whether the movant was diligent in attempting to settle or promptly reinstate the case, and
- whether there is possible prejudice to the nonmovant if the action were to be reinstated. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 142 (2000).

> **Note:** This list is not exhaustive, and it does not preclude the analysis of any other relevant factors that may exist in a particular case. *Wickings*, *supra* at 142 n 28.

"On reinstating an action, the court shall enter orders to facilitate the prompt and just disposition of the action." MCR 2.502(C).

D. Voluntary Dismissal

Without court order. In most cases, the plaintiff may dismiss an action without a court order and upon payment of costs by (1) filing a notice of dismissal before an opposing party serves an answer or a motion under MCR 2.116, or (2) filing a stipulation signed by every party. MCR 2.504(A)(1). Additional provisions exist in MCR 2.420 (settlements and judgments for minors and legally incapacitated individuals) and MCR 3.501(B) (class actions). The dismissal is without prejudice unless otherwise stated in the notice or stipulation. MCR 2.504(A)(1). Also, "a dismissal under [MCR 2.504(A)(1)(a)] operates as an adjudication on the merits when filed by a plaintiff who has previously dismissed an action in any court based on or including the same claim." MCR 2.504(A)(1). A dismissal with prejudice is res judicata because it is considered an adjudication on the merits. See *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417 (2007)[3].

With court order. A court order is required if the plaintiff seeks to dismiss the action after service of a responsive pleading or motion.

[3] See Section 2.16 on res judicata.

MCR 2.504(A)(2). If the defendant files a counterclaim before being served with a motion to dismiss, the court may not dismiss the action unless the counterclaim can remain pending for independent adjudication. MCR 2.504(A)(2)(a). A dismissal under MCR 2.504(A)(2) is without prejudice unless the order specifies otherwise. MCR 2.504(A)(2)(b).

E. Involuntary Dismissal as a Sanction

When a party fails to comply with the court rules or a court order, MCR 2.504(B)(1) authorizes the court, on its own initiative or on the opposing party's motion, to enter a default judgment against the noncomplying party or to dismiss the noncomplying party's claim or action.

Dismissal is a drastic sanction. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506 (1995). In deciding whether to dismiss the case, the court must "evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Vicencio*, *supra* at 506. In *Dean v Tucker*, 182 Mich App 27, 32-33 (1990), the Court referred to a nonexhaustive list of factors to consider when determining whether dismissal is an appropriate sanction:

> "(1) whether the violation was [willful] or accidental;
>
> "(2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);
>
> "(3) the prejudice to the [other party];
>
> "(4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice;
>
> "(5) whether there exists a history of [the party] engaging in deliberate delay;
>
> "(6) the degree of compliance by the [party] with other provisions of the court's order;
>
> "(7) an attempt by the [party] to timely cure the defect; and
>
> "(8) whether a lesser sanction would better serve the interests of justice."

A trial court has the authority to impose appropriate sanctions, including dismissal, in order to "contain and prevent abuses so as to ensure the orderly operation of justice." *Maldonado v Ford Motor Co*, 476 Mich 372, 375 (2006). In *Maldonado*, the plaintiff and her counsel

ignored a trial court's order suppressing "unduly prejudicial" evidence concerning the defendant's expunged criminal record and "engaged in a concerted and wide-ranging campaign . . . to publicize the details of the inadmissible evidence through the mass media and other available means." *Maldonado*, *supra* at 392. The trial court ultimately sanctioned the misconduct by dismissing the plaintiff's lawsuit after having expressly warned the plaintiff and her counsel that violation of the court's order would result in dismissal. *Id.* at 394-395. The Court stated, "The trial court has a gate-keeping obligation, when such misconduct occurs, to impose sanctions that will not only deter the misconduct but also serve as a deterrent to other litigants." *Id.* at 392.

An involuntary dismissal due to the plaintiff's failure to comply with the court rules or any court order will operate as an adjudication on the merits unless:

> (1) the order of dismissal provides otherwise,
>
> (2) the case was dismissed for lack of jurisdiction, or
>
> (3) the case was dismissed for failure to join a party under MCR 2.205. MCR 2.504(B)(3). See also *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 414 (2007).

Reasons for dismissing a case as a sanction include:

- Failure to permit discovery. MCR 2.313(B)(2)(c).
- Failure to appear at a scheduled conference or for lacking adequate information or authority to effectively participate in the conference. MCR 2.401(G).
- Failure to make progress on the case. MCR 2.502(A)(1).
- Failure to pay previously assessed fees, including attorney fees. MCR 2.504(D); *Sirrey v Danou*, 212 Mich App 159, 160-161 (1995).

F. Involuntary Dismissal in a Bench Trial

At the close of the plaintiff's evidence during an action, claim, or hearing without a jury, the court, on its own initiative, may dismiss the case, or the defendant may move for dismissal on the ground that the plaintiff has no right to relief based on the facts and law presented. MCR 2.504(B)(2). "The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence." MCR 2.504(B)(2). See also *In re ASF*, ___ Mich App ___, ___ (2015) ("Pursuant to [MCR 2.504(B)(2)], 'a motion for involuntary dismissal calls upon the trial

judge to exercise his [or her] function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences.' *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724 (1983).")

The standard on this motion is different than that for a directed verdict. In determining whether to dismiss an action under MCR 2.504(B)(2), the trial court is not "required to view the evidence in the light most favorable to [the defendant], to resolve all conflicts of evidence in his [or her] favor, or to determine whether there [is] a genuine issue of material fact." *Williamstown Twp v Hudson*, ___ Mich App ___, ___ (2015).

If the court grants a motion for involuntary dismissal, it must make the required findings under MCR 2.517. MCR 2.504(B)(2).

G. Costs

Where the plaintiff commences an action involving the same claim against the same defendant in a previously dismissed action, the court has the discretion to order the plaintiff to pay costs from that prior action and to "stay proceedings until the plaintiff has complied with the order." MCR 2.504(D).

H. Standard of Review

Questions of law pertinent to an involuntary dismissal motion based on MCR 2.504(B)(2) are reviewed de novo. *Sands Appliance Svcs v Wilson*, 231 Mich App 405, 409 (1998), rev'd on other grounds 463 Mich 231 (2000). The trial court's factual findings are reviewed for clear error. *Williamstown Twp v Hudson*, ___ Mich App ___, ___ (2015). "A trial court's findings are considered clearly erroneous where [the reviewing court] is left with a definite and firm conviction that a mistake has been made." *Id. (*quotations and citation omitted).

The decision whether to grant the plaintiff's motion for voluntary dismissal is reviewed for an abuse of discretion. *McLean v McElhaney*, 269 Mich App 196, 201 (2005).

When dismissal is used as a sanction, it is reviewed for an abuse of discretion. *Donkers v Kovach*, 277 Mich App 366, 368 (2007).

The clearly erroneous standard applies to review of a dismissal at the close of plaintiff's proofs in a bench trial. *Hoffman v Garden City Hospital-Osteopathic*, 115 Mich App 773, 779-780 (1982).

A trial court's decision whether to reinstate an action is reviewed for an abuse of discretion. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 138 (2000).

Committee Tips:

There are specific provisions in the court rules addressing reinstatement of a case when the dismissal is for failure to serve a party or for lack of progress. If the dismissal is without prejudice, at a minimum, the case can be refiled. If the dismissal is with prejudice, relief may be possible under MCR 2.603(D) (Default and Default Judgment) or MCR 2.612 (Relief From Judgment or Order).

3.8 Default and Default Judgments

A. Default

1. Purpose of Default

A party may be found in default for either failing to plead or answer, or for improper conduct (in which case, default is used as a sanction). *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87 (2000).

"These two circumstances under which a default may be entered are fundamentally different. Failing to plead or answer bespeaks an implied concession that the party is liable, or perhaps an indifference to the outcome of the litigation. In contrast, a default entered as a sanction is a means to penalize a party for failure to comply with the trial court's directives and . . . should be entered only in the most egregious circumstances." *Kalamazoo Oil Co*, *supra* at 87.

"The purpose of the default procedure is to keep the dockets current, to expedite the disposal of causes so as to prevent a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his [or her] claim." *Mason v Marsa*, 141 Mich App 38, 41 (1985).

2. Entry of Default

MCR 2.603(A)(1) governs entry of default:

> "If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party."

MCR 2.603(A)(1) has been interpreted to mean that "a party must not be defaulted if the party pleads or, as an alternative to filing a responsive pleading, otherwise defends the action." *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 388 (2011). See *Huntington Nat'l Bank*, *supra* at 389 (defendant failed to "otherwise defend" himself by filing a motion for an evidentiary hearing and stay of the proceedings and was therefore properly defaulted); *Marposs Corp v Autocorn Corp*, 183 Mich App 166, 168-170 (1990) (defendant "otherwise defend[ed]" itself under MCR 2.603(A)(1) by filing an application for leave to appeal trial court's denial of its motion for change of venue and was therefore improperly defaulted).

If the defaulted party has not appeared, notice must still be given either by personal service, ordinary first-class mail at his or her last known address or place of service, or as the court directs. MCR 2.603(A)(2).

"Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party." MCR 2.603(A)(2). The party seeking a default must send the notice and file proof of service and a copy of the notice with the court.[4] MCR 2.603(A)(2)(b).

B. Default Judgments

1. Notice of Request for Judgment

The defaulted party must be given notice of a request for default judgment if:

- the defaulted party has appeared in the action;[5]
- the judgment seeks relief different in kind or in a greater amount than the pleadings state; or

[4] In district court proceedings, the court clerk must send the notice. MCR 2.603(A)(2)(a).

- the pleadings do not demand a specific amount of damages. MCR 2.603(B)(1)(a)(*i*)-(*iii*).

- "The notice . . . must be served at least 7 days before entry of the requested default judgment." MCR 2.603(B)(1)(c).

MCR 2.113(C)(1)(d) requires a pleading's caption to identify the pleading, and where "[n]othing in [a] document['s] caption[] . . . identifie[s] that the pleading contained or was intended to be notice of [a] plaintiff's intent to request entry of a default judgment[,]" the document "cannot be considered as notice that is consistent with either the letter or the spirit of MCR 2.113(C)(1)(d)." *Brooks Williamson and Assoc, Inc v Mayflower Constr Co,* 308 Mich App 18, 28 (2014) (rejecting the claim that timely notice was provided in the text of a case evaluation summary filed by the plaintiff with the mediation tribunal and noting that the Court's "construction of [MCR 2.113(C)(1)(d)] prevents a party from concealing notice in the text of a document that might not be given close or immediate attention prior to the entry of a default judgment[]").

2. Entry of Default Judgment

By clerk. The amount that the plaintiff is seeking must be supported by an affidavit, and:

- the plaintiff's claim is for a sum certain or amount that can be certain by computation;

- the defendant was defaulted for failure to appear; the defendant is not an infant or incompetent person; and

- "the damages amount requested is not greater than the amount stated in the complaint." MCR 2.603(B)(2).

By court. The court has the authority to enter default judgments in all other cases. MCR 2.603(B)(3).

The party seeking the default judgment must file a motion requesting entry of a default judgment. MCR 2.603(B)(3).

[5]A general appearance entered by the defaulted party's agent is sufficient to trigger the notice requirement under MCR 2.603(B)(1)(a)(*i*). *Brooks Williamson and Assoc, Inc v Mayflower Constr Co*, 308 Mich App 18, 27-28 (2014) (notice was required where the defaulted party's agent entered a general appearance in the action by answering the plaintiff's request for discovery).

Effect. "Entry of a default judgment is equivalent to an admission of every well-pleaded matter in the complaint." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 554 (2015), citing *Lesisko v Stafford*, 293 Mich 479, 481 (1940).

Hearings and/or ordering references. In certain instances, it may be necessary to conduct more proceedings before the judgment may be entered. See MCR 2.603(B)(3)(b). See Section 3.8(B)(3) for information on conducting a hearing on damages in order to enter or effectuate a default judgment.

Notice. Once a default judgment is entered, the clerk must promptly mail notice of the entry of default judgment to all parties. MCR 2.603(B)(4). The clerk is required to "keep a record that notice was given." *Id.*

3. Hearings on Damages

"[A] default is merely an admission of liability and not an admission regarding the proper amount of damages." *Epps*, 498 Mich at 554. Thus, "[i]f the amount of damages is in dispute, a defaulting defendant is nonetheless entitled to a hearing, at which [the defendant] may challenge the plaintiff's alleged damages amount, if the trial court determines that a hearing is necessary." *Id.* at 555. The defaulted party has a right to participate in the proceedings on damages. *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 513 (1981).

A party's default does not automatically waive the party's right to a jury trial on the issue of damages. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 554 (2001). If the plaintiff preserved the right to a jury trial and if further proceedings are necessary to determine damages, the defaulted party has the right to a jury trial on the issue of damages. *Id.* at 554. However, with the defaulted party's consent, the moving party may ask the court to decide the damages issue. *Marshall Lasser, PC v George*, 252 Mich App 104, 106 (2002).

The default waives any affirmative defenses. *Haller v Walczak*, 347 Mich 292, 299 (1956). Presumably, this means comparative negligence would not apply to the damages proceedings. However, the trial court has discretion whether to allow evidence of comparative negligence for purposes of a damages hearing in "only those instances where default is utilized as a sanction for discovery abuses." *Kalamazoo Oil Co*, 242 Mich App at 87.

"[W]here a party's sole source of liability is vicarious, a default entered against a coparty does not preclude the former from

contesting its vicarious liability." *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 655 (2002).

The right to participate in the adjudication of the property division after a default does not apply to equitable actions, such as divorce. *Draggoo v Draggoo*, 223 Mich App 415, 427 (1997).

3.9 Setting Aside Judgments

A. Generally

Relief from an entry of default or a default judgment may be granted under either MCR 2.603(D) or MCR 2.612(C)[6]. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 234 n 7 (1999).

Unless MCR 2.612 provides otherwise, and if personal service was made on the defaulted party, a motion to set aside the default or the default judgment must be filed before the default judgment is entered or within 21 days after entry of the default judgment. MCR 2.603(D)(2)(a)-(b).

If the motion to set aside a default is not based on lack of jurisdiction over the defendant, it can be filed any time before entry of the default judgment. MCR 2.603(D)(1) and (D)(2). However, if the default judgment has been entered, the defaulted party has 21 days to move to set aside the default judgment pursuant to MCR 2.603(D)(2). A default judgment not based on lack of jurisdiction may only be set aside if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1).

B. Setting Aside Default or Default Judgment Under Michigan Court Rule 2.603(D)

Except when grounded on lack of jurisdiction or under certain circumstances involving multiple defendants,[7] a default or default judgment may be set aside only when two conditions are fulfilled:

> (1) Good cause for failure to make a timely response has been shown.

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[6] MCR 2.612(C) also allows relief from other final judgments, orders, and proceedings in certain circumstances. See Section 3.9(C).

[7] "[W]here a bill makes a joint charge against several defendants, and one of them makes default, . . . if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 555-556 (2015) (noting that the default against a defaulting party "would need to be set aside[]" as to a claim if that claim failed on the merits against the non-defaulting defendant) (quotation marks and citations omitted).

(2) An affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 95 (2003).

"[W]hen it is shown that [a] party did not receive notice of the opponent's intent to request a default judgment,[8] the requirements in MCR 2.603(D)(1) that a party must show a meritorious defense to set aside a default judgment results in a denial of the constitutional right to due process, and . . . that portion of the court rule is unenforceable as applied to a party who has not been provided adequate notice." *Brooks Williamson and Assoc, Inc v Mayflower Constr Co*, 308 Mich App 18, 36 (2014), citing *Peralta v Heights Med Ctr, Inc*, 485 US 80 (1988); *Petroff v Petroff*, 88 Mich App 18 (1979).

The "good cause" and "meritorious defense" elements of a motion to set aside a default must be considered separately. *Alken-Ziegler, Inc*, 461 Mich at 229-234.

1. Good Cause

Good cause sufficient to set aside a default means: "(1) a substantial irregularity or defect in the proceeding upon which the default is based, [or] (2) a reasonable excuse for failure to comply with the requirements that created the default." *Alken-Ziegler, Inc*, 461 Mich at 233.

Note: Prior to the decision in *Alken-Ziegler, Inc, supra*, many courts also included an analysis of "manifest injustice" when deciding if good cause existed. However, the Michigan Supreme Court stated, "'Manifest injustice' is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently." *Alken-Ziegler, Inc, supra* at 233. Instead, it is the result that would occur if a default were allowed to stand once a party has shown good cause and a meritorious defense. *Id.* Therefore, a trial court should not consider whether a manifest injustice would occur when it is analyzing whether sufficient good cause exists to set aside a default.

Examples of "substantial defect in the proceeding" include:

(1) Failing to notify the defaulted party of entry of the default. *Bradley v Fulgham*, 200 Mich App 156, 158-159 (1993).

[8] See Section 3.8(B)(1) for notice requirements when seeking entry of a default judgment.

(2) Failing to notify the defaulted party about the request for entry of a default judgment. *Perry v Perry*, 176 Mich App 762, 769-770 (1989).

(3) Failing to properly serve the opposing party. *Thomas v Thomas*, 81 Mich App 499, 501 (1978).

The Michigan Court of Appeals created a totality of the circumstances test for determining whether a party has demonstrated good cause for purposes of setting aside a default or default judgment. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 236 (2008). The trial court should consider the following factors in making this determination:

"(1) Whether the party completely failed to respond or simply missed the deadline to file;

"(2) If the party simply missed the deadline to file, how long after the deadline the filing occurred;

"(3) The duration between entry of the default judgment and the filing of the motion to set aside;

"(4) Whether there was defective process or notice;

"(5) The circumstances behind the failure to file or file timely;

"(6) Whether the failure was knowing or intentional;

"(7) The size of the judgment and the amount of costs due under MCR 2.603(D)(4);

"(8) Whether the default judgment results in an ongoing liability (as with paternity or child support); and

"(9) If an insurer is involved, whether internal policies of the company were followed." *Shawl*, *supra* at 238.

Note: This list is not intended to be exhaustive. *Id.* at 239. The trial court should only consider factors that are relevant to the case and should exercise its discretion in deciding how much weight each factor should receive. *Id.*

"[S]ervice [of process] on [a court-appointed receiver is] sufficient under MCR 2.105(H), and [a] defendant[] cannot establish good cause to set aside [a] default judgment on [the]

ground[]" that "[the] defendant[was] also entitled to be personally served[.]" *Brooks Williamson and Assoc, Inc v Mayflower Constr Co*, 308 Mich App 18, 26 (2014).

It is improper to blur the separate requirements of good cause and meritorious defense under MCR 2.603(D). *Alken-Ziegler, Inc*, 461 Mich at 229. The good cause prong of the rule cannot be satisfied, in part, by a showing of a potentially meritorious defense because MCR 2.603(D) requires a showing of good cause *and* a meritorious defense. *Alken-Ziegler, Inc, supra* at 230-234.

The provisions for setting aside a default for good cause under MCR 2.603(D) impose a less strenuous showing of reasonable excuse on the party seeking to avoid default than the "excusable neglect" ground for relief from a final judgment provided in MCR 2.612(C)(1)(a). *Komejan v Suburban Softball Inc*, 179 Mich App 41, 50 (1989).

2. Affidavit of Meritorious Defense

> **Note:** "[W]hen it is shown that [a] party did not receive notice of [an] opponent's intent to request a default judgment[as required under MCR 2.603(B)(1)], the requirement in MCR 2.603(D)(1) that a party must show a meritorious defense to set aside a default judgment results in a denial of the constitutional right to due process, and . . . that portion of the court rule is unenforceable as applied to a party who has not been provided adequate notice." *Brooks Williamson and Assoc, Inc v Mayflower Constr Co*, 308 Mich App 18, 36 (2014), citing *Peralta v Heights Med Ctr, Inc*, 485 US 80 (1988); *Petroff v Petroff*, 88 Mich App 18 (1979).

The defaulted party must file an affidavit of facts showing a meritorious defense before a default may be set aside, even if good cause exists. *Shawl*, 280 Mich App at 232. "The purpose of an affidavit of meritorious defense is to inform the trial court whether the defaulted defendant has a meritorious defense to the action." *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 392 (2011).

> "If an affidavit is filed in support of or in opposition to a motion, it must:
>
> "(a) be made on personal knowledge;

> "(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> "(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit." MCR 2.119(B).

An unsupported assertion, without any particular facts or evidence that a defendant can defend against a plaintiff's claim, does not constitute a meritorious defense. *Huntington Nat'l Bank*, 292_ Mich App at 394 (defendant's unsupported dispute over the amount of debt owed to plaintiff was insufficient to establish a meritorious defense).

The following are examples of meritorious defenses:

- The plaintiff's complaint is insufficient as a matter of law. *Lindsley v Burke*, 189 Mich App 700, 702-703 (1991) (where complaint failed to state claim for relief).
- The supporting affidavits and documentation challenge a key element of the claim. *Kuikstra v Cheers Good Time Saloons, Inc*, 187 Mich App 699, 703 (1991).
- The affidavits demonstrate that the defendant is not liable to the plaintiff. *Hunley v Phillips*, 164 Mich App 517, 523 (1987) (governmental immunity).
- The affidavits support the defendant's claim that long-arm jurisdiction could not be acquired. *ISB Sale Co v Dave's Cakes*, 258 Mich App 520, 532-533 (2003).

The Michigan Court of Appeals created a totality of the circumstances test for determining whether a party has presented a meritorious defense for purposes of MCR 2.603(D). *Shawl v Spence Bros, Inc*, 280 Mich App 213, 236, 238 (2008). When determining whether a party has established a meritorious defense in support of its motion to set aside a default or default judgment, the trial court should consider whether the party's affidavit contains evidence that:

> "(1) The plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;

> "(2) A ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7), or (8); or
>
> "(3) The plaintiff's claim rests on evidence that is inadmissible." *Shawl*, *supra* at 238.
>
> > **Note:** This list is not intended to be exhaustive. *Id.* at 239. The trial court should only consider factors that are relevant to the case and should exercise its discretion in deciding how much weight each factor should receive. *Id.*

"If a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent manifest injustice." *Alken-Ziegler*, *Inc*, 461 Mich 219, 233-234.

3. Costs

The court must impose taxable costs and may impose other conditions, including reasonable attorney fees, as prerequisites to setting aside a default. MCR 2.603(D)(4).

C. Setting Aside Fina l Judgment Under Michigan Court Rule 2.612

While a default judgment may be set aside pursuant to MCR 2.603(D), relief from a default or default judgment may also be sought under MCR 2.612. See MCR 2.603(D)(3).

1. Personal Jurisdiction

Under MCR 2.612(B), a defendant may be relieved from a default judgment if he or she "was not personally notified of an action pending against [him or her] and several additional requirements are satisfied." *Lawrence M Clarke*, *Inc v Richco Const*, *Inc*, 489 Mich 265, 272 (2011). MCR 2.612(B) states:

> "A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was

necessary, on payment of costs or on conditions the court deems just."

Personal jurisdiction. For purposes of MCR 2.612(B), personal jurisdiction over a party is required to satisfy due process. *Lawrence M Clarke, Inc*, 489 Mich at 275. In *Clarke*, *supra* at 275-276, the Court assumed that personal jurisdiction was actually acquired (despite the defendants' arguments to the contrary) because it ultimately "conclude[d] that defendants [lacked actual knowledge of the pending suit and thus were] entitled to relief under MCR 2.612(B) and [it] does not decide cases on constitutional grounds when doing so can be avoided."

Knowledge of the action. Based on the plain language of MCR 2.612(B), a defendant may seek relief from a default judgment under this rule "as long as the defendant did not have *actual* knowledge of the pending action." *Lawrence M Clarke, Inc*, 489 Mich at 276. In *Clarke*, *supra* at 277-278, the defendants did not have actual knowledge of the pending action where (1) they were never personally served with a summons and complaint, (2) they stated in their affidavit of meritorious defense[9] that they only became aware of the action after personal property had been seized from their homes (nearly two years after the plaintiff filed a complaint), (3) the plaintiff's attorney "impliedly conceded that defendants did not have actual notice . . . when he argued that constructive notice is sufficient to bar relief under MCR 2.612(B)," and (4) the plaintiff attempted to serve the defendants by repeatedly mailing notice to an address known to not be a current address and publishing notice in a newspaper located in a county where the defendants did not reside and had not worked for over three years. Although the plaintiff's efforts may have satisfied the requirements for granting a motion for substituted service and defendants may have been put on constructive notice because of these efforts, the Court concluded that the "plaintiff's efforts were inadequate to provide defendants with *actual* knowledge as required by MCR 2.612(B)." *Lawrence M Clarke, Inc*, *supra* at 280.

Appearance. MCR 2.612(B) requires a defendant to make an appearance within one year after a final judgment; a default judgment constitutes a final judgment. *Lawrence M Clarke, Inc*, 489 Mich at 280.

Reasons justifying relief. A defendant may show that he or she has a "'reason justifying relief from the judgment'" as required

[9] The Court noted that consideration of an affidavit of meritorious defense–even if it is not filed at the same time as the motion for relief from judgment–may be considered when deciding whether relief may be granted under MCR 2.612(B). *Lawrence M. Clarke, Inc*, 489 Mich at 277 n 6.

by MCR 2.612(B) "by showing that he or she (1) did not have actual notice of the action and (2) has a meritorious defense." *Lawrence M Clarke, Inc*, 489 Mich at 282. A defendant does not need to show "mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party because MCR 2.612(C) provides for relief from a judgment on those grounds." *Lawrence M Clarke, Inc, supra* at 281.

Prejudice to third parties. MCR 2.612(B) requires the court to determine that no innocent third parties will be prejudiced if relief is granted. See *Lawrence M Clarke, Inc*, 489 Mich at 285.

2. Other Grounds for Relief

Pursuant to MCR 2.612(C), a court may relieve a party or the party's legal representative from a final judgment, order, or proceeding on the following grounds:

> "(a) Mistake, inadvertence, surprise, or excusable neglect.
>
> "(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> "(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> "(d) The judgment is void.
>
> "(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> "(f) Any other reason justifying relief from the operation of the judgment."

"MCR 2.612 envisions a court relieving a party from its own judgment, not the judgment of a higher authority." *Kidder v Ptacin*, 284 Mich App 166, 171 (2009). In *Kidder*, the Court of Appeals, based on a case that it later overruled, ordered that summary disposition be granted in favor of the defendants. *Kidder, supra* at 170. When the case on which the Court based its decision was overruled, the plaintiff did not appeal the decision to the Court of Appeals; instead the plaintiff moved under MCR 2.612(C)(1)(e) to reinstate her case at the trial court. The trial

court erred in granting the plaintiff's motion because the Court of Appeals opinion in the case constituted the law of the case and bound all lower courts with regard to the issue. *Kidder*, *supra* at 170. According to the Court:

> "In this case, MCR 2.612(C)(1)(e) does not apply because this Court's decision ordering the grant of summary disposition in favor of defendants has not been reversed or otherwise vacated; its holding has been *overruled* by subsequent case[]law. There is an important distinction.
>
> "Reversing or vacating a decision changes the result in the specific case before an appellate court. On the other hand, a decision to overrule a particular rule of law affects not only the specific case before the appellate court, but also future litigation. A decision to overrule is an appellate court's declaration that a rule of law no longer has precedential value. However, an appellate court's pronouncement that a rule of law no longer applies does not change the result of an effective judgment. In the instant case, this Court's decision was in effect, as the time for filing an application with our Supreme Court had lapsed." *Kidder*, *supra* at 170 (internal citations omitted).

Motions made pursuant to MCR 2.612(C)(1)(a)-(c) must be made "within one year after the judgment, order, or proceeding was entered or taken." MCR 2.612(C)(2). Motions made pursuant to MCR 2.612(C)(1)(d)-(f) must be made within a reasonable time. *Id.*

An attorney's negligence is generally attributable to his or her client and is not normally grounds to set aside a default judgment. *Pascoe v Sova*, 209 Mich App 297, 298-299 (1995). However, where the attorney withdraws from the case and does not provide notice to the client, and the client is defaulted because neither the client nor the withdrawn attorney appeared in court, grounds may exist to set aside the default judgment. *Pascoe*, *supra* at 300-301.

A party may request relief from a final judgment, order, or proceeding on the basis of fraud, misrepresentation, or other misconduct by the adverse party. MCR 2.612(C)(1)(c). "An evidentiary hearing is necessary where fraud has been alleged because the proof required to sustain a motion to set aside a judgment because of fraud is 'of the highest order.'" *Kiefer v Kiefer*, 212 Mich App 176, 179 (1995).

Relief under MCR 2.612(C)(1)(f) "require[s] the presence of both extraordinary circumstances and a demonstration that setting aside the judgment will not detrimentally affect the substantial rights of the opposing party." *Rose v Rose*, 289 Mich App 45, 58 (2010). The Court stated that "extraordinary circumstances warranting relief from judgment [under MCR 2.612(C)(1)(f)] generally arise when the judgment was obtained by the improper conduct of a party." *Rose*, 289 Mich App at 62. The Court further explained that "the competing concerns of finality and fairness counsel a cautious, balancing approach" to setting aside a judgment under MCR 2.612(C)(1)(f). *Rose*, 289 Mich App at 58. In *Rose*, the parties entered into a consent judgment of divorce whereby the defendant would pay the plaintiff spousal support if the plaintiff would forego any interest in a jointly-owned company. *Id.* at 47. The divorce judgment expressly stated that "it is the intention of the parties that regardless of any change in circumstances . . . , this spousal support provision is to be non-modifiable." *Id.* at 48. Two years after the consent judgment was executed, the company shut down, and the defendant sought relief from the divorce judgment under MCR 2.612(C)(1)(f). *Rose*, 289 Mich App at 48-49. The Court concluded that relief could not be granted because extraordinary circumstances did not exist and because setting aside the spousal support provision would have a "detrimental effect on the plaintiff's substantial rights." *Id.* at 60-61. The Court stated:

> "[T]he events giving rise to [the company's] failure qualify as tragic, but hardly extraordinary. As a seasoned business owner, defendant undoubtedly understood that an economic downturn, or financial mismanagement, could endanger the solvency of his company. He nevertheless agreed that plaintiff could receive nonmodifiable spousal support. We feel hard pressed to conclude that a business failure amounts to a circumstance so unexpected and unusual that it may constitute a ground for setting aside a final, binding and nonmodifiable spousal support provision." *Rose*, 289 Mich App at 62.

Once a case is closed, a party cannot be granted relief under MCR 2.612(C)(1)(f) where the case law on which the court's decision was based was retroactively reversed. *King v McPherson Hosp*, 290 Mich App 299, 304 (2010). In *King*, it was undisputed that the case was closed, and that the case law[10] on which the court relied was later reversed and given partial retroactive

[10] *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007).

effect. *King*, *supra* at 307-308. The Court of Appeals concluded that the plaintiff could not be granted relief under MCR 2.612(C)(1)(f) because binding precedent[11] prohibited such relief and denying the requested relief did not constitute an extraordinary circumstance as required by MCR 2.612(C)(1)(f). *King*, *supra* at 308.

"An order entered without subject-matter jurisdiction may be challenged collaterally and directly. Error in the exercise of jurisdiction may be challenged only on direct appeal. The erroneous exercise of jurisdiction does not void a court's jurisdiction as does the lack of subject-matter jurisdiction. However, error in the exercise of jurisdiction can result in the setting aside of the judgment." *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 669 (1996) (internal citations omitted).

D. Independent Action

A party may seek relief from a judgment, order, or proceeding by filing an independent action. MCR 2.612(C)(3) provides:

> "This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court."

"The express language of MCR 2.612(C)(3) states that the provisions in MCR 2.612(C)(1) and (2) in no way 'limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . .' Hence, a party need not allege fraud or nonservice in order to seek relief from a judgment in an independent action pursuant to MCR 2.612(C)(3)." *Trost v Buckstop Lure Co*, *Inc*, 249 Mich App 580, 584-585 (2002).

If the claim is based on an independent action, the one year period of limitations stated in MCR 2.612(C)(2) does not apply. *Kiefer*, 212 Mich App 176, 182.

[11] See *Reynoldsville Casket Co v Hyde*, 514 US 749 (1995), *People v Maxson*, 482 Mich 385 (2008), *Sumner v Gen Motors Co (On Remand)*, 245 Mich App 653 (2001), and *Gillespie v Bd of Tenant Affairs of the Detroit Housing Comm*, 145 Mich App 424 (1985).

E. Standard of Review

"[A]lthough the law favors the determination of claims on the merits, it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, Inc*, 461 Mich 219, 229 (internal citations omitted).

The ruling on a motion to set aside a default or default judgment is reviewed for a clear abuse of discretion. *Saffian v Simmons*, 477 Mich 8, 12 (2007). In exercising its discretion, the trial court should balance the public's interest in the finality of judgments against the individual's interest in correcting an injustice. *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 203 (1989).

"Where a party has alleged that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations." *Kiefer*, 212 Mich App at 179.

3.10 Summary Disposition

Committee Tips:

Consider the following:

- *Is the motion timely and properly noticed for hearing?*
- *What type of motion is it? (Parties can be careless in identifying the grounds for their motion.)*
- *What is the standard for the motion?*
- *Is discovery complete?*
- *If not, does it matter whether discovery is complete?*
- *Will an amendment cure the problem?*

A. Timing

"Summary disposition is generally premature if discovery is not complete." *Caron v Cranbrook Ed Comm*, 298 Mich App 629, 645 (2012). But "'summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of

uncovering factual support for the position of the party opposing the motion.'" *Id.*, quoting *Prysak v R L Polk Co*, 193 Mich App 1, 11 (1992). "'[A] party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists.'" *Caron*, 298 Mich App at 645-646, quoting *Mich Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241 (1993). "Mere speculation that additional discovery might produce evidentiary support is not sufficient." *Caron*, 298 Mich App at 646 (summary disposition in favor of defendants was not premature where plaintiffs could point to no prospective evidence to support their position, and there was not a fair chance of such evidence existing).

Although MCR 2.116(B)(2) allows a summary disposition motion to "be filed *at any time* consistent with [MCR 2.116(D) and MCR 2.116(G)(1)]," (emphasis added), this court rule does not "deprive[] the trial court of discretion to set a time limit on the time within which a motion under MCR 2.116 may be filed[.]" *Kemerko Clawson LLC v RxIV Inc*, 269 Mich App 347, 350 (2005). MCR 2.401(B)(2)(a)(*ii*) (giving courts discretion to set pretrial deadlines through scheduling orders) is a more specific provision and controls over the more general rule found in MCR 2.116. *Kemerko Clawson LLC*, 269 Mich App at 351.

1. Motions Based on (C)(1), (C)(2), and (C)(3)

"The grounds listed in [MCR 2.116(C)(1) (lack of jurisdiction over person or property), (C)(2) (insufficient process), or (C)(3) (insufficient service of process)] must be raised in a party's first motion under [MCR 2.116] or in the party's responsive pleading, whichever is filed first, or they are waived." MCR 2.116(D)(1).

2. Motions Based on (C)(4)

Motions based on MCR 2.116(C)(4) (lack of subject matter jurisdiction) and those based on governmental immunity "may be raised at any time, regardless of whether the motion is filed after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401." MCR 2.116(D)(3).

3. Motions Based on (C)(5), (C)(6), and (C)(7)

Motions based on MCR 2.116(C)(5) (plaintiff lacks standing), (C)(6) (another action exists between same parties on same claim), or (C)(7) (claim is barred) "must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under [MCR 2.116] prior to the party's first responsive pleading." MCR 2.116(D)(2).

4. Motions Based on (C)(8), (C)(9), and (C)(10)

Motions based on "[MCR 2.116(C)(8) (failure to state a claim), (C)(9) (failure to state a valid defense), or (C)(10) (no genuine issue of material fact)] may be raised at any time, unless a period in which to file dispositive motions is established under a scheduling order entered pursuant to MCR 2.401." MCR 2.116(D)(4). It is at the court's discretion whether to consider a motion filed after such period. *Id.*

5. Filing, Service, and Hearing Deadlines

Unless MCR 2.116(G) specifically provides otherwise, MCR 2.119 governs summary disposition motions.

The motion, brief, and affidavits, if any, must be filed and served 21 days before the hearing, unless the court orders otherwise. MCR 2.116(G)(1)(a)(i).

The response to the motion, brief, and affidavits, if any, must be filed and served at least 7 days before the hearing. MCR 2.116(G)(1)(a)(ii).

"[T]he hearing on a motion brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim." MCR 2.116(B)(2).

B. Grounds

A summary disposition motion must specify the grounds on which it is based. MCR 2.116(C). However, "where a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if neither party is misled." *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312 (2005) (internal citations omitted).

The court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 540 (2001), citing *DeBrow v Century 21 Great Lakes, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 13, 1996 (Docket No. 161048). When a witness's credibility is necessary to a determination of liability, "[a] jury should be permitted to assess [the witness's] credibility while on the witness stand." *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 630 (2007).

1. (C)(1): Lack of Jurisdiction over Person or Property

A motion for summary disposition based on the lack of personal jurisdiction is resolved based on the pleadings and the evidence, including affidavits. *Lease Acceptance Corp v Adams*, 272 Mich App 209, 218 (2006). The burden of establishing jurisdiction is on the plaintiff. MCR 2.116(G)(5); *Lease Acceptance*, *supra* at 218.[12]

"Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on [MCR 2.116(C)(1)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

2. (C)(2): Insufficient Process

"When ruling on a motion brought under MCR 2.116(C)(2), the trial court must consider the pleadings, affidavits, and other documentary evidence submitted by the parties." *Richards v McNamee*, 240 Mich App 444, 448 (2000). See also MCR 2.116(G)(5).

"Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on [MCR 2.116(C)(2)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

3. (C)(3): Insufficient Service of Process

Summary disposition may be granted where "[t]he service of process was insufficient." MCR 2.116(C)(3). If the defendant actually receives service of process within the life of the summons, the fact that the manner of service was improper is not grounds for dismissal. MCR 2.105(J)(3); *Hill v Frawley*, 155 Mich App 611, 613 (1986). "MCR 2.105(J)(3) forgives errors in the manner or content of service of process. It does not forgive a failure to serve process." *Holliday v Townley*, 189 Mich App 424, 426 (1991). It is only where there is a complete failure of service of process that dismissal is warranted. *Holliday*, *supra* at 425-426.[13]

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[12] See Section 2.3 on personal jurisdiction.

[13] See Section 2.10(A)on service of process.

If a party submits any affidavits with the pleadings, depositions, admissions, or other documentary evidence, the trial court must consider these document when ruling on a motion pursuant to MCR 2.116(C)(3). MCR 2.116(G)(5).

"Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on [MCR 2.116(C)(3)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

The court may order an immediate trial for summary motions based on MCR 2.116(C)(3). MCR 2.116(I)(3). It is within the court's discretion whether to hold a jury trial or a bench trial on MCR 2.116(C)(3) motions. *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 288-289 (2007). A jury trial is not required to determine whether service of process was sufficient. *Al-Shimmari*, *supra* at 289-290.

"[A] defendant waives the ability to object to service of process under MCR 2.116(C)(3) unless the objection is raised in the defendant's first motion or responsive pleading[.]" *Al-Shimmari*, 477 Mich at 291-292, overruling *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178 (1993), to the extent that *Penny* conflicts with MCR 2.116(D)(1). A general appearance does not waive a party's right to challenge the sufficiency of service of process under MCR 2.116(C)(3). *Al-Shimmari*, *supra* at 293.

4. (C)(4): Lack of Subject Matter Jurisdiction

A motion pursuant to MCR 2.116(C)(4) asserts that the trial court lacks subject matter jurisdiction. Whether subject matter jurisdiction exists is a question of law for the court. *Dep't of Nat Resources v Holloway Constr Co*, 191 Mich App 704, 705 (1991). The court must consider the pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties. MCR 2.116(G)(5).[14]

In an appeal regarding a motion for summary disposition pursuant to MCR 2.116(C)(4), the reviewing court "must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Sun Communities v Leroy Twp*, 241 Mich App 665, 668 (2000).

[14] See Section 2.2 on subject matter jurisdiction.

Where a plaintiff has failed to exhaust all available administrative remedies, summary disposition for lack of jurisdiction may be granted under MCR 2.116(C)(4). *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50 (2000).

"Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on [MCR 2.116(C)(4)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

5. (C)(5): Lack of Legal Capacity to Sue

A motion for summary disposition pursuant to MCR 2.116(C)(5) asserts the defense that a party lacks the legal capacity to sue.[15] In deciding a motion under this subrule, the trial court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence. MCR 2.116(G)(5); *Wortelboer v Benzie Co*, 212 Mich App 208, 213 (1995).

"Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on [MCR 2.116(C)(5)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

6. (C)(6): Another Action Exists Between the Same Parties Involving the Same Claim

A motion for summary disposition pursuant to MCR 2.116(C)(6) is based on the grounds that an action may be dismissed if another action has been initiated between the same parties and involves the same claim. *Valeo Switches & Detection Sys, Inc v EMCom, Inc*, 272 Mich App 309, 319-320 (2006). The purpose of this rule is to prevent endless litigation of the same claim by the same parties. *Valeo Switches*, *supra* at 319-320.[16]

If a party submits any affidavits with the pleadings, depositions, admissions, or other documentary evidence, the trial court must consider these document when ruling on a motion pursuant to MCR 2.116(C)(6). MCR 2.116(G)(5).

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[15] See Section 2.7 on standing.

[16] See Section 2.16 on res judicata.

The other action initiated between the parties need not be filed within the Michigan courts or within the federal courts located in Michigan in order for summary disposition under MCR 2.116(C)(6) to be proper. *Valeo Switches*, 272 Mich App at 319.

"Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on [MCR 2.116(C)(6)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

7. (C)(7): Claim Is Barred by One of Several Grounds Listed in the Subrule

A motion for summary disposition pursuant to MCR 2.116(C)(7) is based on the grounds that entry of judgment, dismissal of the action, or other relief is appropriate because of (1) release, (2) payment, (3) prior judgment, (4) immunity granted by law, (5) statute of limitations, (6) statute of frauds, (7) an agreement to arbitrate or to litigate in a different forum, (8) infancy or other disability of the moving party, or (9) assignment or other disposition of the claim before commencement of the action.

A party may show entitlement to summary disposition on the face of the pleadings alone, and "[i]n reviewing a motion under MCR 2.116(C)(7) that challenges whether the movant is entitled to [summary disposition] on the face of the plaintiff's pleadings, the trial court must accept all well-pleaded allegations as true." *Yono v Dep't of Transp (On Remand)*, 306 Mich App 671, 679 (2014). Further, the trial court must "construe the allegations in the light most favorable to the nonmoving party." *Id.* However, "a party moving for summary disposition under MCR 2.116(C)(7) is not limited to challenging the facial validity of the pleadings." *Yono (On Remand)*, 306 Mich App at 679. A party may also use affidavits, depositions, admissions, or other documentary evidence to support the motion. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). "In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Yono v Dep't of Transp*, 495 Mich 982, 982-83 (2014); see also MCR 2.116(G)(5). "If the movant properly supports his or her motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the movant [is entitled to summary disposition], the burden shifts to the nonmvoing party to present evidence that establishes a question of fact[.] *Yono (On Remand)*, 306 Mich App at 679-680. "If the trial

court determines that there is a question of fact as to whether the movant [is entitled to summary disposition], the court must deny the motion. *Id.* at 680.

"Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on [MCR 2.116(C)(7)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

8. (C)(8): Failure to State a Claim on Which Relief Can Be Granted

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380 (1997). "[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the non-moving party." *Wade v Dep't of Corr*, 439 Mich 158, 162-163 (1992). The Court will "draw any reasonable inferences from the alleged facts[,]" but "conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Diem v Sallie Mae Home Loans*, *Inc*, 307 Mich App 204, 210 (2014). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade*, 439 Mich at 163. A mere statement of conclusions, unsupported by factual allegations, is not sufficient to state a cause of action. *ETT Ambulance Svc Corp v Rockford Ambulance*, *Inc*, 204 Mich App 392, 395 (1994). When deciding a motion brought under this section, a court may consider only the parties' pleadings. MCR 2.116(G)(5).

9. (C)(9): Failure to State a Valid Defense

A motion for summary disposition under MCR 2.116(C)(9) tests the legal sufficiency of a pleaded defense to determine whether the defense is "'so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery.'" *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730 (1991), quoting *Domako v Rowe*, 184 Mich App 137, 142 (1990). When deciding a motion under this subrule, a court may consider only the parties' pleadings. MCR 2.116(G)(5); *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 47 (1990). Summary disposition is inappropriate under this subrule when a material allegation of the complaint is categorically denied. *Village of Dimondale v Grable*, 240 Mich App 553, 564-565 (2000).

10. (C)(10): No Genuine Issue as to Any Material Fact Exists

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). Accordingly, "it is the moving party–whether the plaintiff or the defendant–who bears the initial burden of production in a motion for summary disposition[under MCR 2.116(C)(10)]; the moving party must not only 'specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact,' but must also support the motion 'as provided in [MCR 2.116].'" *Lowrey v LMPS & LMPJ, Inc*, ___ Mich App ___, ___ (2015). "[B]ecause the burden of production is on the moving party at this point, the moving party risks having his or her motion 'thrown out of court' if the moving party fails to properly support it." *Lowrey*, ___ Mich App at ___. "Affidavits, deposition, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on [MCR 2.116(C)(10)]." MCR 2.116(G)(3)(b). "[A] [party] who moves for summary disposition [under MCR 2.116(C)(10)] does not satisfy [his or her] initial burden of production [under MCR 2.116(G)(3) and MCR 2.116(G)(4)] by asserting his or her mere belief that the [nonmoving party] will be unable to make his or her case at trial[; r]ather, the moving party must present evidence that, if left unrebutted, would permit a reasonable finder of fact to find in the moving party's favor on the element at issue." *Lowrey v LMPS & LMPJ, Inc*, ___ Mich App ___, ___ (2015) (citations omitted).

If the motion for summary disposition is properly made and supported, an adverse party must, by affidavit or otherwise, "set forth specific facts showing there is a genuine issue for trial." MCR 2.116(G)(4). "It is only when the moving party properly supports the motion that the burden shifts to the nonmoving party to present evidence sufficient to establish that there is a genuine issue for trial." *Lowrey*, ___ Mich App at ___. If the adverse party fails to respond, and, if appropriate, the court must grant the summary disposition motion. MCR 2.116(G)(4).

In evaluating a motion for summary disposition brought under this subsection, a trial court must consider any affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, subject to the limitations in MCR 2.116(G)(6) (material submitted for consideration must be admissible as evidence). MCR 2.116(G)(5). This evidence should

be considered in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552 (2007). Where, except for the amount of damages, the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment or partial judgment as a matter of law. *Brown*, 478 Mich at 552; MCR 2.116(C)(10).

"'A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10).' Instead, a litigant opposing a properly supported motion for summary disposition under this subrule must present substantively admissible evidence to the trial court before its decision on the motion, which creates a genuine issue of material fact." *Sprague v Farmers Ins Exch*, 251 Mich App 260, 265 (2002).

It is not appropriate for the court to consider whether a record "might be developed" in an attempt to give the nonmovant the benefit of reasonable doubt. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2 (1999). The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. *Smith*, 460 Mich at 455 n 2; MCR 2.116(G)(6). A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. *Smith*, 460 Mich at 455 n 2. A promise is insufficient under the current court rules. *Id.*

Generally, motions based on MCR 2.116(C)(10) should not be filed until discovery is completed. *Colista v Thomas*, 241 Mich App 529, 537 (2000). However, the motion may be granted when "there is no reasonable chance that further discovery will result in factual support for the nonmoving party." *Colista*, 241 Mich App at 537-538. "[A] party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior clear and unequivocal [deposition] testimony." *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155 (1997).

An affidavit that simply states an expert's opinion, without providing any scientific or factual support, may be insufficient to create a genuine issue of material fact. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 174-175 (1996) (the affidavit was not factually or scientifically supported and "merely parrot[ed] the language of the legal test").

Summary disposition under MCR 2.116(C)(10) may be granted when the issues raised are merely those of contractual interpretation rather than factual dispute. See *Allstate Ins Co v Freeman*, 432 Mich 656, 700 (1989).

C. Unavailability of Affidavits

A party may present an affidavit to establish "that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits a party cannot procure." MCR 2.116(H). See also *Brooks v Reed*, 93 Mich App 166, 173-174 (1979) (an automobile accident case). In *Brooks*, the defendant filed a summary disposition motion pursuant to what is now MCR 2.116(C)(10), stating "that there was no issue as to a material fact since the injuries claimed did not constitute 'serious impairment of body function' so as to meet the threshold tort requirements of the no-fault act." *Brooks*, *supra* at 170. However, the defendant was unable to present an affidavit on the facts because "the specific evidential facts concerning the nature of the plaintiff's injuries and treatment were within the personal knowledge of only the plaintiff and [her doctor]." *Id.* at 174 (citations omitted). The Michigan Court of Appeals concluded that under such circumstances, the defendant may be excused from presenting the material facts by filing an affidavit under what is now MCR 2.116(H). *Brooks*, *supra* at 174.

The party's affidavit must include (1) the names of the people whose affidavits the party cannot procure, (2) a statement as to why the party cannot procure the testimony, and (3) a statement as to "the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts." MCR 2.116(H)(1)(a)-(b).

Once the party has filed a conforming affidavit, "the court may enter an appropriate order, including an order

> "(a) denying the motion, or
>
> "(b) allowing additional time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories, or other discovery." MCR 2.116(H)(2)(a)-(b).

D. Disposition

Outcomes for summary disposition motions include:

- judgment for the moving party, MCR 2.116(I)(1);
- judgment for the nonmoving party, MCR 2.116(I)(2);
- an immediate trial on disputed issues, subject to the requirements in MCR 2.116(I)(3);

- postponement until trial of a hearing and decision on the matters, MCR 2.116(I)(4); or

- where the grounds are based on MCR 2.116(C)(8), (C)(9), or (C)(10), and justification exists, a mandatory opportunity to amend the pleadings, MCR 2.116(I)(5).

MCR 2.116(I) does not expressly require a motion to order summary disposition; the court may do so sua sponte. *Boulton v Fenton Twp*, 272 Mich App 456, 462-463 (2006). See MCR 2.116(I)(1), which states:

> "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."

A trial court may not sua sponte grant summary disposition in contravention of a party's due process rights. *Al-Maliki v Lagrant*, 286 Mich App 483, 489 (2009). In a civil proceeding, notice and a meaningful opportunity to be heard meet basic due process requirements. *Al-Maliki*, *supra* at 485. "Where a court sua sponte considers an issue, due process can be satisfied by affording a party with an opportunity for rehearing." *Id*. at 485-486. In addition, "any error by a court in sua sponte granting summary disposition sua sponte without affording a party an adequate opportunity to brief an issue and present it to the court may be harmless under MCR 2.613(A), if the party is permitted to fully brief and present the argument in a motion for reconsideration." *Id*. at 486.

1. Immediate Trial

"A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court. An immediate trial may be ordered if the grounds asserted are based on [MCR 2.116(C)(1)] through (C)(6), or if the motion is based on [MCR 2.116(C)(7)] and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on [MCR 2.116(C)(7)] and a jury trial has been demanded, the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury." MCR 2.116(I)(3).

Where the summary disposition motion is *not* based on MCR 2.116(C)(1)-(7), the court may not order an immediate trial. *Sweet Air Investment*, *Inc v Kenney*, 275 Mich App 492, 505 (2007). It must provide notice to the plaintiff and allow him or her an opportunity to present any objections. *Sweet Air*, *supra* at 505.

2. Amendment of Pleadings

If a motion is based on MCR 2.116(C)(8), (C)(9), or (C)(10), the court must give the parties an opportunity to amend their pleadings, unless evidence before the court shows that an amendment would be unjustified. MCR 2.116(I)(5). "[A]n amendment is not justified if it would be futile." *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 138 (2003).

Where summary disposition has been entered against a party, he or she may only amend the complaint by leave of the court. *Steele v Cold Heading Co*, 125 Mich App 199, 203 (1983).[17]

E. Standard of Review

A trial court's decision whether to grant summary judgment is reviewed de novo. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558 (2007).

[17] See Section 2.13 on amendment of pleadings.

Chapter 4: Discovery

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4.1 Discovery in General

A. Scope of Discovery

Michigan follows the open, broad discovery policy, permitting liberal discovery of any unprivileged matter that is relevant to the subject matter in the pending case. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616 (1998); MCR 2.302(B)(1). "However, a trial court should also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Cabrera v Ekema*, 265 Mich App 402, 407 (2005). Discovery should "not encompass 'fishing expedition[s].'" *VanVorous v Burmeister*, 262 Mich App 467, 477 (2004).

Liberal discovery includes discovery of electronically stored information. MCR 2.302(B)(1). Where a producing party shows that the electronically stored information is not reasonably accessible because of undue burden or cost, the party does not have to produce the information. *Id.* However, if the requesting party files a motion to compel or for a protective order, the court may order the other party to produce the information despite a showing of undue burden or cost "if the requesting party shows good cause, considering the limitations of MCR 2.302(C)." MCR 2.302(B)(1), (6).

"'Discovery rules are to be liberally construed . . . to further the ends of justice.'" *Domako v Rowe*, 438 Mich 347, 359 (1991), quoting *Daniels v Allen Industries, Inc*, 391 Mich 398, 403 (1974). The purpose of discovery is to simplify and clarify issues. *Domako*, *supra* at 360. "Restricting parties to formal methods of discovery [does] not aid in the search for truth[.]" *Id.* In *Domako*, *supra*, the trial court did not abuse its discretion in allowing the defendant to conduct ex parte interviews with the plaintiff's witness. *Id.* at 357-361. The Michigan Supreme Court concluded that allowing ex parte interviews advances the purpose of MCR 1.105, which states, "[t]hese [court] rules are to be construed to secure the just, speedy, and economical determination of every action. . . ." *Domako*, *supra* at 360-361. By allowing ex parte interviews, the parties may save time and money, litigation may be simplified, and settlements are encouraged. *Id.* at 361.

A party may not object to a discovery request simply because the information sought will be inadmissible at trial. MCR 2.302(B)(1). However, the information sought must be "reasonably calculated to lead to the discovery of admissible evidence." *Id.* Discovery of financial assets in the course of a civil action may be outside the scope as allowed by MCR 2.302, if the information is irrelevant or does not appear reasonably calculated to lead to the discovery of admissible evidence. *Bauroth v Hammoud*, 465 Mich 375, 381 (2001).

B. Supplementing Responses

Generally, a party has no duty to supplement his or her response to a discovery request if it was a complete response at the time it was made. MCR 2.302(E)(1). However, some exceptions exist:

Later acquired information must be submitted as a supplement when:

- The question directly addressed the identity and location of people with knowledge of discoverable matters;
- The question directly addressed who would be called as an expert witness at trial, the subject matter about which he or she would testify, and the substance of his or her testimony.
- The party knows that the first response was incorrect when made;
- The party knows that the first response "is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." MCR 2.302(E)(1)(a)-(b).

"A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time before trial through new requests for supplementation of prior responses." MCR 2.302(E)(1)(c).

Pursuant to MCR 2.303(E)(2), failure to provide such supplementation, even without an order compelling discovery, may result in imposition of the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b) (authorizing the court to refuse to allow the insubordinate party to support designated claims, or to prohibit that party from introducing specific matters into evidence).

C. Alternative Forms of Discovery

The court has discretion to order discovery by methods other than those specifically mentioned in the court rules, subject to the scope restrictions in MCR 2.302(B). MCR 2.302(B)(4)(a)(iii). See also *Reed Dairy Farm*, 227 Mich App at 616-618, which upheld a trial court's decision to allow the plaintiff to submit interrogatories to nonparty expert witnesses in lieu of spending a lot of time and money traveling all over the country questioning each witness individually.

D. Award of Expenses

Unless it would be manifestly unjust,

- if a party is seeking to depose or discover through alternative means an expert hired by the opposing party, the court *must* order the party seeking discovery to pay the expert's reasonable fee for time spent in a deposition. This fee cannot include preparation time. MCR 2.302(B)(4)(c)(i).

- the court *may* also require "the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert" if the expert is expected to be called as a witness. If the expert is not expected to be called to testify, the court *must* order the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred in obtaining the information. MCR 2.302(B)(4)(c)(ii).

E. Standard of Review

A trial court's decision to grant or deny discovery is reviewed for an abuse of discretion. *Reed,* 227 Mich App at 616.

4.2 Discovery Motions

Committee Tips:

• Determine whether motion is routine or complex. Does motion address failure to respond or the response? If the motion addresses failure to respond, set deadline and possible consequences.

• If hearing is on objections to interrogatories, or allegations of evasive or incomplete answers, require submission of both interrogatories and answers in advance, and require specificity in motion.

• Consider in camera review.

• Consider alternative discovery methods beyond those specified in the Michigan Court Rules. See Reed Dairy Farm v Consumers Power Co, 227 Mich App 614, 618 (1998), which upheld a trial court's decision to allow the plaintiff to submit interrogatories to nonparty expert

witnesses in lieu of spending a lot of time and money traveling all over the country questioning each witness individually.

- *Consider whether to extend discovery.*
- *Build a record.*

A. Motion to Compel

The party seeking discovery may file a motion to compel discovery if:

> "(a) a deponent fails to answer a question propounded or submitted under MCR 2.306 or [MCR] 2.307,
>
> "(b) a corporation or other entity fails to make a designation under MCR 2.306(B)(5) or [MCR] 2.307(A)(1),
>
> "(c) a party fails to answer an interrogatory submitted under MCR 2.309, or
>
> "(d) in response to a request for inspection submitted under MCR 2.310, a person fails to respond that inspection will be permitted as requested." MCR 2.313(A)(2)(a)-(d).

When taking an oral deposition, the examiner may complete or adjourn the questioning before filing the motion to compel. MCR 2.313(A)(2).

1. Failure to Obey Order Compelling Discovery

"If a deponent fails to be sworn or answer a question" after being ordered to do so by a court in the county or district where the deposition is taking place, he or she may be found in contempt of court. MCR 2.313(B)(1).

If a party or other person listed in MCR 2.313(B)(2) fails to obey an order compelling discovery, the court where the action is pending may order any of the following sanctions, as are just:

> (a) Establish that certain matters and designated facts stated in the moving party's claim are true.
>
> (b) Refuse to allow disobedient party to support or oppose designated claims or defenses, or introduce designated matters into evidence.

> (c) Strike pleadings or parts of pleadings, stay further proceedings until order is obeyed, dismiss action or parts of it, or enter judgment by default.
>
> (d) Find the nonmoving party in contempt of court (either in addition to or in lieu of any other sanctions). This sanction is not applicable to orders requiring a physical or mental examination. MCR 2.313(B)(2)(a)-(d).

Sanctions listed under MCR 2.313(B)(2)(a), (b), and (c) may be applied to a person who has been ordered to and fails to produce another person for examination pursuant to MCR 2.311(A), unless the disobedient party can show that he or she is unable to produce the person for examination. MCR 2.313(B)(2)(e).

In the absence of exceptional circumstances, a court may not impose sanctions on a party "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." MCR 2.313(E).

"[R]easonable expenses, including attorney fees, caused by the failure" may also be added to or substituted for any of the sanctions listed in MCR 2.313(B)(2), "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." MCR 2.313(B)(2). Expenses may be apportioned if the motion is granted in part and denied in part. MCR 2.313(A)(5)(c). Both the party and the attorney may be sanctioned. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 89 (1999).

2. Determining an Appropriate Sanction

MCR 2.313(B)(2) requires the court to choose a sanction that is "'proportionate and just[,]'" and the severe sanction of a default judgment may be imposed only when a party has flagrantly and wantonly refused to provide or permit discovery. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 661-662 (2011), quoting *Kalamazoo Oil v Boerman*, 242 Mich App 75, 87 (2000). In *Hardrick*, *supra* at 659, the plaintiff sought a default judgment after the defendant violated discovery orders by providing late and incomplete discovery. The trial court found that the plaintiff had been severely prejudiced by the delay, but because the defendant did not "impair discovery in a malicious sense[,]" it imposed what it considered to be "an appropriate lesser sanction": precluding the defendant from presenting any witnesses or evidence regarding the issue in dispute and limiting the defendant to challenging the plaintiff's expert witness through cross-examination. *Id*. at 657, 659. Because "the sanction was

disproportionate and affected the entirety of the trial," the Court of Appeals found the sanction inappropriate:

> "The [trial] court specifically concluded that [the defendant's] conduct did not merit the drastic sanction of a default judgment. Even though the court labeled its order as 'a lesser sanction,' the court actually imposed a sanction more severe and limiting than a default judgment would have been. Had the court granted [the plaintiff's] request for a default judgment, [the defendant] would have been permitted to present evidence to prove the extent of [the plaintiff's] damages." *Id*. at 661.

In *Dean v Tucker*, 182 Mich App 27, 32-33 (1990), the Court referred to a nonexhaustive list of factors to consider when determining an appropriate sanction:

> "(1) whether the violation was [willful] or accidental;
>
> "(2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);
>
> "(3) the prejudice to the [other party];
>
> "(4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice;
>
> "(5) whether there exists a history of [the party] engaging in deliberate delay;
>
> "(6) the degree of compliance by the [party] with other provisions of the court's order;
>
> "(7) an attempt by the [party] to timely cure the defect; and
>
> "(8) whether a lesser sanction would better serve the interests of justice."

3. Evidentiary Hearing

While a party may be sanctioned for failing to permit discovery, the party is entitled to an evidentiary hearing so that both parties may introduce evidence alleging and rebutting the disobedient party's willfulness and to what extent the other party has been prejudiced by the failure. See *Traxler v Ford Motor Co*, 227 Mich App 276, 288 (1998).

A court should hold an evidentiary hearing when there is a challenge to the reasonableness of a fee request. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113 (1999). However, a hearing may not be required if the parties create a sufficient record, and the court explains its decision on the record. *Head*, *supra* at 113.

4. Award of Expenses

Expenses awarded for filing the motion to compel. The court may award reasonable expenses, including attorney fees, to (1) the moving party if the motion is granted, or (2) the nonmoving party if the motion is denied, unless filing the motion or opposing the motion was substantially justified or other circumstances make an award of expenses unjust. MCR 2.313(A)(5)(a)-(b).[1]

Expenses awarded for failing to comply with order compelling discovery. The court may order the disobedient party to pay the other party's "reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make the award unjust." MCR 2.313(B)(2).

B. Motions for Protective Orders

"Michigan's court rules acknowledge the wisdom of placing reasonable limits on discovery." *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 398 (2015) (quotation and citation omitted). "To that end, the court rules allow a party or a person from whom discovery is sought to move for a protective order." *Id.*, citing MCR 2.302(C). "The movant must demonstrate good cause for the issuance of a protective order." *Arabo*, 310 Mich App at 398.

1. Basis

When a moving party has given reasonable notice and shown good cause, the court "may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" MCR 2.302(C).

2. Types of Protective Orders

"Despite Michigan's broad discovery policy, a trial court should protect parties from excessive, abusive, or irrelevant discovery

[1] This court rule also applies to motions for protective orders. MCR 2.302(C).

requests." *Thomas M Cooley Law School v John Doe 1*, 300 Mich App 245, 260-261 (2013). "Thus, a party may bring a motion in a trial court for a protective order[.]" *Id.* at 261. When issuing a protective order, the court may order one or more of the following:

> (1) No discovery.
>
> (2) Discovery on specified terms and conditions.
>
> (3) Another method of discovery.
>
> (4) Limit scope of discovery.
>
> (5) Limit people present at discovery.
>
> (6) Require court order to open sealed depositions.
>
> (7) Deposition for discovery and impeachment purposes only.
>
> (8) Nondisclosure or limited disclosure of trade secrets or confidential commercial information.
>
> (9) Simultaneous filing of specified documents in sealed envelopes, to be opened as directed by the court. MCR 2.302(C)(1)-(9).

C. Standard of Review

A court's decisions regarding a motion to compel discovery, imposing sanctions, and awarding costs are reviewed for an abuse of discretion. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 697 (2003).

A court's decision to award attorney fees is reviewed for clear error. *McDonald*, 255 Mich App at 697.

A court's decision to grant or deny a protective order limiting discovery is reviewed for an abuse of discretion. *P T Today, Inc v Comm'r of Office of Fin & Ins Svcs*, 270 Mich App 110, 151 (2006).

4.3 Request for Admission

A. Purpose

The purpose of MCR 2.312 is "to limit the areas of controversy and to conserve resources that otherwise would be spent amassing proofs." *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 425 (1996).

B. Timing

"Within the time for completion of discovery, a party may serve on another party a written request for [admission]." MCR 2.312(A).

A matter will be deemed admitted if the nonmoving party does not serve a response within 28 days after the request was served. MCR 2.312(B)(1). If the nonmoving party is a defendant, he or she has 42 days after being served with the summons and complaint to serve a response to an admissions request. *Id.* The court may alter response times at its discretion. *Id.*

C. Scope

MCR 2.312(A) permits written requests seeking the truth of a matter within the scope of discovery. A party may request another party to admit the truth of a matter relating to statements or opinions of fact. MCR 2.312(A). However, requesting that the defendant admit to the basis of the plaintiff's claim is not a proper subject for admission where the defendant reasonably believes he or she may prevail on the claim. *Richardson v Ryder Truck Rental*, 213 Mich App 447, 457-458 (1995).

D. Response

A party served with a request for admission has several options in responding to the request. *Radtke*, 453 Mich at 419. The party may (1) make an express admission, (2) do nothing (in which case it will be deemed an admission), (3) deny the matter, in whole or in part, (4) explain why a response is impossible, or (5) object to the request. *Radtke*, *supra* at 419. "Gratuitous statements that are beyond the scope of a request do not constitute conclusively binding judicial admissions under MCR 2.312, and are not precluded by [MCR 2.312(D)(2)] from being used in other proceedings." *Radtke*, *supra* at 426.

If the party does not respond or object within the time frame outlined in MCR 2.312(B)(1), the matter is admitted. MCR 2.312(B)(1); *Medbury v Walsh*, 190 Mich App 554, 556 (1991). An admission is conclusive unless the court, in its discretion, permits amendment or withdrawal. MCR 2.312(D)(1).

A party may be allowed to file late answers to an opposing party's request for admission. *Janczyk v Davis*, 125 Mich App 683, 692-693 (1983). The trial judge is to balance three factors when deciding whether to permit a late answer: (1) whether it will aid in the presentation of the action; (2) whether the other party would be

prejudiced by a late answer; and (3) the reason for the delay. *Janczyk*, *supra* at 692-693. The court cautioned:

> "When a trial judge is asked to decide whether or not to allow a party to file late answers to the request for admissions, he is in effect called upon to balance between the interests of justice and diligence in litigation. . . . 'The severity of the sanctions should be tempered by a consideration of the equities involved.' In other words, a rigid rule is sometimes unjustified; but too lenient a rule will undermine the policy of the court rule itself." *Id.* at 691-692 (internal citations omitted).

The trial court did not abuse its discretion in allowing the defendants to amend their answer where (1) the plaintiff was given ample opportunity to conduct discovery after the trial court's decision (in fact, discovery was subsequently reopened at the plaintiff's request—to depose another witness), and (2) the defendants' late discovery of documents critical to the lawsuit (i.e. the reason they sought to amend their answer) was inadvertent. *Bailey v Schaff*, 293 Mich App 611, 622-623 (2011), aff'd in part, vacated in part on other grounds 494 Mich 595 (2013). The Court stated that "[t]he situation here—in which two parties later learned that timely, initial responses had inadvertently failed to account for critical documents—is precisely the kind of possibility the reservation of trial court discretion in MCR 2.312(D)(1) addresses." *Bailey*, 293 Mich App at 623.

E. Effect

Admissions under MCR 2.312 are judicial admissions, not evidentiary admissions. *Radtke*, 453 Mich at 420. A judicial admission is conclusive, whereas an evidentiary admission is not. *Id.* at 420-421. Evidentiary admissions are subject to contradiction or explanation. *Id.* at 421. Admissions under MCR 2.312 (judicial admissions) must be narrowly construed. *Hilgendorf v St John Hosp and Med Ctr Corp*, 245 Mich App 670, 690 (2001). "Only that portion of the response that directly meets and admits the request is a judicial admission under MCR 2.312, so that it is conclusively binding for the pending action and may not be used as evidence in other proceedings." *Radtke*, 453 Mich at 425. Judicial admissions may be considered for purposes of ruling on a motion for summary disposition. *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 61-62 (1991). See also MCR 2.116(G)(5), which allows summary disposition motions made pursuant to MCR 2.116(C)(1)-(7), (10) to be supported by admissions.

The procedures in MCR 2.312 are not self-executing and require the party seeking to rely upon any conclusive admission to bring the issue to the trial court's attention before the close of proofs. *Radtke*, 453

Mich at 421 n 7. However, neither the court rules nor the case law require a party to file a motion before the court can deem the request admitted.

F. Sanction for Failure to Admit

"If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter," the court must grant a motion by the requesting party for expenses incurred in making the proof, unless it finds that (1) the request was found objectionable under MCR 2.312, (2) the admission sought was not substantially important, (3) the failing party had reasonable grounds to believe he or she may have prevailed on the matter, or (4) some other good reason existed for failing to admit. MCR 2.313(C).

"'The mere fact that the matter was proved at trial does not, of itself, establish that the denial in response to the request for an admission was unreasonable.'" *King v Mich State Police Dep't*, 303 Mich App 162, 182 (2013), quoting *Richardson*, 213 Mich App at 457 (internal quotation marks and citations omitted) (trial court abused its discretion in awarding attorney fees to the plaintiffs as a discovery sanction because the plaintiffs did not prove the truth of the matter that was the subject of the requests for admissions).

G. Standard of Review

The court's decision to allow a party to amend, withdraw, or file a late response is reviewed for an abuse of discretion. *Janczyk*, 125 Mich App at 691.

4.4 Depositions

A. Deposition On Oral Examination

A party may take the oral deposition of any person (subject to the scope of discovery), including a party. MCR 2.306(A)(1). Leave of court is only required when the plaintiff wishes to depose the defendant before he or she has had a reasonable time to obtain an attorney, or if the deponent is one of the individuals listed in MCR 2.306(A)(2).[2] MCR 2.306(A)(1). "A reasonable time is deemed to have elapsed if:

[2]Persons in prison or patients in a state home, institution, or hospital for the mentally ill or mentally handicapped, or any other state home, institution, or hospital.

> "(a) the defendant has filed an answer;
>
> (b) the defendant's attorney has filed an appearance;
>
> (c) the defendant has served notice of the taking of a deposition or has taken other action seeking discovery;
>
> (d) the defendant has filed a motion under MCR 2.116; or
>
> (e) 28 days have expired after service of the summons and complaint on a defendant or after service made under MCR 2.106." MCR 2.306(A)(1).

The party seeking to depose a witness or another party must provide reasonable written notice to every party in the action. MCR 2.306(B)(1). The notice must include the time of the deposition, location, and the name and address of each deponent. MCR 2.306(B)(1)(a)-(b). If the name of a deponent is unknown, "a general description sufficient to identify the person or the particular class or group to which the person belongs" will be allowed. MCR 2.306(B)(1)(b). A party may also send a request for the production of documents and tangible things with the notice to a party deponent. MCR 2.306(B).

A witness may be required to attend a deposition if subpoenaed pursuant to MCR 2.305. MCR 2.306(B)(3).

Where the witness to be deposed is a high-ranking government official or a corporate officer, the trial court must employ the "apex deposition rule." *Alberto v Toyota Motor Corp*, 289 Mich App 328, 336 (2010). "[T]he apex deposition rule provides that before a plaintiff may take the deposition of a high-ranking or 'apex' government official or corporate officer, the plaintiff must demonstrate both that the government official or corporate officer possesses superior or unique information relevant to the issues being litigated and that the information cannot be obtained by a less intrusive method, such as by deposing lower-ranking employees." *Alberto*, *supra* at 333. The Court emphasized that the apex rule does not shift the burden of proof to the party seeking discovery. *Id.* at 338. Rather, "after the party opposing the deposition demonstrates by affidavit or other testimony that the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims in issue, then the party seeking the deposition of the high-ranking corporate or public official must demonstrate that the relevant information cannot be obtained absent the disputed deposition." *Id.* at 339. In *Alberto*, the plaintiff sought to depose two high-ranking corporate officers regarding the plaintiff's claim that a defect in a Toyota vehicle caused the accident that resulted in the death of the plaintiff's decedent. *Id.* at 331. The Court found that the two corporate officers only had

generalized knowledge of the vehicle's defect, "but had no unique or superior knowledge of or role in designing the subject vehicle or in implementing manufacturing or testing processes." *Id.* at 343. Therefore, they were not required to attend a deposition on the matter. *Id.*

The court may alter the time for taking depositions upon a motion for good cause. MCR 2.306(B)(2). The decision may be based on what will "best serve the convenience of the parties and witnesses and the interests of justice." *Id.*

During the deposition, the court that is hearing the action, or the court in the county or district where the deposition is taking place, may terminate or limit the scope of the deposition if the deponent or a party files a motion and shows "that the examination is being conducted in bad faith or in a manner unreasonably to annoy, embarrass, or oppress the deponent or party, or that the matter inquired about is privileged[.]" MCR 2.306(D)(1). If the deposition is terminated, only the court that is hearing the action may order the deposition to resume. *Id.*

The court must suspend the deposition upon demand by a deponent or the objecting party until that individual can file the motion requesting termination or limited questioning. MCR 2.306(D)(2).

A party will be subject to costs under MCR 2.306(G), if he or she plans to "assert that the matter to be inquired about is privileged," but fails to do so before the deposition. MCR 2.306(D)(3).

B. Deposition On Written Questions

Similar to MCR 2.306(A), a party may take the testimony by deposition on written questions of any person (subject to the scope of discovery), including a party. MCR 2.307(A)(1). A witness may be compelled to attend if subpoenaed pursuant to MCR 2.305. MCR 2.307(A)(1). This type of deposition "may be taken of a public or private corporation or partnership or association or governmental agency in accordance with the provisions of MCR 2.306(B)(5)." MCR 2.307(A)(1).

A notice must accompany the written questions when being served. MCR 2.307(A)(2). Pursuant to the time requirements in MCR 2.307(A)(3), a nonmoving party has the opportunity to serve cross and recross questions, and the moving party has an opportunity to serve redirect questions. MCR 2.307(A)(3). These time requirements may be altered for cause shown. *Id.*

C. Subpoenas

Upon proper service of notice on a deponent under MCR 2.303(A)(2), 2.306(B), or 2.307(A)(2), a party may request the court to issue a subpoena pursuant to MCR 2.506 for the person named or described in the notice. MCR 2.305(A)(1). However, if the person served was (1) a party; (2) an attorney for a party; or (3) a director, trustee, officer, or employee of a corporate party, the service "is sufficient to require the appearance of the deponent; a subpoena need not be issued." *Id.*

A subpoena issued pursuant to MCR 2.305 may state that the deposition is for the sole purpose of inspecting and copying documents or other tangible things. MCR 2.305(A)(3). The subpoena is also subject to the rules in MCR 2.302(C) (regarding protective orders). "[T]he court in which the action is pending, on timely motion made before the time specified in the subpoena for compliance, may

> "(a) quash or modify the subpoena if it is unreasonable or oppressive;
>
> (b) enter an order permitted by MCR 2.302(C); or
>
> (c) condition denial of the motion on prepayment by the person on whose behalf the subpoena is issued of the reasonable cost of producing books, papers, documents, or other tangible things." MCR 2.305(A)(4)(a)-(c).

The court may order a party to pay another party's reasonable expenses associated with appearing at the deposition site, including reasonable attorney fees if the party giving the notice of the deposition (1) fails to attend the deposition, or (2) fails to subpoena a witness for the deposition, and (3) another party attends the deposition in person or by attorney in reliance on the notice. MCR 2.306(G)(2).

4.5 Interrogatories

The use of interrogatories is only available to parties. MCR 2.309(A). Without leave of court, written interrogatories may be served on the plaintiff once the action has commenced. *Id.* The defendant may be served with interrogatories "with or after the service of the summons and complaint on that defendant." *Id.*

MCR 2.309(B) governs how and when a party must respond to interrogatories. The court may alter the timing rules. MCR 2.309(B)(4). The court may also, for good cause, "excuse service [of the answers] on parties other than the party who served the interrogatories." *Id.*

MCR 2.309(C) permits the party submitting interrogatories to file a motion to compel discovery "under MCR 2.313(A) with respect to an objection to or other failure to answer an interrogatory."[3] "If the motion is based on the failure to serve answers, proof of service of the interrogatories must be filed with the motion. The motion must state that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the deposit without court action." MCR 2.309(C).

A letter from counsel does not constitute an answer that complies with MCR 2.309(B), unless there is an agreement to accept the letter as the answer. *Jilek v Stockson (On Remand)*, 297 Mich App 663, 668 (2012). However, there is no discovery violation if the party submitting the interrogatories did not file a motion to compel under MCR 2.313(A). *Jilek*, *supra* at 668.

4.6 Request for Documents

A. Generally

MCR 2.310 covers the production of documents, tangible things, electronically stored information, and entry on land for inspection and other purposes. There is a separate rule for medical records. See MCR 2.314[4].

B. Scope

With respect to requests to parties and nonparties for tangible things, electronically stored information, and for entry on land, the scope of MCR 2.310 is limited to "matters within the scope of MCR 2.302(B) and that are in the possession, custody, or control of the party [or person] on whom the request is served[.]" MCR 2.310(B)(1)(a)(ii), (2)(a).

C. Requests to Parties

The request may "be served on the plaintiff after commencement of the action and on the defendant with or after the service of the summons and complaint on that defendant." MCR 2.310(C)(1). The request must list the items requested and describe each with reasonable particularity, including "the form or forms in which electronically stored information is to be produced, subject to objection." *Id.* The party served with the request must serve a written

[3] See Section 4.2(A) for more information on filing motions to compel discovery.

[4] See Section 4.7 for a discussion about medical records.

response within 28 days after being served. MCR 2.310(C)(2). If the party served with the request is the defendant, he or she has 42 days after the summons and complaint are served to serve a written response. *Id.* The court may alter the response time. *Id.*

Documents should be produced as kept in the usual course of business or organized and labeled to correspond to the categories requested. MCR 2.310(C)(5). Similarly, where the request is for electronically stored information, and it does not specify the form or forms in which the information is to be produced, the information must be produced "in a form or forms in which the party ordinarily maintains it, or in a form or forms that is or are reasonably usable." MCR 2.310(C)(2). The responding party only needs to "produce the same information in one form." *Id.*

The requesting party may move for an order compelling discovery pursuant to MCR 2.313(A) in the absence of a response, upon objection to the request, or upon failure to permit inspection. MCR 2.310(C)(3). In the motion, the moving party must state that he or she made a good faith effort to secure the disclosure before taking court action. *Id.*

"The party to whom the request is submitted may seek a protective order under MCR 2.302(C)." MCR 2.310(C)(4).

Unless otherwise ordered by the court, the party who produces the items for inspection is responsible for assembly costs, and the party requesting the items is responsible for any copying costs. MCR 2.310(C)(6).

D. Requests on Nonparties

Requests may be served on nonparties at any time. MCR 2.310(D)(1). However, "leave of court is required if the plaintiff seeks to serve a request before the occurrence of one of the events stated in MCR 2.306(A)(1)." MCR 2.310(D)(1). The request must (1) list and describe the items with reasonable particularity; (2) specify a reasonable time, place, and manner; and (3) inform the person that an order may be sought to compel compliance. MCR 2.310(D)(3)(a)-(c).

If the person does not permit inspection or entry within 14 days after the request is served, the requesting party may file a motion to compel. MCR 2.310(D)(4). The court may direct a shorter time period than 14 days. *Id.* The requesting party may be responsible for any reasonable costs associated with the entry or inspection. MCR 2.310(D)(5). MCR 2.310 "does not preclude an independent action against a nonparty for production of documents and other things and

permission to enter on land or a subpoena to a nonparty under MCR 2.305." MCR 2.310(D)(6).

E. Good Cause Not Required

The Michigan Court Rules do not impose a requirement of good cause for the discovery of relevant, nonprivileged documents or things. *Ostoin v Waterford Twp Police Dep't*, 189 Mich App 334, 340 (1991).

F. Standard of Review

A trial court's decision whether to order a party to produce relevant, nonprivileged documents is reviewed for an abuse of discretion. *Davis v O'Brien*, 152 Mich App 495, 504-505 (1986).

4.7 Party's Medical Information

If a party's mental or physical condition is in controversy, medical information regarding the condition may be discoverable as long as it is discoverable under MCR 2.302(B) (scope of discovery), and the party does not assert a valid privilege to prevent discovery of the condition. MCR 2.314(A)(1)(a)-(b).

Discoverable medical information "includes, but is not limited to, medical records in the possession or control of a physician, hospital, or other custodian, and medical knowledge discoverable by deposition or interrogatories." MCR 2.314(A)(2). The party is considered to be in control of his or her own medical information even if the party does not have immediate physical possession of it. MCR 2.314(A)(3).

When a party is served with a request for medical information, the party must

> (a) make the information available,
>
> (b) assert a privilege,
>
> (c) object to the request, or
>
> (d) provide the requesting party with the location of the information and enough signed authorizations so that the requesting party can obtain the information from the individual or entity that possesses the information. MCR 2.314(C)(1)(a)-(d).

A party with a valid privilege may assert it to prevent discovery regarding his or her mental or physical condition. MCR 2.314(B)(1). See

also MCR 2.302(B)(1). A privilege that is not asserted in a timely manner is waived in that action only. MCR 2.314(B)(1). See also MCR 2.306(D)(4). "Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition." MCR 2.314(B)(2).[5]

If privileged or protected information is inadvertently produced during discovery, "the party making the claim [of privilege] may notify any party that received the information of the claim and the basis for it." MCR 2.302(B)(7). Once a receiving party is on notice, that party "must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim." *Id.* If a receiving party disclosed the information before the producing party provided notice of the claim, the receiving party must take reasonable steps to retrieve the information. *Id.* "The producing party must preserve the information until the claim is resolved. *Id.*

4.8 Privileged Materials

A. Medical Records

MCR 2.314 addresses the mechanism used for discovering medical information where the condition of a party is in controversy. Medical information of nonparties is not discoverable under MCR 2.314. MCR 2.314(E).

Custodians of medical information must comply with a proper request within 28 days after receiving the request, or if the party is hospitalized for the condition for which the request was made, within 28 days after he or she is released. MCR 2.314(D)(1). For good cause, the court may alter this time limit. *Id.*

To be considered compliant, the custodian must

- make the information reasonably available, or
- deliver a properly verified original or true and exact copy of the original information to the requesting party, as provided in MCR 2.314(D)(2)(b). MCR 2.314(D)(2)(a)-(b).

[5] See Section 4.8 for more information on asserting a privilege regarding medical information.

If the custodian does not comply with the request, a subpoena may be issued under MCR 2.305(A)(2). MCR 2.314(D)(6).

The requesting party must pay the custodian reasonable reimbursement in advance for the expense of complying. MCR 2.314(D)(5). In determining what constitutes a reasonable expense, the Michigan Court of Appeals gave the following guidance:

> "At a minimum . . . [the custodian] should reveal how many copies are made per year in response to requests occasioned solely by paying requestors, as well as the total number of copies made per year by [the custodian] for paying, nonpaying, and any other requestors. Once these amounts are revealed, they may be compared to the total, itemized labor and machine maintenance costs incurred by [the custodian]. Those latter costs may be divided in proportion to the number of copies made for paying requestors and the number of copies made for nonpaying and other requestors. A reasonable per-page amount is then easily calculated by dividing the number of copies made for paying requestors into the pro rata amount of expenses incurred attributable to all paying requestors." *Graham v Thompson*, 167 Mich App 371, 375 (1988).

B. Hospital Records

In determining whether a privilege applies to certain hospital documents, two sections of the Public Health Code may play a role. The peer review privilege statutes, MCL 333.20175(8) (applicable to health facilities, health agencies, and certain institutions of higher education) and MCL 333.21515 (applicable to hospitals), both state essentially the same thing:

> "The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena." MCL 333.21515. See also MCL 333.20175(8).

MCL 333.20175(8) and MCL 333.21515 "make privileged all records, data, and knowledge collected for or by a peer review committee in furtherance of its statutorily mandated purpose of reducing morbidity and mortality and improving patient care.[6] This includes objective facts gathered contemporaneously with an event contained in an otherwise privileged incident report." *Krusac v Covenant Med*

Ctr, *Inc*, 497 Mich 251, 263 (2015).~~, overruling *Harrison v Munson Healthcare, Inc*, 304 Mich App 1 (2013), to the extent that it held "that objective facts gathered contemporaneously with an event do not fall within the peer review privilege."~~ However, "the scope of the [peer review] privilege is not without limit." *Krusac*, 497 Mich at 261. "[T]he privilege only applies to records, data, and knowledge that are collected for or by the committee under [MCL 333.20175(8) and MCL 333.21515] 'for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients.'" *Krusac*, 497 Mich at 261-262, quoting MCL 333.21513(d). "In determining whether any of the information requested is protected by the statutory privilege, the trial court should bear in mind that mere submission of information to a peer review committee does not satisfy the collection requirement[7] so as to bring the information within the protection of the statute. Also, in deciding whether a particular committee was assigned a review function so that information it collected is protected, the court may wish to consider the hospital's bylaws and internal regulations, and whether the committee's function is one of current patient care or retrospective review." *Monty v Warren Hosp Corp*, 422 Mich 138, 146-147 (1985) (citations omitted). Moreover, litigants "may still obtain relevant facts through eyewitness testimony, including from the author of a privileged incident report, and from the patient's medical record." *Krusac*, 497 Mich at 262.

C. Personnel Files

Disclosure of personnel files is governed by the Bullard-Plawecki Employee Right to Know Act. MCL 423.501 *et seq*. The Act defines "personnel records" as:

> "[A] record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. A personnel record shall include a record in the possession of a person, corporation, partnership, or other association who has a contractual agreement with the employer to keep or supply a personnel record as provided in this subdivision. A personnel record shall not include:

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[6] "MCL 333.21513(d) imposes a duty on hospitals to create peer review committees 'for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients.'" *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 256 (2015), quoting MCL 333.21513(d).

[7] See MCL 333.21515.

> "*(i)* Employee references supplied to an employer if the identity of the person making the reference would be disclosed.
>
> "*(ii)* Materials relating to the employer's staff planning with respect to more than 1 employee, including salary increases, management bonus plans, promotions, and job assignments.
>
> "*(iii)* Medical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved.
>
> "*(iv)* Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.
>
> "*(v)* Information that is kept separately from other records and that relates to an investigation by the employer pursuant to section 9.
>
> "*(vi)* Records limited to grievance investigations which are kept separately and are not used for the purposes provided in this subdivision.
>
> "*(vii)* Records maintained by an educational institution which are directly related to a student and are considered to be education records under section 513(a) of title 5 of the family educational rights and privacy act of 1974, 20 U.S.C. 1232g.
>
> "*(viii)* Records kept by an executive, administrative, or professional employee that are kept in the sole possession of the maker of the record, and are not accessible or shared with other persons. However, a record concerning an occurrence or fact about an employee kept pursuant to this subparagraph may be entered into a personnel record if entered not more than 6 months after the date of the occurrence or the date the fact becomes known." MCL 423.501(2)(c)*(i)-(viii)*.

Information that is not included in the personnel file, but should have been included cannot be used by an employer in a judicial or quasi-judicial proceeding, unless the exclusion was inadvertent and the employee agrees to its use or has been given a reasonable amount of

time to review the information. MCL 423.502. Employees may review their record after submitting a written request. MCL 423.503. Generally, an employee is limited to viewing his or her personnel file "not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement[.]" *Id.* Employers may charge the employee for providing a copy of the personnel file. MCL 423.504.

An employer or former employer may not disclose an employee's disciplinary reports or reprimands to (1) third parties, (2) anyone who is not part of the employer's organization, or (3) anyone who is not part of the labor organization representing the employee, without providing proper written notice to the employee. MCL 423.506. An employer must review a personnel file and "delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old" before releasing information to a third party, unless the release is ordered pursuant to a legal action or arbitration which involves the third party. MCL 423.507.

D. Trade Secrets

Discovery of trade secrets is generally addressed under MCR 2.302(C)(8), which states:

> "**(C) Protective Orders.** On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> * * *
>
> > (8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.]"

E. Work Product

The Michigan Court of Appeals has recognized the importance of protecting an attorney's work product:

> "[T]he balancing of the policy favoring complete discovery and that favoring preserving attorney-client confidences weigh[s] in favor of allowing a party

> seeking discovery of attorney work product to proceed only upon a showing of substantial need for the materials sought plus inability to obtain the information without undue hardship." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 638 (1998).

The *substantial need* and *undue hardship* standards are also stated in MCR 2.302(B)(3)(a), which protects the discovery of documents and other tangible things prepared in anticipation of litigation by or for a party's attorney, consultant, surety, indemnitor, insurer, or agent. If the requesting party satisfies the *substantial need* and *undue hardship* requirements, and the court orders discovery of the material, the court must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* "'[I]f a party demonstrates the substantial need and undue hardship necessary to discover work product, that party may discover only factual, not deliberative, work product.'" *Augustine v Allstate Ins Co*, 292 Mich App 408, 421 (2011), quoting *Leibel v Gen Motors Corp*, 250 Mich App 229, 247 (2002); see also *Messenger*, 232 Mich App at 644 (in attorney fees claim, trial court abused its discretion in denying defendant's request for plaintiff's entire litigation file where any items including the mental impressions, thoughts, or strategies could be redacted, and the sanitized file would be useful in corroborating and validating time claims to determine a reasonable fee; "defendant [] met its burden of showing the need for review of properly redacted trial preparation materials as contemplated by MCR 2.302(B)(3)(a) where it [] demonstrated a substantial need for the material and a lack of other reasonable avenues for obtaining the information").

Statements given by a party or witness shortly after an incident relevant to pending litigation may be discoverable under MCR 2.302 (then GCR 1963, 310.1(1)). *Lynd v Chocolay Twp*, 153 Mich App 188, 193-195 (1986). Statements taken shortly after an incident are likely not reproducible without undue hardship, and such statements would be useful in trial preparation (good cause). *Id.* at 195.

Voluntary disclosure of privileged materials to a third party generally results in waiver of the privilege because "such action necessarily runs the risk the third party may reveal it, either inadvertently or under examination by an adverse party[.]" *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 81 (2014) (quotation marks and citation omitted). However, this "principle is not ironclad[.]" *Id.* (citation omitted). "[W]here work product is prepared for certain third parties, the qualified privilege may be retained." *Id.*; MCR 2.302(B)(3)(a) (work product prepared by or for another party or another party's representative is privileged material). Further, even when material is not prepared by or for a specific party, disclosure to

a third party will not result in waiver when the "common-interest doctrine" applies. *D'Alessandro Contracting Group, LLC*, 308 Mich App at 82. Thus, "the disclosure of work product to a third party does not result in a waiver if there is a reasonable expectation of confidentiality between the transferor . . . and the recipient . . . ." *Id.* at 82 (holding that the common-interest doctrine applied and the work product privilege was not waived because the defendants had a reasonable expectation of confidentiality in sharing the report with the third party where the defendants and the third party had an indemnification agreement).

F. Standard of Review

A court's decision regarding the work-product doctrine in MCR 2.302(B)(3) is reviewed de novo. *Leibel v Gen Motors Corp*, 250 Mich App 229, 244 (2002).

4.9 Medical Examinations

A. Generally

Whenever the mental or physical condition of a party, or of a person in the custody of or under the control of a party, is in controversy, the court may order the party to submit to an examination, or to produce the person in the party's custody for examination. MCR 2.311(A).

"The order may be entered only on a motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination." MCR 2.311(A). See also MCL 600.1445(1). "'In the context of our court rules, "[g]ood cause simply means a satisfactory, sound or valid reason[.]" The trial court has broad discretion to determine what constitutes "good cause."'" *Burris v KAM Transp, Inc*, 301 Mich App 482, 488 (2013), quoting *Thomas M Cooley Law Sch v Doe*, 300 Mich App 245, 264 (2013). "'[W]hat may be good cause for one type of examination may not be so for another. *The ability of the movant to obtain the desired information by other means is also relevant*.'" *Burris*, 301 Mich App at 489, quoting *Schlagenhauf v Holder*, 379 US 104, 118-119 (1964) (alteration added) (interpreting FR Civ P 35, the federal counterpart to MCR 2.311).

In the context of determining whether good cause exists to grant a request for *additional* independent medical examinations, the trial court should consider the number of previous examinations, whether a subsequent examination is duplicative and/or necessary, as well as

the passage of time since the previous examination(s). See *Burris*, 301 Mich App at 492-493.

No-fault cases. MCL 500.3151 of the no-fault act states that "[w]hen the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians." MCR 2.311(A) allows the court to order medical examinations and place conditions on the examinations. Any conditions placed on a medical examination conducted under MCL 500.3151 must be tailored to achieve the protection granted to an insured under MCL 500.3159. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 194 (2007). In *Muci*, the Michigan Supreme Court held that the specific mandates of the no-fault statute (MCL 500.3151) take precedence over the general court rule for civil actions (MCR 2.311(A)), and a trial court may not impose conditions on medical examinations in no-fault cases unless the insured demonstrates good cause as required by MCL 500.3159. See *Muci*, 478 Mich at 193-194. For example, the plaintiff established good cause in requesting the court to impose conditions on the examining doctor when the plaintiff revealed that the doctor had asked inappropriate questions of another examinee relating to the possibility of settlement and other matters covered by attorney-client privilege. *Id.* at 193. See also *Burris*, 301 Mich App at 488 n 2, quoting *Muci*, 478 Mich at 192 (quotation marks and citations omitted) ("[i]n the context of no-fault benefits, 'good cause' under MCL 500.3159 for a trial court to limit mental or physical examinations in a dispute 'may only be established by a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements[]'").

B. Report of Physician, Physician's Assistant, or Certified Nurse Practitioner

A copy of the report and findings by the examining licensed physician, licensed physician's assistant, or certified nurse practitioner must be provided to the person examined or his or her attorney. MCL 600.1445(3). See also MCR 2.311(B)(1), which requires the party requesting the examination to deliver the reports and findings under certain circumstances. The party requesting the examination may request a copy of a similar report from any previous or subsequent examinations made regarding the same condition. MCR 2.311(B)(2).

If a physician fails to comply with MCR 2.311, the court may order the physician to appear for a discovery deposition. MCR 2.311(B)(3).

C. Privilege

By requesting and obtaining a report of an examination ordered pursuant to MCR 2.311, or by deposing the examiner, "the person examined waives any privilege he or she may have in that action, or another action involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine the person as to the same mental or physical condition." MCR 2.311(B)(4).

D. Standard of Review

A court's decision whether to grant an order requiring the mental or physical examination of a party or its agent is reviewed for an abuse of discretion. *Brewster v Martin Marietta Aluminum Sales, Inc*, 107 Mich App 639, 643 (1981).

4.10 Disclosure of Witnesses

A. Witness Lists

"Witness lists are an element of discovery." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628 (1993). They serve the purpose of avoiding "'trial by surprise.'" *Grubor*, *supra*, quoting *Stepp v Dep't of Nat Resources*, 157 Mich App 774, 779 (1987).

The parties must file and serve their witness lists within the time limits prescribed by the court under MCR 2.401(B)(2)(a). MCR 2.401(I)(1). The witness list should include the witness's name, address (if known), whether the witness is an expert, and his or her field of expertise. MCR 2.401(I)(1)(a)-(b). However, only a general identification is necessary if the witness is a records custodian "whose testimony would be limited to providing the foundation for the admission of records[.]" MCR 2.401(I)(1)(a).

B. Sanctions for Failure to File Witness List

"The court may order that any witness not listed in accordance with [MCR 2.401] will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2). "While it is within the trial court's authority to bar an expert witness or dismiss an action as a sanction for the failure to timely file a witness list, the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate." *Dean v Tucker*, 182 Mich App 27, 32 (1990). Just because a witness list was not timely filed does not justify the imposition of such a sanction. *Dean*, *supra* at 32. In *Dean*, *supra* at

32-33, the Court referred to a nonexhaustive list of factors to consider when determining what is an appropriate sanction:

> "(1) whether the violation was [willful] or accidental;
>
> "(2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);
>
> "(3) the prejudice to the [other party];
>
> "(4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice;
>
> "(5) whether there exists a history of [the party] engaging in deliberate delay;
>
> "(6) the degree of compliance by the [party] with other provisions of the court's order;
>
> "(7) an attempt by the [party] to timely cure the defect; and
>
> "(8) whether a lesser sanction would better serve the interests of justice."

C. Standard of Review

A court's decision to permit or exclude undisclosed witnesses is reviewed for an abuse of discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90-91 (2000). In *Kalamazoo*, *supra*, the trial court did not abuse its discretion in denying the defendant's request to testify and to call an expert witness when the request was made the morning of trial, and the defendant had repeatedly refused to be deposed. *Kalamazoo*, *supra* at 90.

Chapter 5: Resolution Without Trial

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5.1 Pretrial Conferences

A. Early Scheduling Conference

1. Purposes

Setting an early scheduling conference may serve the following purposes:

- To consider whether jurisdiction and venue are proper;
- To consider whether the case is frivolous;
- To decide whether an alternative dispute resolution process is appropriate;
- To consider the complexity of the case and to enter a scheduling order; and
- To consider issues associated with electronically stored information. MCR 2.401(B)(1)(a)–(c).

2. Timing

Early scheduling conferences may be held anytime after the action has commenced. MCR 2.401(A). The court may schedule one on its own initiative or at the request of a party. *Id.* The court must give reasonable notice after scheduling a conference. *Id.*

3. Participants

Generally, attorneys are the only participants in scheduling conferences. See MCR 2.401(A) and (F). The attorney must be prepared and have the authority to fully participate in the conference. MCR 2.401(E). The conference may be held in chambers or by conference call. See MCR 2.402.

4. Scheduling Order

When creating a scheduling order pursuant to MCR 2.401(B), the court must take into consideration:

- Nature and complexity of the case,
- Number and location of the parties,
- Number and location of the witnesses,

- Extent of necessary discovery, and
- Availability of reasonably certain trial dates. MCR 2.401(B)(2)(b).

Generally, the court should only enter a scheduling order after having "meaningful consultation with all counsel of record." MCR 2.401(B)(2)(d). However, if the court enters a scheduling order without providing advance consultation, a party has 14 days to file a written request for an amendment of the scheduling order. MCR 2.401(B)(2)(d)(i). The court must reconsider its decision and "either enter a new scheduling order, or notify the parties in writing that the court declines to amend the order." MCR 2.401(B)(2)(d)(ii). The reconsidered decision must be made within 14 days after receiving the objection. *Id.*

If the court concludes that a scheduling order will "facilitate the progress of the case," it must "establish times for events the court deems appropriate, including

> "(i) the initiation or completion of an ADR [(alternative dispute resolution)] process,
>
> "(ii) the amendment of pleadings, adding of parties, or filing of motions,
>
> "(iii) the completion of discovery,
>
> "(iv) the exchange of witness lists under [MCR 2.401(I)], and
>
> "(v) the scheduling of a pretrial conference, a settlement conference, or trial." MCR 2.401(B)(2)(i)–(v).

The scheduling order may also include provisions related to electronically stored information, claims of privilege, and preserving discoverable information. MCR 2.401(B)(2)(c).

B. Pretrial Conference

1. Purposes

Similar to a scheduling conference, a pretrial conference may serve the purposes discussed in Section 5.1(A) in addition to the following:

- To identify and simplify the issues;
- To discuss estimated length of discovery and trial;

- To discuss amendments of pleadings;
- To discuss admissions of fact and documents;
- To propose limitations on number of expert witnesses;
- To discuss consolidation of actions and separation of issues;
- To discuss settlement;
- To discuss possible methods of alternative dispute resolution;
- To identify witnesses actually testifying;
- To determine whether MCR 2.203(A) has been satisfied (joinder of claims); and
- To discuss any "other matters that may aid in the disposition of the action." MCR 2.401(C)(1)(a)–(*l*).

Committee Tip:

• Pretrial conferences should be set 3-4 weeks before trial and should last no longer than 15 minutes to one hour, depending on the case.

• It is helpful to discuss things such as whether jurors may take notes, whether jurors may ask questions, the exhibit marking process, motions in limine (sometime before jury selection), and the voir dire process.

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2. Participants

Where the court expects meaningful discussion of settlement, the court may require the presence of attorneys, parties, representatives of lien holders, representatives of insurance carriers, or other persons. MCR 2.401(F), and 2.506(A)(4). The court cannot designate who will be the insurer's representative. *Kornak v Auto Club Ins Ass'n*, 211 Mich App 416, 422 (1995). But see MCR 2.401(F)(2), which provides that the court may require the availability of a specified individual as long as the order authorizes the use of a substitute who has the same information and authority. "The court's order may specify whether the availability is to be in person or by telephone." MCR 2.401(F).

A party represented by counsel is not required to appear in person for a civil proceeding unless he or she has been ordered to appear. *Rocky Produce, Inc v Frontera,* 181 Mich App 516, 517-518 (1989).

A party may be defaulted or a dismissal may be ordered for the failure of the party, or the party's attorney or representative, to attend a scheduled conference, or for lacking the information and authority necessary to effectively participate in all aspects of the conference. MCR 2.401(G)(1). However, if manifest injustice would result from an order of default or dismissal, or the failure was not due to the culpable negligence of the party or the party's attorney, the court may excuse the failure. MCR 2.401(G)(2)(a)–(b).

Committee Tips:

- *Review file for witness lists, pending motions, and offers of judgment.*
- *Create a conference order, if appropriate. See MCR 2.401(C)(2).*
- *Consider sanctions for failure to appear. MCR 2.401(G).*

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3. Conference Order

The court must enter an order that incorporates any agreements or decisions made during the pretrial conference. MCR 2.401(C)(2).

C. Settlement Conference

Committee Tip:

Settlement conferences are typically set 1-14 days before trial but may be set at any time. They may last from 15 minutes to all day depending on the case. For this reason, it is important to determine the scope of a settlement conference at a pretrial conference.

The court may direct attorneys, parties, representatives of lien holders, representatives of insurance carriers, or other persons to attend a settlement conference. MCR 2.401(E), (F), and 2.506(A)(4). The court cannot designate who will be the insurer's representative. *Kornak*, 211 Mich App at 422. But see MCR 2.401(F)(2), which provides that the court may require the availability of a specified individual but authorizes the use of a substitute with the same information and authority. "The court's order may specify whether the availability is to be in person or by telephone." MCR 2.401(F).

A party represented by counsel is not required to be present for a civil proceeding unless they have been ordered by the court or properly subpoenaed to appear. *Rocky Produce, Inc*, 181 Mich App at 517-518.

A party may be defaulted or a dismissal may be ordered for the failure of the party, the party's attorney or representative, to attend unless manifest injustice would result or the failure was not due to the culpable negligence of the party or the party's attorney. MCR 2.401(G).

A party cannot be defaulted based solely on a representative of the party's insurance company refusing to make a settlement offer. *Henry v Prusak*, 229 Mich App 162, 170 (1998).

D. Posttrial Settlement Conference

Committee Tip:

Schedule a status conference if an appeal is being considered. Whether to hold a posttrial settlement conference is not addressed by the court rules. Such a conference provides an opportunity for discussion of settlement after trial but before appeal.

E. Standard of Review

A dismissal under MCR 2.401(G) is reviewed for an abuse of discretion. *Schell v Baker Furniture Co*, 232 Mich App 470, 474 (1998).

A trial court's decision on a motion to amend the scheduling order is reviewed for an abuse of discretion. See *Nuriel v YWCA of Detroit*, 186 Mich App 141, 146 (1990).

The Court of Appeals "reviews for an abuse of discretion a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order." *Kemerko Clawson, LLC v RxIV Inc*, 269 Mich App 347, 349 (2005).

5.2 Offer of Judgment

A. Purpose

"The purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation." *Gudewicz v Matt's Catering, Inc*, 188 Mich App 639, 643 (1991).

B. Procedure and Timing

A party may serve an offer of judgment on an adverse party until 28 days before trial. MCR 2.405(B). If the offeror waits until the last day to make a timely offer, the offeree can still make a counteroffer. See *Weiss v Hodge (After Remand)*, 223 Mich App 620, 639-641 (1997). The adverse party may accept an offer or counteroffer by serving a notice of acceptance on the other parties and filing it and proof of service with the court. MCR 2.405(C)(1) and (3). "An offer [or counteroffer] is rejected if the offeree

> "(a) expressly rejects it in writing, or
>
> "(b) does not accept it as provided by [MCR 2.405(C)(1)]." MCR 2.405(C)(2) and (3).

If an offer or counteroffer is accepted, the court must "enter a judgment according to the terms of the stipulation." MCR 2.405(C)(1) and (3).

There is the potential for sanctions if an offer or counteroffer is rejected and the offeror receives a more favorable decision. See MCR 2.405(D).

The offer must be for a sum certain. MCR 2.405(A)(1); *Knue v Smith*, 478 Mich 88, 93 (2007). The offer may be payable in installments. *Central Cartage Co v Fewless*, 232 Mich App 517, 532 (1998).

Although the Court of Appeals did not decide whether MCR 2.405 applies to purely equitable actions, it did state that, "at the minimum, [MCR 2.405] does apply to mixed law and equity actions where the offer of judgment only offers monetary damages and the equitable claims are to be dismissed." *McManus v Toler*, 289 Mich App 283, 290 (2010).

C. Sanctions

The payment of taxable costs and reasonable attorney fees is required, except "[t]he court may, in the interest of justice, refuse to award an attorney fee[.]" MCR 2.405(D)(3). The *interest of justice* exception is a narrow one. For a discussion of possible circumstances where it might or might not apply, see *Luidens v 63rd Dist Court*, 219 Mich App 24, 31-36 (1996). "The purpose of MCR 2.405 is to encourage settlement and to deter protracted litigation." *AFP Specialties*, *Inc v Vereyken*, 303 Mich App 497, 518 (2014). "Viewed in light of this purpose, the 'interest of justice' provision is the exception to a general rule, and it should not be applied '"absent unusual circumstances."'" *Id*. at 518-519 (citations omitted). "[T]he exception may be applied when an offer is made for the purpose of 'gamesmanship' and not a sincere effort at negotiation." *Id*. at 519. "'Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous "are too common" to constitute the unusual circumstances encompassed by the "interest of justice" exception.'" *Id*., quoting *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 391 (2004), quoting *Luidens*, 219 Mich App at 34-35. See also Section 5.3(H)(2).

"[A] party may not recover appellate fees and costs as actual costs under MCR 2.405." *Lech v Huntmore Estates Condo Ass'n*, 310 Mich App 258, 263 (2015) (holding that appellate attorney fees and costs "are not incurred as a result of a party's decision to reject an offer of judgment[]").

"A request for costs under [MCR 2.405(D)] must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion (*i*) for a new trial, (*ii*) to set aside the judgment, or (*iii*) for rehearing or reconsideration." MCR 2.405(D)(6); *Kopf v Bolser*, 286 Mich App 425, 429 (2009). "A judgment adjudicating the rights and liabilities of the particular parties, such that there is no cause of action outstanding, starts the 28-day period for requesting offer-of-judgment sanctions under MCR 2.405(D)." *Kopf*, *supra* at 433-434. In *Kopf*, *supra* at 434, the defendant was not entitled to offer-of-judgment sanctions where he filed his motion more than 28 days after a judgment adjudicating the rights and liabilities of the parties was entered, even though the precise amount of taxable costs and interest had not yet been determined.

A reasonable refusal is insufficient to deny attorney fees. *Luidens*, 219 Mich App at 31-36; *Butzer v Camelot Hall Convalescent Ctr*, *Inc (After Remand)*, 201 Mich App 275, 278-279 (1993).

D. Relation to Case Evaluation

If a case has been submitted to case evaluation, costs under MCR 2.405 cannot be awarded, unless the case evaluation award was not unanimous. MCR 2.405(E). Case evaluation is discussed in the next section,Section 5.3.

If there is a rejection of both the case evaluation award and an offer of judgment, "the cost provisions of the rule under which the later rejection occurred control." *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426 (1996).

E. Standard of Review

A trial court's decision to award offer of judgment sanctions is reviewed for an abuse of discretion. *J C Bldg Corp II*, 217 Mich App at 426.

5.3 Case Evaluation

A. Scope and Applicability

Any civil action in which the relief sought is primarily money damages or division of property may be submitted to case evaluation. MCR 2.403(A)(1).

Case evaluation is mandatory for tort cases filed in circuit court after October 1, 1986. MCR 2.403(A)(2).

"A court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate." MCR 2.403(A)(3).

B. Submission of Cases

"The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order after the filing of the answer

> "(a) on written stipulation by the parties;
>
> "(b) on written motion by a party; or,
>
> "(c) on the judge's own initiative."MCR 2.403(B)(1)(a)–(c).

C. Objections to Case Evaluation

To object to case evaluation, a written motion and notice of hearing must be filed and served within 14 days after notice of the order assigning the case to case evaluation. MCR 2.403(C)(1). "The motion must be set for hearing within 14 days after it is filed, unless the court orders otherwise." *Id.*

"A timely motion must be heard before the case is submitted to case evaluation." MCR 2.403(C)(2).

D. Case Evaluation Decision

The panel's case evaluation must be in writing and made within 14 days after the case evaluation hearing. MCR 2.403(K)(1). Except as indicated in MCR 2.403(H)(3) (derivative claims), the panel's case evaluation "must include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action." MCR 2.403(K)(2).

The evaluation must indicate if it is not a unanimous award. MCR 2.403(K)(1). "Costs shall not be awarded if the case evaluation aware was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution process, at the expense of the parties, pursuant to MCR 2.410(C)(1)." MCR 2.403(O)(7).

In certain tort cases, "if the panel unanimously finds that a party's action or defense as to any other party is frivolous [as defined in MCR 2.403(K)(4)(a)–(c)], the panel shall so indicate on the evaluation." MCR 2.403(K)(4). If a party's claim or defense was found to be frivolous under MCR 2.403(K)(4), the party may file a motion within 14 days requesting the court to review that finding. MCR 2.403(N)(2).

E. Acceptance or Rejection of Evaluation

Failure to file a written acceptance or rejection within 28 days constitutes a rejection. MCR 2.403(L)(1). "Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party." *Id.* MCR 2.403(L)(3) applies to case evaluations involving multiple parties. "MCR 2.403(L) gives a party two options: 'accepting all of the awards covering the claims by or against the party' or 'accepting some and rejecting others.' The grammar of this rule indicates that the word 'some' in the phrase 'accepting some and rejecting others' refers to the *awards*, not the *parties*." *Mercantile Bank Mtg Co, LLC v NGPCP/Brys Centre, LLC*, 305 Mich App 215, 225 (2014). The Court explained that

because a case evaluation panel is generally required to issue a separate award from each plaintiff to each defendant under MCR 2.403(K)(2), "a plaintiff will be able to accept awards against some defendants while rejecting awards against other defendants." *Mercantile Bank Mtg Co, LLC*, 305 Mich App at 225 (finding that "[t]he court rules do not allow a party to partially accept and partially reject a single reward[,]" and although the case evaluation panel failed to follow the court rules when it issued one award for multiple parties, the plaintiff's partial acceptance/partial rejection was an improper response that constituted a rejection of the entire evaluation).

"If all parties accept the panel's evaluation, the case is over." *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 557 (2002). Where there is acceptance by all parties, the trial court should enter the judgment "in accordance with the evaluation." MCR 2.403(M)(1). If "the award is paid within 28 days after notification of the acceptances," the court must dismiss the action with prejudice. *Id.* "The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered, except for cases involving rights to personal protection insurance benefits under MCL 500.3101 *et seq.*, for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing." *Id.* See also *Magdich & Assoc, PC v Novi Dev Assoc LLC*, 305 Mich App 272, 274-275 (2014), where subsequent to the defendant's motion to amend its counter-complaint, but before the trial court ruled on the motion, the parties accepted a case evaluation award without qualification and the plaintiff paid the award to the defendant. Following the acceptance and payment of the award, the trial court issued an opinion and order granting the defendant's motion to amend its counter-complaint to allege additional claims. *Id.* at 275. The plaintiff moved for entry of an order of dismissal with prejudice under MCR 2.403(M), alleging that the case was resolved with regard to all claims. *Magdich & Assoc, PC*, 305 Mich App at 275. The trial court denied the plaintiff's motion, and the plaintiff appealed. *Id.* The Michigan Court of Appeals reversed the trial court, holding that "both parties accepted the case evaluation award without qualification, and therefore, the case is over." *Id.* at 281. Citing *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549 (2002), the Court noted that the court rule does not allow a party to make a showing that less than all issues were submitted to case evaluation. *Magdich & Assoc, PC*, 305 Mich App at 280.

"If only a part of an action has been submitted to case evaluation pursuant to [MCR 2.403(A)(3)] and all of the parties accept the panel's evaluation, the court shall enter an order disposing of only those claims." MCR 2.403(M)(2).

The court has authority to extend case evaluation deadlines pursuant to MCR 2.108(E). *Steward v Poole*, 196 Mich App 25, 29-30 (1992), rev'd on other grounds 443 Mich 863 (1993). Whether a court has the authority to shorten the period stated in MCR 2.403(L)(1) has not yet been considered. *Steward v Poole*, 443 Mich 863 (1993).

F. Post-Rejection Proceedings

If the evaluation is rejected, the action proceeds to trial. MCR 2.403(N)(1).

If a claim or defense is found to be frivolous, the party may motion the court to review the decision, or the party must post a bond. MCR 2.403(N)(2) and (3).

The evaluation cannot be revealed to the judge in a nonjury case. MCR 2.403(N)(4). See also *Cranbrook Prof Bldg, LLC v Pourcho*, 256 Mich App 140, 143 (2003). If a party discloses the evaluation to a judge in a nonjury case, "the trial court must declare a mistrial and reassign the case to another judge." *Bennett v Medical Evaluation Specialists*, 244 Mich App 227, 231 (2000). See also MCR 2.403(N)(2)(d). This is the only appropriate sanction "where a party, in clear violation of MCR 2.403(N)(4), makes a blatant effort to influence the court before it renders judgment and there is no suggestion that the revelation was done as a means to forum shop[.]" *Bennett*, *supra* at 233.

G. Motion to Set Aside Case Evaluation

A trial court has discretion to set aside an acceptance of the award both before and after entry of a judgment on the award. *Reno v Gale*, 165 Mich App 86, 92-93 (1987). In limited circumstances, the court also has discretion to allow an amendment to a rejection of the award. *State Farm Mut Auto Ins Co v Galen*, 199 Mich App 274, 277-279 (1993). In *State Farm*, the defendant was deemed to have rejected the mediation award when his insurer failed to file a written acceptance because it was under the mistaken belief that it had no duty to defend or indemnify the defendant. *State Farm*, *supra* at 276. Under these limited circumstances, the trial court did not err in allowing the defendant to amend the rejection to reflect his acceptance of the mediation award. *Id.* at 278.

Although a case is completely settled once both parties accept a case evaluation award, the parties are not precluded from filing a motion to set aside that award. *Goch Properties, LLC v C Van Boxell Transportation, Inc*, 477 Mich 871 (2006). The court should only set aside the acceptance "if failure to do so would result in substantial injustice." *State Farm Mut Auto Ins Co*, 199 Mich App at 277.

H. Rejecting Party's Liability for Costs

Committee Tip:

Consider a motion for costs as another opportunity for settlement.

If a party has rejected the case evaluation and the action proceeds to verdict, the rejecting party must pay the opposing party's actual costs, unless the verdict is more favorable to the rejecting party than the evaluation. MCR 2.403(O)(1). If both parties rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation. *Id*. However, "the court retains discretion regarding whether to award costs in certain circumstances." *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 359-360 (2014), rev'g in part and vacating in part 298 Mich App 558 (2012). See e.g., MCR 2.403(O)(11).[1]

1. Verdict

For case evaluation purposes, a verdict is:

> "(a) a jury verdict,
>
> "(b) a judgment by the court after a non-jury trial, [or]
>
> "(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2).

A verdict does not include a settlement by the parties. *Webb v Holzheuer*, 259 Mich App 389, 391-392 (2003).

A dismissal order is not a verdict for purposes of MCR 2.403(O)(4). See *Oram v Oram*, 480 Mich 1163 (2008).

For purposes of MCR 2.403(O)(2)(c), a verdict exists and costs may be awarded if "the action 'proceeded to a judgment[,]' . . . the judgment 'entered as a result' of the court's ruling on a motion[, and] . . . the court entered the judgment after [a party] rejected the case evaluation." *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 350-351 (2014) (holding that an entry of judgment confirming an appraisal award pursuant to

[1] See Section 5.3(H)(2) for more information on actual costs.

MCL 500.2833(1)(m)[2] is a verdict for purposes of MCR 2.403(O)(2).

As it relates to MCR 2.403(O)(1), "a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided in MCL 600.6306." MCR 2.403(O)(3).

Where the parties agree to arbitration and where the arbitration agreement and the court's order state that mediation or case evaluation sanctions will apply, the arbitration decision need not be unanimous for mediation or case evaluation sanctions to apply. *Cusumano v Velger*, 264 Mich App 234, 235-236 (2004). The arbitrator's decision is tantamount to a "verdict," and MCR 2.403 does not require a verdict to be unanimous before sanctions may be ordered. *Cusumano*, 264 Mich App at 235-236.

Attorney fees awarded under MCL 500.3148(1) (attorney's representation of a claimant in a no-fault insurance case) are not an assessable cost by which a verdict may be adjusted under MCR 2.403(O)(3). *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 364 (2007).

A trial court may award case evaluation sanctions in connection with both a trial and a retrial. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 30-31 (2013). "In *Severn v Sperry Corp*, 212 Mich App 406, 417 (1995), [the Court of Appeals] held that 'fees generated in connection with both trials were "necessitated by the rejection" of the mediation evaluation because they arose after the rejection,' adding, '[t]he cost of two trials was part of the risk assumed by [the rejecting party] when it rejected the mediation evaluation.'" *Zaremba*, 302 Mich App at 31. In *Zaremba*, 302 Mich App at 30-31, the defendants rejected the case evaluation panel's award to the plaintiff, and the case proceeded to a verdict, which was affirmed on appeal. On retrial, the jury awarded the plaintiff an additional amount. *Id*. at 31. The plaintiff claimed sanctions for the defendants' rejected case evaluation awards, and the trial court awarded sanctions in connection with the retrial as well as the initial trial. *Id*. The Court of Appeals found no error because the trial court "followed applicable case law in including the first trial in its award of case evaluation sanctions." *Id*. at 30.

[2] MCL 500.2833(1)(m) establishes an appraisal award procedure for cases involving a fire insurance policy.

2. Actual Costs

For case evaluation purposes, actual costs are:

> "(a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR 2.626." MCR 2.403(O)(6)(a)-(b).

"MCR 2.403(O) does not require that the attorney fee be 'incurred,' it requires only that the trial court determine a 'reasonable' attorney fee amount according to a prescribed method, namely, by determining the 'hourly or daily rate . . . for services necessitated by the rejection of the case evaluation.'" *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 304 Mich App 174, 216 (2014), rev'd in part on other grounds 497 Mich 265 (2015), quoting MCR 2.403(O)(6)(b). "Accordingly, an award of case evaluation sanctions must include an award of attorney fees to be determined by this method." *Fraser Trebilcock Davis & Dunlap PC*, 304 Mich App at 216.

Costs may only be awarded if the evaluation award was unanimous. MCR 2.403(O)(7). However, under the offer of judgment rule, a party may only recover costs when the case evaluation award was *not* unanimous. MCR 2.405(E).

"A request for costs under [MCR 2.403(O)] must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion (*i*) for a new trial, (*ii*) to set aside the judgment, or (*iii*) for rehearing or reconsideration." MCR 2.403(O)(8). For purposes of the 28-day rule in MCR 2.403(O)(8), a motion for reconsideration is equivalent to a motion for a new trial or to set aside judgment, because all three motions have the same purpose: "to rescind a dispositive ruling or judgment issued by the trial court." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 285 (2011). A motion for a new trial, for reconsideration, or to set aside judgment must be filed "within 21 days after the issuance of the ruling or judgment." *MEEMIC Ins Co*, *supra* at 285. Because this 21-day period expires before the 28-day period in MCR 2.403(O)(8), "a party seeking case evaluation sanctions may elect to hold the motion for sanctions until learning whether the opposing party has filed any dispositive motions." *Id*. When a trial court enters "a

summary disposition order that fully adjudicates the entire action, MCR 2.403(O)(8) requires a party to file and serve a motion for case evaluation sanctions within 28 days after entry of a ruling on a motion for reconsideration of the order." *Id.*

Consideration of a case evaluation before entry of judgment is not permissible when considering whether to assess costs and award attorney fees and determining the amount to be awarded. *O'Neill v Home IV Care, Inc*, 249 Mich App 606, 614-615 (2002).

The court may, in the "interest of justice," refuse to award actual costs when the verdict is a result of a motion under MCR 2.403(O)(2)(c). MCR 2.403(O)(11).[3] Examples of where the *interest of justice* exception may apply include "where a legal issue of first impression is presented, . . . or 'where the law is unsettled and substantial damages are at issue, where a party is indigent and an issue merits decision by a trier of fact, or where the effect on third persons may be significant.'" *Haliw v City of Sterling Hts*, 257 Mich App 689, 707 (2003), rev'd on other grounds, 471 Mich 700 (2005), quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 36 (1996) (internal citation omitted). "'Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception.'" *Haliw*, *supra* at 707, quoting *Luidens*, *supra* at 36. There must be unusual circumstances to invoke the *interest of justice* exception. *Haliw*, *supra* at 707. The exception "must not be too broadly applied so as to swallow the general rule . . . and must not be too narrowly construed so as to abrogate the exception." *Id.* at 706-707. See also *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 349 (2014) (recognizing that trial courts retain discretion regarding whether to award actual costs in the interests of justice under MCR 2.403(O)(11)).

The trial court did not err in denying case evaluation sanctions based upon the *interest of justice* exception where the defendant's decision to wait until after the close of proofs to move for a directed verdict based on a viable defense caused the "plaintiff and the court to expend time and resources on litigation that might have been unnecessary from the outset." *Harbour v Correctional Med Svcs, Inc*, 266 Mich App 452, 467 (2005).

Attorney fees and costs incurred prior to the deadline for accepting or rejecting the evaluation may not be recovered. *Taylor v Anesthesia Assoc of Muskegon, PC*, 179 Mich App 384, 386 (1989).

[3] See Section 7.3 on costs.

The court has authority to award costs and attorney fees for posttrial proceedings necessitated by the rejection of a case evaluation award. *Troyanowski v Village of Kent City*, 175 Mich App 217, 226-227 (1988).

"Actual costs" pursuant to MCR 2.403(O) do not include appellate attorney fees and costs. *Haliw v City of Sterling Hts*, 471 Mich 700, 711 (2005).

Costs taxable in any civil action.[4] The courts have construed the phrase, "costs taxable in any civil action," to limit recovery to those costs authorized by statute. *Taylor*, 179 Mich App at 387-388, and *Elia v Hazen*, 242 Mich App 374, 379 (2000). For examples of taxable costs, see MCL 600.2405, MCL 600.2441, MCL 600.2455, and MCR 2.625(A) and (C).

The party who prevails on the entire record is deemed the prevailing party for purposes of taxing costs. MCR 2.625(B)(2).

"The fact that [the plaintiff] recovered less than the full amount of damages sought is not dispositive of whether it was the prevailing party. On the other hand, mere recovery of some damages is not enough; in order to be considered a prevailing party, that party must show, at the very least, that its position was improved by the litigation. . . .We read MCR 2.625(B)(2) and MCR 2.403(O)(6) together to conclude that the party entitled to actual costs under the [case evaluation] rule for a cause of action shall also be deemed the prevailing party under MCR 2.625(B)(2) on the entire record." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81 (1998).

When a party's recovery does not exceed 10 percent more than the case evaluation amount, the opposing party has prevailed for purposes of MCR 2.625 and is entitled to recover costs authorized by MCL 500.3148(1) (claimant's attorney fees in a no-fault insurance case). *Ivezaj*, 275 Mich App at 367-368.

In *Fansler v Richardson*, 266 Mich App 123, 127 (2005), the Court of Appeals found that a defendant is not a "prevailing party" entitled to costs from another codefendant where "[t]he ultimate issue of fault stemming from the resolution of the [dispute] would have benefited [the defendants'] positions against *plaintiffs*, but not against [the codefendant]. Therefore, because [defendants] had no vested right to recover from [the codefendant], they could not be considered prevailing parties under MCR 2.625 against [the codefendant], and they had no

[4] See Section 7.3 on costs.

right to tax costs against [the codefendant]." *Fansler*, *supra* at 129-130.

Expert witness fees actually incurred qualify as actual costs under MCR 2.403(O). *Elia*, 242 Mich App at 379-380.

Reasonable attorney fee.[5] To calculate a reasonable attorney fee, the court should first determine "the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence." *Smith v Khouri*, 481 Mich 519, 522 (2008). The court should then multiply that number by "the reasonable number of hours expended." *Smith*, *supra* at 522. Finally, the court may adjust the fee up or down after considering and indicating its view of each of the factors listed in *Wood v DAIIE*, 413 Mich 573, 588 (1982), as "fine tuned" by the *Smith* Court, and in light of Michigan Rule of Professional Conduct 1.5(a). *Smith*, *supra* at 522, 530. Trial courts should "discuss the *Wood* and MRPC 1.5(a) factors in a manner sufficient 'to aid appellate review.'" *Augustine v Allstate Ins Co*, 292 Mich App 408, 436 (2011), quoting *Smith*, *supra* at 531.

> "A meaningful application of the factors is more than a recitation of those factors prefaced by a statement such as 'after careful review of the criteria the ultimate finding is as follows . . . .' Similarly, an analysis is not sufficient if it consists merely of the recitation of the factors followed by a conclusory statement that 'the trial court has considered the factors and holds as follows . . .' without clearly setting forth a substantive analysis of the factors on the record. The trial court should consider the interplay between the factors and how they relate to the client, the case, and even the larger legal community." *Augustine*, 292 Mich App at 436.

In *Augustine* 292 Mich App at 436, 439, the Court of Appeals remanded the case and instructed the trial court to make specific findings under *Smith*, *supra*, where the trial court "acknowledged the fee-consideration factors, but provided little analysis or insight into the application of those factors to the client or the case."

The fee applicant bears the burden of "'produc[ing] satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the

[5] See Section 7.4 on attorney fees.

community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" *Smith*, 481 Mich at 531, quoting *Blum v Stenson*, 465 US 886, 895 n 11 (1984). The fee applicant may support his or her request with "testimony or empirical data found in surveys and other reliable reports." *Smith*, *supra* at 531-532. To satisfy the "reasonable number of hours expended" requirement, the fee applicant must submit detailed billing records and evidence to support the claimed hours. *Id.* at 532. The court must examine these records, and the opposing party may dispute them. *Id.* If there is a factual dispute, the opposing party is entitled to an evidentiary hearing to contest the reasonableness of the hours billed or the hourly rate. *Id.*

The court may award attorney fees based on an hourly rate in excess of the actual hourly rate charged because nothing in the rule requires a trial court to find that reasonable attorney fees are equivalent to actual fees. *Cleary v The Turning Point*, 203 Mich App 208, 211-212 (1994). The court may consider expenses incurred by a party's attorney when determining a reasonable attorney fee. *Michigan Basic Prop Ins Ass'n v Hackert Furniture Distributing Co*, 194 Mich App 230, 236-237 (1992).

Case evaluation attorney fees. MCR 2.403 does not require a detailed bill of costs for an award of attorney fees as part of case evaluation sanctions, as is required for determining ordinary taxation of costs under MCR 2.625. *Young v Nandi*, 276 Mich App 67, 88-89 (2007), vacated in part on other grounds 482 Mich 1007 (2008). However, "some documentation is needed to enable the trial court to determine the proper amount to award." *Young*, *supra* at 88. According to the *Young* Court,

"We refuse to require an exhaustive and detailed list of the precise service provided at every moment.

And, the court rule does not require it. [MCR 2.403] merely requires that the attorney fee awarded be reasonable and 'based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.'" *Young*, *supra* at 89-90. See also MCR 2.403(O)(6)(b).

The *necessitated by the rejection* language in MCR 2.403(O)(6) "requires a causal nexus between the rejection and incurred expenses." *Haliw*, 471 Mich at 711 n 8. The Court concluded that a causal nexus exists between rejection of a case evaluation and the subsequent trial fees and costs; however, there is no causal nexus between a rejection and appellate attorney fees and costs. *Id.*

~~A litigant-attorney may not recover attorney fees under MCR 2.403 for time spent working on the case. *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 432 (2007). Similarly, a "law firm [may not] recover, as case-evaluation sanctions under MCR 2.403(O)(6)(b), a 'reasonable attorney fee' for the legal services performed by its own member lawyers in connection with [a] suit" in which the firm is a party, because "the 'plain and unambiguous meaning of the term "attorney"' requires 'an agency relationship between an attorney and the client whom he or she represents' and, with that relationship, 'separate identities between the attorney and the client.'" *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497 Mich 265, 275 (2015) (concluding that although the plaintiff law firm, "as a corporation, [was] a legal entity distinct from its shareholders[,] . . . the firm and its member lawyers [did not enjoy] separate identities as client and attorney for the purposes of . . . litigation[]" in which the firm was self-represented) (citations omitted).~~

"An award of attorney fees may include an award for the time and labor of any legal assistant who contributed nonclerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan." MCR 2.626.

3. Interest on Sanctions

"Costs imposed under MCR 2.403(O) are in the nature of sanctions, and a successful plaintiff will otherwise receive interest on the judgment itself, in addition to costs and attorney fees that can be ordered under MCR 2.403(O)." *Ayar v Foodland Distributors*, 472 Mich 713, 718 (2005).

4. Double Award

Once the prevailing party is awarded attorney fees as part of a claim, additional attorney fees under MCR 2.403(O) are not warranted. *Rafferty v Markovitz*, 461 Mich 265, 272-273 (1999). In *Rafferty*, the plaintiff recovered her attorney fees under the Civil Rights Act. *Rafferty*, *supra* at 272. The Court concluded that she could not recover the fees twice because she "had no remaining 'actual costs' for which she could claim compensation under the mediation court rule." *Id.*

MCR 2.403(M) provides that, except for cases involving personal protection insurance benefit claims that have not accrued and claims that were not submitted to case evaluation, "a judgment entered on an accepted award dispose[s] of all claims in the

action and includes all fees, costs, and interest to the date it is entered." MCR 2.403(M)(1). It is for the case evaluation panel to decide if costs, fees, or interest should be included in any evaluation under MCR 2.403. *Larson v Auto-Owners Ins Co*, 194 Mich App 329, 332 (1992). "If the [case evaluation] panel declines to award costs or fees, the mutual acceptance of the [] evaluation waives the subsequent raising of the issue of costs or fees in the trial court." *X v Peterson*, 240 Mich App 287, 290 (2000).

I. Standard of Review

A trial court's decision whether to grant case evaluation sanctions under MCR 2.403(O) is a question of law that is reviewed de novo on appeal. *Smith*, 481 Mich at 526. A trial court's award of attorney fees and costs is reviewed for an abuse of discretion. *Smith*, *supra* at 526.

A trial court's decision to set aside a party's acceptance of a case evaluation award before it is entered is reviewed for an abuse of discretion. *Young v Everlock Taylor Corp*, 137 Mich App 799, 802 (1984). "[J]udgment on the acceptance should be set aside only if failure to do so would result in substantial injustice." *Hauser v Roma's of Michigan, Inc*, 156 Mich App 102, 104 (1986).

The court has discretion to set attorney fees, and its award will be upheld absent an abuse of discretion. *Cleary*, 203 Mich App at 211.

5.4 Alternative Dispute Resolution

"All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule." MCR 2.410(A)(1). For purposes of MCR 2.410, "alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; and other procedures provided by local court rule or ordered on stipulation of the parties." MCR 2.410(A)(2). Courts that use ADR pursuant to MCR 2.410 must develop an ADR plan by local administrative order and must meet the requirements of MCR 2.410(B). MCR 2.410(B)(1).

"At any time, after consultation with the parties, the court may order that a case be submitted to an appropriate ADR process." MCR 2.410(C)(1). The order must provide for the selection and payment of the ADR provider and provide time limits for initiation and completion of the process. MCR 2.410(C)(2). A party may object to the court's decision to refer the case to ADR by filing a motion within 14 days after the order

referring the case was entered. MCR 2.410(E). Attorneys and parties can be required to attend the ADR proceedings. MCR 2.410(D).

Neither MCR 2.410 nor MCR 2.411 permit a court to order a party to disclose information to a mediator that has nothing to do with the case, is irrelevant, or is not within the scope of discovery. *Wheeler v Baumgartener*, 468 Mich 947, 948 (2003).

Effective December 8, 2014, 2014 PA 159 created the Uniform Collaborative Law Act, MCL 691.1331 *et seq.*, "to allow parties to agree to a collaborative alternative dispute resolution process as an alternative to litigation [in family or domestic relations cases]; and to provide remedies." See title of Uniform Collaborative Law Act; MCL 600.1332(e). The act sets forth procedures for commencing a *collaborative law process*, which "means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons sign a collaborative law participation agreement and are represented by collaborative lawyers." MCL 691.1332(c). A *collaborative matter* "means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, that is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state[.]" MCL 691.1332(e). A *collaborative law participation agreement* "means an agreement by persons to participate in a collaborative law process." MCL 691.1332(b). See MCL 691.1333—MCL 691.1352 for a complete discussion of collaborative alternative dispute resolution.

5.5 Settlements

A. Must Be in Writing or on the Record

"An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." MCR 2.507(G). This is essentially a statute of frauds governing legal proceedings. *Brunet v Decorative Engineering, Inc*, 215 Mich App 430, 435 (1996).

"An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571 (1994). However, "[a] settlement agreement will not be enforced even if it fulfills the requirements of contract principles where the agreement does not additionally satisfy the requirements of MCR 2.507(H)."[6] *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 668-669 (2002).

Where the parties have agreed to settlement terms on the record but cannot agree on the written terms, it may be appropriate for the trial court to enforce the terms as stated on the record. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 348-349 (1999). An oral agreement under oath at a deposition hearing is not binding unless reduced to a signed writing or made in open court. *Brunet*, 215 Mich App at 436.

An exchange of e-mails may satisfy the requirement that the settlement be in writing. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 459-460 (2006).

"There is a material difference between a covenant not to sue and a release. A release immediately discharges an existing claim or right. In contrast, a covenant not to sue is merely an agreement not to sue on an existing claim. It does not extinguish a claim or cause of action. The difference primarily affects third parties, rather than the parties to the agreement." *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 472 Mich 353, 357-358 (2005).

B. Attorney's Authority

An attorney is presumed to have authority to act on his or her client's behalf. *Jackson v Wayne Circuit Judge*, 341 Mich 55, 59 (1954). However, an attorney must have specific authority from the client to settle a case. See *Nelson v Consumers Power Co*, 198 Mich App 82, 85 (1993).

An attorney cannot prevent a client from settling a case. *Simon v Ross*, 296 Mich 200, 203 (1941). However, the attorney may assert an attorney's lien for services rendered if a client decides to settle. *George v Sandor M Gelman, PC*, 201 Mich App 474, 476-477 (1993).

C. Attorney's Duty

"It is the lawyer's professional duty to ensure that his [or her] client is fully advised and aware of all the ramifications of . . . a settlement." *Clark v Al-Amin*, 309 Mich App 387, 400 (2015). "This professional obligation is the core duty of the plaintiff's lawyer—not the opposing party or its counsel. If the plaintiff's lawyer fails to fulfill this obligation—and does not ensure that he [or she] and his [or her] client consider all possible claims before signing a settlement agreement—the lawyer cannot shift this responsibility to the opposing party or opposing counsel." *Id.* at 400, 402 (holding that "[u]nder Michigan law, neither [an insurer] nor its counsel ha[s] any duty to inform [an injured party] of possible claims [he or] she [may] have . . . regarding

[6] Now MCR 2.507(G).

[a PIP benefit], or to advise [him or] her to include those claims in [a] settlement[]").

D. Approval

Committee Tips:

- *Always have parties confirm the details of their settlement on the record.*
- *Review attorney fees and expenses if required. Approve attorney fees and expenses if appropriate.*

Court approval is required for class actions, MCR 3.501(E) and settlements for minors and incompetent persons, MCR 2.420(B); court approval may be requested by the personal representative for wrongful death settlements, MCL 600.2922(5).

> **Note:** Authority to approve or reject a proposed settlement involving a minor remains with the judge to whom the case was assigned when the action on behalf of the minor was commenced, even when a party to the settlement has been dismissed from the case. *Peterson v Auto-Owners Ins Co*, 274 Mich App 407, 415 (2007). MCR 2.420 does not require that proper service be made to a defendant before the court may consider a proposed settlement. *Peterson*, *supra* at 415.

Taxable costs are included in the settlement unless otherwise specified. MCR 2.625(H).

E. Wrongful Death Settlements

MCL 600.2922 governs wrongful death settlements. In wrongful death cases, it must be determined whether there was conscious pain and suffering, a claim that is an asset of the probate estate. MCL 600.2922(6)(d). The judge may wish to determine whether there is a probate estate and/or creditors, before deciding whether there was pain and suffering. MCR 8.121 addresses permissible attorney fees in wrongful death cases.[7]

[7] See the Michigan Judicial Institute's checklist on wrongful death settlements.

F. Settlements for Minors and Legally Incapacitated Individuals

MCR 2.420 governs settlements for minors and legally incapacitated individuals.[8] *Peterson*, 274 Mich App at 414. A hearing must be conducted. *Bowden v Hutzel Hosp*, 252 Mich App 566, 574-575 (2002). If a conflict of interest exists for the next friend, guardian, or conservator, the court must appoint a lawyer guardian ad litem for the party. MCR 2.420(B)(2).

If a guardian or conservator has been appointed, he or she must be appointed before the settlement is approved, and the judgment must specify that the money is to be paid to that person. MCR 2.420(B)(3). See also *Bierlein v Schneider*, 478 Mich 893 (2007). In addition, the trial court may not enter a judgment or dismissal until it receives written verification from the probate court "that it has passed on the sufficiency of the bond and the bond, if any, has been filed with the probate court." MCR 2.420(B)(3).

G. Setting Aside Settlements

A settlement agreement is a contract and is "governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge Aldinger Co*, 207 Mich App at 571. "As a general rule, settlement agreements are final and cannot be modified[] . . . because settlements are favored by the law, and therefore will not be set aside, except for fraud, mutual mistake, or duress." *Clark v Al-Amin*, 309 Mich App 387, 395 (2015) (quotation marks and citation omitted). "A mutual mistake is an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Id.* (quotation marks and citation omitted). Where the plaintiff agreed to "a settlement that explicitly encompassed all PIP benefits incurred as of that date[,]" the plaintiff could not "void this universal, binding settlement by asserting that she and her lawyer were unaware of a . . . [PIP] benefit she incurred several months before the settlement[;]" the plaintiff's "unilateral lack of knowledge of the [additional medical] bill[]" was not a mutual mistake where "[the] plaintiff explicitly allege[d] that [the defendant] had knowledge of [the] charge . . . when it made the settlement agreement." *Id.* at 399-400.

"[T]he trial court may not modify the settlement in the absence of fraud, duress or mutual mistake[.]" *Marshall v Marshall*, 135 Mich App 702, 708 (1984).

[8] See the Michigan Judicial Institute's checklist on settlements for minors/incapacitated individuals.

"[S]ettlement agreements are binding until rescinded for cause. Tender of consideration received is a condition precedent to the right to repudiate a contract of settlement." *Stefanac v Cranbrook Ed Comm (After Remand)*, 435 Mich 155, 163 (1990). In order to challenge a release, a plaintiff must actually tender the consideration that was received for signing that release. *Id.* at 165. For a tender to be effective, it must be without stipulation or condition. *Swain v Kayko*, 44 Mich App 496, 501 (1973).

H. Disclosure of Settlement

"When there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, the jury shall not be informed of the existence of a settlement or the amount paid, unless the parties stipulate otherwise." *Brewer v Payless Stations*, *Inc*, 412 Mich 673, 679 (1982).

The trial court has discretion whether to disclose to the jury the existence of "high-low" settlements between the plaintiff and some defendants who remain in the case. *Hashem v Les Stanford Oldsmobile*, *Inc*, 266 Mich App 61, 85-86 (2005). "[T]he interest of fairness served by disclosure of the true alignment of the parties must be weighed against the countervailing interests in encouraging settlements and avoiding prejudice to the parties." *Hashem*, *supra* at 86. "[T]he trial court has both the duty and the discretion to fashion procedures that ensure fairness to all the litigants in these situations." *Id.*

I. Standard of Review

The trial court's decision whether to permit a party to disavow a settlement is reviewed for an abuse of discretion. *Groulx v Carlson*, 176 Mich App 484, 493 (1989).

When reviewing the trial court's decision involving the distribution of wrongful death proceeds, findings of fact are reviewed for clear error. *Hoogewerf v Kovach*, 185 Mich App 577, 579 (1990). The court's distribution of the proceeds based on its findings is reviewed for an abuse of discretion. *Hoogewerf*, *supra* at 579.

Chapter 6: Trial

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6.1 Jury Trial or Jury Waiver

A. Jury Trial

The right to a trial by jury is waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. Const 1963, art 1, § 14. See also MCR 2.508.

There is no right to a jury trial where the relief sought is solely equitable in nature. See *McPeak v McPeak*, 457 Mich 311, 314 (1998) (a case involving insurance policy beneficiaries); *New Prod Corp v Harbor Shores BHBT Land Dev, LLC*, 308 Mich App 638, 647 (2014).

However, the parties may consent to a jury trial on equitable claims under MCR 2.509(D). *McPeak*, 457 Mich at 315-316. In *McPeak*, the Court concluded that the parties had consented to a jury trial where the plaintiff made a jury demand, both parties participated in jury selection, both parties submitted proposed jury instructions, both parties mostly agreed on the verdict form, and the defendant never objected to submitting the issues to the jury. *Id* at 316.

Parties to a civil proceeding have the right to a trial by jury unless: (1) the action is by its nature jury barred; (2) the claim is for equitable relief; (3) the Legislature has not provided for the claim to be brought before a circuit court; or (4) the Legislature denied the right to a jury. *Anzaldua v Band*, 457 Mich 530, 549-550 (1998).

In cases filed in the Court of Claims, there is no right to a jury. *Lumley v Bd of Regents of the Univ of Michigan*, 215 Mich App 125, 133 (1996). See also MCL 600.6419. In addition, there is no right to a jury trial for either informal or formal hearings regarding municipal and/or state civil infractions. MCL 600.8719(1); MCL 600.8721(4); MCL 600.8819(1); MCL 600.8821(4).

B. Jury Demand

A jury demand must be made "within 28 days after the filing of the answer or a timely reply." MCR 2.508(B)(1). The demand may be included in a party's pleading as long as notice of the demand is included in the pleading's caption. *Id*. The party must pay the required jury fee at the time of filing the demand. *Id*.

C. Waiver of Jury Trial

"Waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence stated, or attempted to be stated, in the original pleading." MCR 2.508(D)(2).

"A demand for trial by jury may not be withdrawn without the consent, expressed in writing or on the record, of the parties or their attorneys." MCR 2.508(D)(3).

"[T]he subsequent waiver of a properly demanded jury trial can be inferred from the conduct of the parties under a 'totality of the circumstances' test." *Marshall Lasser, PC v George*, 252 Mich App 104, 108 (2002). It would be unfair to allow a party to demand a jury trial, participate in a bench trial without objection, and then attempt to overturn the result by claiming error based on the jury demand. *Id*. at 109.

Where the plaintiff demanded a jury trial and was awarded a default judgment, the plaintiff's subsequent participation in bench trial proceedings on the issue of damages precluded him from appealing the damages award on the basis that a jury, not a judge, should have decided the issue. *Marshall Lasser*, 252 Mich App at 108-109.

D. Standard of Review

Whether a party has a right to a jury trial is reviewed de novo on appeal. *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 66 (2013).

The court's decision whether to grant a late demand for a jury trial is reviewed for an abuse of discretion. *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 331 (2005).

6.2 Bench Trial

A. Is Disqualification an Issue?

"A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

> "(1) The judge is personally biased or prejudiced for or against a party or attorney.
>
> "(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> "(3) The judge has been consulted or employed as an attorney in the matter in controversy.
>
> "(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

"(5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

"(6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

> "(a) is a party to the proceeding, or an officer, director or trustee of a party;
>
> "(b) is acting as a lawyer in the proceeding;
>
> "(c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
>
> "(d) is to the judge's knowledge likely to be a material witness in the proceeding." MCR 2.003(B).

A judge is not automatically disqualified when "the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge." MCR 2.003(B).

"The mere fact that a judge rules against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment." *Davis v Henry (In re Contempt of Henry)*, 282 Mich App 656, 680 (2009).

Examples of situations involving disqualification include:

- Where the nature and scope of media exposure to the case created an appearance of bias such that the trial court's public comments appeared to be inconsistent with his findings of fact, disqualification was proper. *Ireland v Smith*, 214 Mich App 235, 250-251 (1995).

- Where "the transcript of the motion hearing suggest[ed] the trial judge ha[d] a settled predisposition to the detriment of defendant or his

attorney," disqualification was proper. *Kiefer v Kiefer*, 212 Mich App 176, 183 (1995).

Committee Tip:

When the parties opt for a bench trial, the trial judge should make a record of the court's prior involvement with the case and consider reassignment if the court is too familiar with the file. See MCR 2.003(B)(2). Consider obtaining express approval of the parties to proceed if the court has had prior involvement with the case.

B. Pretrial Motions in a Bench Trial

The trial court is not required to explain its reasoning and state its findings of fact on pretrial motions, but doing so is helpful for appellate review. MCR 2.517(A)(4); *People v Shields*, 200 Mich App 554, 558 (1993).

C. Evidentiary Issues in a Bench Trial

Generally, during a bench trial the judge should only consider the same evidence and information that would be available to a jury. *Hinterman v Stine*, 55 Mich App 282, 285 (1974). This includes considering evidence based on an individual's own common experience and observation of others. *Hinterman*, *supra* at 285.

Pursuant to MRE 614(b), a trial court may interrogate witnesses at trial. "Questions designed to clarify points and to elicit additional relevant evidence, particularly in a nonjury trial, are not improper. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 24 (1989). In bench trials, courts are afforded more discretion when questioning witnesses. *In re Jackson*, 199 Mich App 22, 29 (1993). A reversal may be in order when the questions are "intimidating, argumentative, prejudicial, unfair, or partial." See *In re Jackson*, *supra* at 29.

D. Court View

Effective January 1, 2015, ADM File No. 2005-19 amends MCR 2.507 to add a new subsection (D), which provides: "On application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred." MCR 2.507(D).

E. Motion for Dismissal

In a bench trial, a directed verdict motion should be treated as a motion for involuntary dismissal under MCR 2.504(B)(2). *Stanton v Dachille*, 186 Mich App 247, 261 (1990). The standard on this motion is different than that for a directed verdict in a jury trial. MCR 2.504(B)(2) "permit[s a] court to make credibility evaluations and factual findings[,]" and the court, in determining whether to dismiss an action under MCR 2.504(B)(2), is not "required to view the evidence in the light most favorable to [the defendant], to resolve all conflicts of evidence in his [or her] favor, or to determine whether there [is] a genuine issue of material fact." *Williamstown Twp v Hudson*, ___ Mich App ___, ___ (2015). "The involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Samuel D Begola Svcs, Inc v Wild Bros*, 210 Mich App 636, 639 (1995), quoting MCR 2.504(B)(2). The court may determine the facts and render a judgment against the plaintiff or may decline to render judgment until the close of all evidence. MCR 2.504(B)(2). If the court grants the motion, it must make findings under MCR 2.517. MCR 2.504(B)(2).

F. Decision

"A judge is presumed to know and understand the law." *In re Costs & Attorney Fees (Powell Production, Inc v Jackhill Oil Co)*, 250 Mich App 89, 101 (2002). At the conclusion of the case, the trial court must "find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 2.517(A)(1). A court's decision should include "[b]rief, definite, and pertinent findings and conclusions on the contested matters . . . without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Articulation is designed to aid appellate review. See *Johnson v Wynn*, 38 Mich App 302, 304-305 (1972). However, "[b]revity alone is not fatal to a trial court's opinion because the rule does not require over-elaboration of detail or particularization of facts." *Powell v Collias*, 59 Mich App 709, 714 (1975). Findings are sufficient if it appears that the court was aware of the issues and correctly applied the law. *In re Cotton*, 208 Mich App 180, 183 (1994).

"A court must base its decision on testimony given in open court, not extrajudicial information." *Gubin v Lodisev*, 197 Mich App 84, 86 (1992).

Committee Tip:

When rendering a decision after a bench trial, it is recommended that the judge cover the following:[1]

- *Applicable statutes, if any;*
- *Applicable jury instructions;*
- *Burden of proof;*
- *Any presumptions that may apply;*
- *Findings of facts sufficient to show an appellate court that the trial judge was aware of the issues and correctly applied the appropriate law;*
- *Conclusions of law; and*
- *Entry of the appropriate judgment.*

G. Standard of Review

A trial court's conclusions on questions of law are reviewed de novo. *Haliw v City of Sterling Hts*, 471 Mich 700, 704 (2005). Findings of fact are reviewed for clear error. *Mulcahy v Verhines*, 276 Mich App 693, 698 (2007); MCR 2.613(C). A trial court's decision will not be reversed if the correct result is reached for the wrong reason. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313 (2005).

Questions of law pertinent to an involuntary dismissal motion based on MCR 2.504(B)(2) are reviewed de novo. *Sands Appliance Svcs v Wilson*, 231 Mich App 405, 409 (1998), rev'd on other grounds 463 Mich 231 (2000). The trial court's factual findings are reviewed for clear error. *Williamstown Twp v Hudson*, ___ Mich App ___, ___ (2015). "A trial court's findings are considered clearly erroneous where [the reviewing court] is left with a definite and firm conviction that a mistake has been made." *Id.* (quotations and citation omitted).

"In reviewing a motion to disqualify a judge, [the Michigan Court of Appeals] reviews the trial court's findings of fact for an abuse of discretion, and reviews the court's application of those facts to the relevant law de novo." *Davis*, 282 Mich App at 679.

[1] See the Michigan Judicial Institute's checklist for bench trials.

6.3 Jury Selection

Parties are entitled to be tried by a fair and impartial jury. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 258 (1989). The process by which potential jurors are selected and brought to court is governed by MCL 600.1301 *et seq*. A random selection process should be used. See MCR 2.511(A)(3) and MCL 600.1328.

"It is essential to the proper disposition of jury matters that they be submitted to and determined by a jury drawn from an array of qualified jurors . . . . The selection of a jurors list with reference to sex, employment, or age does violence to the fundamental precept of the jury system that juries should be chosen from a fair cross section of the community." *Robson v Grand Trunk W R Co*, 5 Mich App 90, 97-98 (1966).

The selection process, as described in MCR 2.511(A)(4), authorizes "any other fair and impartial method directed by the court or agreed to by the parties."

A. Number of Jurors

The minimum number of jurors required in a circuit court civil case is six, unless the parties agree otherwise. MCL 600.1352; MCR 2.514(A)(1). The minimum number of jurors required in a district court civil case is also six. MCL 600.8353. The court may direct that seven or more jurors be impaneled to sit on the jury. MCR 2.511(B). After the jury instructions are delivered and the case is ready for submission to the jury, the names of all jurors impaneled must be put into a container where the court randomly draws names to reduce the number of jurors to six. MCR 2.511(B). However, by agreement of the parties, the court may allow all of the impaneled jurors to participate in deliberations. MCR 2.514(A)(3). The parties can also agree that a stated majority verdict will represent the verdict of the jury. MCR 2.514(A)(2).

B. Identity of Jurors

Access to juror personal history questionnaires is governed by MCR 2.510(C)(2) and the court's local administrative order.

"The attorneys must be given a reasonable opportunity to examine the questionnaires before being called on to challenge for cause." MCR 2.510(C)(2). An "attorney's right to see the juror questionnaire ends when the trial ends." *Collier v Westland Arena, Inc*, 183 Mich App 251, 254 (1990). After the trial, an attorney may view a questionnaire pursuant to a court order. *Collier*, *supra at* 254.

The press has a qualified right of post verdict access to juror names and addresses, subject to the court's discretion to consider jurors' concerns about safety and privacy. *In re Disclosure of Juror Names & Addresses (People v Mitchell)*, 233 Mich App 604, 630 (1999).

Juror questionnaires are to be kept on file for at least three years, unless the chief judge orders them to be kept longer. MCL 600.1315. The answers on the juror questionnaires are to be kept confidential, unless otherwise ordered by the chief judge. *Id*.

6.4 Voir Dire

"The purpose of voir dire is to provide counsel an opportunity to obtain sufficient information upon which to develop a rational basis for excluding prospective jurors." *White v City of Vassar*, 157 Mich App 282, 289 (1987). The court rules permit either the court or the lawyers to conduct voir dire. MCR 2.511(C). "When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror." *Id*. See also MCL 600.1337.

The court must provide the prospective jurors with sufficient factual information so they can intelligently answer the voir dire questions. *Kuisel v Farrar*, 6 Mich App 560, 563 (1967).

"In a large measure the scope of examination of jurors on voir dire is within the discretion of the trial judge; but it must not be so limited as to exclude a showing of facts that would constitute ground for challenging for cause or the reasonable exercise of peremptory challenges."*Fedorinchik v Stewart*, 289 Mich 436, 438-439 (1939).

MCR 2.511(F) prohibits discrimination in the jury selection process:

> "(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
>
> "(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection."

When information potentially affecting a juror's ability to act impartially is discovered after the jury has been sworn and the juror is allowed to remain on the jury, the defendant *may be* entitled to relief on appeal if the defendant can establish that the juror's presence on the jury resulted in

actual prejudice. *People v Miller (Michael)*, 482 Mich 540, 561 (2008), overruling in part *People v Daoust*, 228 Mich App 1, 9 (1998). "[T]he proper inquiry is whether the defendant was denied his [or her] right to an impartial jury. If he [or she] was not, there is no need for a new trial." *Miller (Michael)*, *supra* at 561. ("To the extent that in *Daoust* the Court of Appeals broadly state[d] in dicta that a new trial is *always* required whenever a juror would have been excusable for cause, *Daoust* is wrong and is overruled." *Miller (Michael)*, *supra* at 561.

In *Miller (Michael)*, 482 Mich at 561, the Michigan Supreme Court held that "[t]he trial court did not clearly err in finding that [the] defendant failed to establish that he was actually prejudiced by the presence of a convicted felon on his jury, and, thus, the trial court did not abuse its discretion when it denied [the] defendant's motion for a new trial." See MCL 600.1354(1) ("[f]ailure to comply with the provisions of [the Revised Judicature Act] shall not . . . affect the validity of a jury verdict unless the party . . . demonstrates actual prejudice . . . ."). The *Miller (Michael)* Court emphasized that although a defendant has a constitutional right to an impartial jury, he or she does not have a constitutional right to a jury free of convicted felons. *Miller (Michael)*, *supra* at 547. The right to a jury free of convicted felons is a statutory right granted by MCL 600.1307a(1)(e). *Miller (Michael)*, *supra* at 544-545, 547-578. Violation of this statutory right requires a new trial only if the violation actually prejudiced the defendant's right to an impartial jury. *Id.* at 548.

A. Challenges for Cause

"Prospective jurors are subject to challenge for cause under MCR 2.511(D)." See *Bynum v ESAB Group, Inc*, 467 Mich 280, 283 (2002). MCR 2.511(D) states:

> "It is grounds for a challenge for cause that the person:
>
> > "(1) is not qualified to be a juror;
> >
> > "(2) is biased for or against a party or attorney;
> >
> > "(3) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;
> >
> > "(4) has opinions or conscientious scruples that would improperly influence the person's verdict;
> >
> > "(5) has been subpoenaed as a witness in the action;
> >
> > "(6) has already sat on a trial of the same issue;

> "(7) has served as a grand or petit juror in a criminal case based on the same transaction;
>
> "(8) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;
>
> "(9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;
>
> "(10) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;
>
> "(11) has a financial interest other than that of a taxpayer in the outcome of the action;
>
> "(12) is interested in a question like the issue to be tried."

In exercising a challenge for cause, the attorney must ascertain the disposition of the prospective juror regarding the subject matter of the case. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 235 (1989). "The success of a challenge depends upon eliciting information from the juror, as well as from other sources, as to the juror's state or condition of mind, as will enable a discretionary judgment to be formed by the court as to the juror's competency." *Poet*, *supra* at 235.

Juror qualification is governed by both statute and court rule. See MCR 2.511(D) and MCL 600.1307a. "Jurors are presumed to be qualified. The burden of proving the existence of a disqualification is on the party alleging it." *Bynum*, 467 Mich at 283.

B. Peremptory Challenges

A juror who is peremptorily challenged is excused without cause. MCR 2.511(E)(1). In a civil case, each party has three peremptory challenges. MCR 2.511(E)(2). There are exceptions if parties are considered a single party or multiple parties. MCR 2.511(E)(2).

Peremptory challenges must be exercised as follows:

> "(a) First the plaintiff and then the defendant may exercise one or more peremptory challenges until each party successively waives further peremptory challenges or all the challenges have been exercised, at which point jury selection is complete.

"(b) A 'pass' is not counted as a challenge but is a waiver of further challenge to the panel as constituted at that time.

"(c) If a party has exhausted all peremptory challenges and another party has remaining challenges, that party may continue to exercise their remaining peremptory challenges until such challenges are exhausted." MCR 2.511(E)(3).

C. Discrimination During Voir Dire

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination during voir dire. *Batson v Kentucky*, 476 US 79 (1986). See also *Edmonson v Leesville Concrete Co*, 500 US 614 (holding that discrimination during jury selection is prohibited in civil cases). MCR 2.511(F)(1) provides that "[n]o person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex." Discrimination during voir dire on the basis of those factors for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of those characteristics is not an excuse or justification for a violation of the rule. MCR 2.511(F)(2).

In *Batson*, 476 US at 96-98, the United States Supreme Court set out a three-step process for determining the constitutional propriety of a peremptory challenge.[2] The Michigan Supreme Court explained the process in *People v Knight*, 473 Mich 324, 336 (2005), habeas corpus gtd *Rice v White*, 660 F3d 242 (CA 6, 2011)[3]:

"First, the opponent of the peremptory challenge must make a prima facie showing of discrimination. To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group

[2] See *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319 n 9 (1996), which stated that there is "no reason why these standards, developed in the criminal trial context, are not equally applicable in the civil trial context."

[3] In *Rice v White*, 660 F3d 242, 253-260 (CA 6, 2011), habeas corpus relief was granted to Jerome Rice, one of the two defendants whose convictions were affirmed in *People v Knight*, 473 Mich 324, 336 (2005). In *Knight*, 473 Mich at 352, the Michigan Supreme Court held that *Batson v Kentucky*, 476 US 79 (1986), was not violated in the jury selection at the codefendants' joint trial. In *Rice*, 660 F3d at 253, 257-260, the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to codefendant Rice and vacated his conviction under 28 USC 2254(d)(2), holding that "the Michigan Supreme Court's adjudication of [Rice's] *Batson* claim was based on the court's unreasonable factual determination that the trial judge did not discredit the prosecutor's proffered race-neutral reasons for the exercise of her peremptory strikes." However, the legal principles cited by *Knight, supra* at 335-348, were not implicated by the Sixth Circuit's decision in *Rice, supra*, and they remain good law. See *Rice, supra* at 253-254 (reiterating the *Batson* process detailed in *Knight, supra* at 335-338).

from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race." *Knight*, 473 Mich at 336 (internal citations omitted).

In the first *Batson* step, the opponent of the challenge is not required to actually prove discrimination. *Knight*, 473 Mich at 336. As long as the sum of the proffered facts gives rise to an inference of discriminatory purpose, the first *Batson* step is satisfied. *Knight*, *supra* at 336-337. "The [party alleging discrimination] must offer facts that *at least* give rise to an inference that the [opposing party] had a discriminatory purpose for excluding the prospective juror." *People v Armstrong (Parys)*, 305 Mich App 230, 238 (2014). In *Armstrong (Parys)*, despite the fact that the defendant demonstrated that he was a member of a cognizable racial group and that a peremptory challenge to exclude a member of a certain racial group was exercised, he failed to demonstrate an inference that the challenge excluded the prospective juror on the basis of race. *Id*. The circumstances did not support an inference of discrimination where the prospective juror had expressed issues with child care on the record and the prosecutor stated that the juror was excused on that basis. *Id*. at 239. While the juror was the "only black juror in the jury pool," and the prosecution only exercised one peremptory challenge, no other prospective juror expressed a similar issue with child care. *Id*. The Court concluded that given those facts, "the circumstances did not lead to the inference that the prosecutor dismissed [the juror] because of his race." *Id*.

"Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike. *Batson*, supra at 97. *Batson's* second step 'does not demand an explanation that is persuasive, or even plausible.' *Purkett v Elem*, 514 US 765, 768 . . . (1995). Rather, the issue is whether the proponent's explanation is facially valid as a matter of law. *Id.*; *Hernandez v New York*, 500 US 352, 360 (1991) (plurality opinion). 'A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' *Id*." *Knight*, 473 Mich at 337.

The state must "demonstrate that 'a significant state interest [is] manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group.'" *Smith v Berghuis*, 543 F3d 326, 344 (CA 6, 2008), quoting *Duren v Missouri*, 439 US 357, 367-368 (1979).

"Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext[4] and whether the opponent of the challenge has proved purposeful discrimination. It must be noted, however, that if the proponent of the challenge offers a race-neutral explanation and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot." *Knight*, 473 Mich at 337-338 (internal citations omitted).

Under *Batson's* third prong, the prosecution's pretextual explanation gives rise to an inference of discriminatory intent. *Snyder v Louisiana*, 552 US 472, 485 (2008). At that stage, the trial court plays a pivotal role in evaluating the prosecutor's credibility; it must consider "not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Snyder*, *supra* at 477. A *Batson* claim will survive if a peremptory strike that was substantially motivated by discriminatory intent could not be sustained because the prosecution could not show that the motivating factor was not determinative. *Snyder*, *supra* at 485-486.

In *Snyder*, the trial court allowed the prosecutor to strike a black juror for the race-neutral reasons that the juror looked nervous, and that, because of a student-teaching obligation, the juror might return a lesser guilty verdict (which would obviate the need for a penalty phase) in order to fulfill his jury duty more quickly. *Snyder*, 552 US at 479-480. The United States Supreme Court held that the trial court clearly erred in overruling the defendant's *Batson* objection to the prosecutor's strike of that juror, specifically noting that "in light of the circumstances here—including absence of anything in the record showing that the trial judge credited the claim that [the juror] was nervous, the prosecution's description of both of its proffered explanations as 'main concern[s],' and the adverse inference noted above [that the prosecutor declined to use a peremptory strike on a white juror with more pressing work and family obligations]—the record does not show that the prosecution would have pre-emptively challenged [the juror] based on his nervousness alone." *Snyder*, *supra* at 485.

Neither *Batson* nor *Snyder* require a demeanor-based peremptory challenge to be rejected where "the judge did not observe or cannot recall the juror's demeanor." *Thaler v Haynes*, 559 US 43, 48 (2010). In *Thaler*, two different judges presided during voir dire. *Thaler*, *supra* at

[4] "Pretext" is defined as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." Webster's Ninth New Collegiate Dictionary (1988).

44. The judge who decided the peremptory challenges was not the same judge who presided when the attorneys questioned the prospective jurors. *Id*. The prosecutor made a race-neutral challenge to a prospective juror because the juror's "demeanor had been 'somewhat humorous' and not 'serious' and [] her 'body language' had belied her 'true feeling.'" *Id*. In addition, the prosecutor stated that "he believed that [the prospective juror] 'had a predisposition' and would not look at the possibility of imposing a death sentence 'in a neutral fashion.'" *Id*. The defendant was convicted and appealed his conviction and death sentence, arguing that "'a trial judge who did not witness the actual voir dire cannot, as a matter of law, fairly evaluate a *Batson* challenge[.]'" *Id*. at 45. The United States Supreme Court disagreed and stated:

> "[W]here the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the *voir dire*. But *Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor.
>
> "Nor did we establish such a rule in *Snyder*." *Thaler*, 559 US at 48.

MCR 2.511(F)(2) prohibits a trial court from denying a party's proper peremptory challenge "'for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury . . . .'" *Pellegrino v Ampco Sys Parking*, 486 Mich 330, 354 (2010), quoting MCR 2.511(F)(2). A trial court's decision to *include* a juror based on race should be treated the same as if the trial court had *excluded* the juror based on race. *Pellegrino*, *supra* at 347. In *Pellegrino*, the trial court denied the defendant's peremptory challenge without going through the required *Batson* analysis and retained a juror because of her race. *Pellegrino*, *supra* at 334-336. The Michigan Supreme Court found that by failing to determine whether the defendant's peremptory challenge was racially motivated under *Batson*, the trial court violated established constitutional principles and was not justified or authorized to deny the peremptory challenge. *Pellegrino*, *supra* at 344. The Court stated:

> "The trial court's refusal to allow defendant to strike [the] prospective juror [] without finding any *Batson* violation led to at least one member of the jury having been selected, not pursuant to nondiscriminatory criteria, but precisely on the basis of race. [The juror]'s presence on the jury was thus the result not of being 'indifferently chosen,' as required by *Batson*, but of

> having been chosen specifically on the basis of race. As asserted in *Batson*, this inflicts harm on defendant, on the prospective juror who was excluded because of [the juror]'s retention, and indeed on the 'entire community.' The trial court's process transformed the jury from a group of mere citizens into a group in which a person's racial background became defining, and it transformed the selection process from one that was neutral in terms of race into one that was predicated on race. While this may be the process preferred by the trial court, it is not the process set forth by the federal or state constitutions or by federal or state law." *Pellegrino*, 486 Mich at 345.

The Court emphasized that where a *Batson* violation leads to the unlawful inclusion or exclusion of a juror, automatic reversal is required. *Pellegrino*, 486 Mich at 348.

"[T]rial courts must meticulously follow *Batson's* three-step test," and the Michigan Supreme Court "*strongly* urge[s] [trial] courts to *clearly* articulate their findings and conclusions on the record." *Knight*, 473 Mich at 339. The best practice is to excuse the jury to conduct the *Batson* hearing. Also, in order to preserve the option of reseating a juror who was improperly struck, the court should not release the challenged juror until the challenge is addressed. *Knight*, *supra* at 347.

In order to ensure the equal protection rights of individual jurors, a trial court may sua sponte raise a *Batson* issue after observing a prima facie case of purposeful discrimination through the use of peremptory challenges. *People v Bell*, 473 Mich 275, 285-287 (2005).

It is important to note the distinction between a *Batson* error and a denial of a peremptory challenge: "[a] *Batson* error occurs when a juror is actually dismissed on the basis of race or gender[,]" whereas "a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain number of jurors." *Bell*, 473 Mich at 293. A *Batson* error is of constitutional dimension, and is subject to automatic reversal, whereas an improper denial of a peremptory challenge is not of constitutional dimension, and is reviewed for a miscarriage of justice if it is preserved, or for plain error affecting substantial rights if it is unpreserved. *Bell*, *supra* at 293-295.[5]

[5] *People v Miller (Dwjuan)*, 411 Mich 321 (1981), and *People v Schmitz*, 231 Mich App 521 (1998), are no longer binding "to the extent that they hold that a violation of the right to a peremptory challenge requires automatic reversal." *Bell*, *supra* at 293.

D. Alternate Jurors and Removal or Substitution of a Juror at Trial

The court may direct that alternate jurors be impaneled to sit. "After the instructions to the jury have been given and the action is ready to be submitted, unless the parties have stipulated that all the jurors may deliberate, the names of the jurors must be placed in a container and names drawn to reduce the number of jurors to 6, who shall constitute the jury." MCR 2.511(B). The court may retain the alternate jurors during deliberations, with the instruction that the alternate jurors may not discuss the case with anyone until the jury has been discharged. *Id.* If a substitution of jurors occurs "after the jury retires to consider its verdict," the judge must instruct the reconstituted jury to begin deliberations anew. *Id.*

The court has the discretion to remove a juror, on its own initiative, for possible bias. *Harrison v Grand Trunk W R Co*, 162 Mich App 464, 471 (1987). In *Harrison*, the trial court did not abuse its discretion when it dismissed two jurors because they indicated that they would have a difficult time being impartial. *Harrison*, *supra* at 471.

E. Substitution of Judges

When a judge is substituted after voir dire, the defendant must show actual prejudice to justify reversal. *Brown v Swartz Creek VFW*, 214 Mich App 15, 21 (1995).

F. Standard of Review

A judge's decision on the scope of voir dire is reviewed for an abuse of discretion. *White*, 157 Mich App at 289.

In order to determine the proper standard of review of a trial court's *Batson* ruling, the appellate court must determine which step of the *Batson* challenge determination is being reviewed. In *Knight*, 473 Mich at 345-346, the Michigan Supreme Court clarified the standards of review for each stage as follows:

"If the first [*Batson*] step is at issue (whether the opponent of the challenge has satisfied his [or her] burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson's* second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the

challenge has proved purposeful discrimination), we review the trial court's ruling for clear error."

The Michigan Court Rules imply that a juror *must* be excused when challenged for cause on the grounds enumerated in MCR 2.511(D)(3)–(12), while the court has some discretion with (D)(1) or (2) challenges. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 236 (1989). "Ultimately, however, the decision to grant or deny a challenge for cause is within the sound discretion of the trial court. . . . [W]here a venire person has expressed a strong opinion, yet has resolved that she can be impartial, we believe the trial court's discretionary function should be balanced against its obligation to fulfill each litigant's right to a fair trial. By achieving this balance in each case, the act of a trial judge in granting or denying a request to remove a potential juror should represent a decision ever mindful of the constitutional seriousness involved." *Poet*, *supra* at 236-237.

The trial court's decision to remove a juror will be reversed only upon a finding of a clear abuse of discretion. *Muilenberg v Upjohn Co*, 169 Mich App 636, 649 (1988). Where a challenge for cause is improperly denied and a party is thus compelled to use a peremptory challenge, there is a presumption of prejudice. *Poet*, 433 Mich at 239-240. In determining whether the degree of prejudice requires a new trial, the Court stated:

> "[I]n order to uniformly determine when a trial court's error in overruling a challenge for cause requires reversal, we will henceforth focus on the causal relationship between an erroneous denial, its effect upon the availability of allotted peremptory challenges, and how each of these factors influenced the ultimate composition of the jury in question. Accordingly, in the interest of requiring an independent and objective manifestation of actionable prejudice, we hold that in order for a party to seek relief in this instance, there must be some clear and independent showing on the record that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable." *Poet*, *supra* at 240-241.

6.5 Oaths or Affirmations

"The word 'oath' shall be construed to include the word 'affirmation' in all cases where by law an affirmation may be substituted for an oath; and

in like cases the word 'sworn' shall be construed to include the word 'affirmed.'" MCL 8.3k.

A. Juror Oath Before Voir Dire

M Civ JI 1.04 provides:

> "Do you solemnly swear or affirm that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case?"

B. Juror Oath Following Selection

MCR 2.511(H)(1) provides:

> "The jury must be sworn by the clerk substantially as follows:
>
> > "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God."

See also M Civ JI 1.10, which provides essentially the same language.

The juror oath following jury selection is mandatory; however, failure to use the precise language of MCR 2.511(H)(1) will not automatically require reversal of a jury verdict. See *People v Cain*, 498 Mich 108, 128-129 (2015). The trial court's mistaken use of the juror oath given before voir dire when swearing in the jury after selection did not seriously affect "the fairness, integrity, or public reputation of the judicial proceedings" where "the record reveal[ed] that the jurors were conscious of the gravity of the task before them and the manner in which that task was to be carried out, the two primary purposes served by the juror's oath[;]" and the jurors "stated under oath that they could be fair and impartial, and the trial court thoroughly instructed them on the particulars of their duties." *Cain*, 498 Mich at 126. Although the oath that was administered "was not a perfect substitute for the oath required by MCR 2.511(H)(1)," the defendant was not entitled to relief based on the unpreserved error where he "was actually ensured a fair and impartial jury[.]" *Cain*, 498 Mich at 123, 128-129 (cautioning courts "to take particular care that the error that occurred in this case be avoided in the future[]").

C. Oath for Witness

MRE 603 states that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." Traditionally, courts have used the following form:

> "Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?"

MCL 600.1432 governs the mode of administering oaths and makes reference to "[t]he usual mode of administering oaths . . . by the person who swears holding up the right hand . . . ." If a witness is opposed to swearing under oath, MCL 600.1434 permits an affirmation of truthful testimony. *Donkers v Kovach*, 277 Mich App 366, 370 (2007). However, neither MCL 600.1434 nor MRE 603, the rules requiring a witness to make an oath or affirmation before testifying, *require* a witness to raise his or her right hand when swearing or affirming to testify truthfully. *Donkers*, 277 Mich App at 371-372. Further, under MRE 603, "no particular ceremonies, observances, or formalities are required of a testifying witness so long as the oath or affirmation awakens the witness's conscience and impresses his or her mind with the duty to testify truthfully." *People v Putman*, 309 Mich App 240, 244 (2015) (citation, quotation marks, and alteration marks omitted). There was no plain error and the oath "was sufficient to awaken the witnesses' consciences and impress the witnesses' minds with the duty to testify truthfully[]" where the trial court asked each witness "if they promised to testify truthfully or some similar variation of that question[,]" and each witness answered affirmatively. *Id.* (holding that "[b]ecause the administrations of oaths and affirmations is a purely procedural matter, to the extent that MRE 603 conflicts with MCL 600.1432 and MCL 600.1434, MRE 603 must prevail over the statutory provisions, meaning that no specific formalities are required of an oath or affirmation[]").

D. Oath for Interpreter

An interpreter must be administered an oath or affirmation "to make a true translation." MRE 604. MCL 393.506(1) requires a qualified interpreter for a deaf or deaf-blind person to swear or affirm to make a true interpretation in an understandable manner to the deaf or deaf-blind person and to interpret the person's statements in the English language to the best of the interpreter's ability. The following may be used for both foreign language and sign language interpreters:

> "Do you solemnly swear or affirm that you will make a true and understandable interpretation to the witness and that you will accurately interpret the statements made by the witness to the best of your ability?"

E. Child Witness

MRE 601 provides that "[u]nless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules." In the case of a child witness, simply ask the child if he or she promises to tell the truth. See *People v Watson*, 245 Mich App 572, 583 (2001). See also M Crim JI 5.9. "Where the trial court examines a child witness and determines that the child is competent to testify, 'a later showing of the child's inability to testify truthfully reflects on credibility, not competency.'" *Watson*, *supra* at 583, quoting *People v Coddington*, 188 Mich App 584, 597 (1991).

Standard of review. A trial court's decision regarding the competency of a child witness is reviewed for an abuse of discretion. *Watson*, 245 Mich App at 583.

6.6 Subpoenas

A. In General

MCL 600.1455(1) authorizes courts of record to issue subpoenas requiring the testimony of witnesses in any matter "pending or triable in such courts[,]", and MCR 2.506 regulates that process. In addition to requiring the attendance of a party or witness, the court is authorized to subpoena a representative of an insurance carrier for a party, "with information and authority adequate for responsible and effective participation in settlement discussions to be present or immediately available at trial." MCR 2.506(A)(4).

Subpoenas may be signed by an attorney of record in the action or by the clerk of the court. MCR 2.506(B)(1). The court may enforce its subpoenas using its contempt power, MCR 2.506(E), and is provided other enforcement options by MCR 2.506(F).

For information on issuing a subpoena based on a foreign subpoena, see Section 6.6(E).

B. Subpoena for Party

Absent a subpoena or court order to appear, a party to a civil case is not required to appear in person for trial. *Rocky Produce, Inc v Frontera*, 181 Mich App 516, 517 (1989). See also MCR 2.117(B)(1).

C. Subpoena Duces Tecum (Subpoena for Production of Evidence)

A party or witness may be required to bring specified notes, records, documents, photographs, or other portable tangible things with them when they appear to testify. MCR 2.506(A)(1).

"A subpoena may specify the form or forms in which electronically stored information is to be produced, subject to objection." MCR 2.506(A)(2). If the subpoena does not specify the form or forms in which the information is to be produced, the information must be produced "in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable." *Id*. The person producing the information only needs to "produce the same information in one form." *Id*.

Subpoenas issued pursuant to MCR 2.506(A)(1) "have no relation to subpoenas issued in conjunction with discovery proceedings. The end of the discovery period does not preclude the issuance of trial subpoenas, including subpoenas duces tecum, even if the records to be produced were not the subject of discovery." *Boccarossa v Dep't of Transportation*, 190 Mich App 313, 316 (1991).

A subpoena for hospital medical records is controlled by MCR 2.506(I).

D. Motion to Quash Subpoena

MCR 2.506(H) provides that a person served with a subpoena may appear and challenge the subpoena. For good cause, the witness may be excused, with or without a hearing. MCR 2.506(H)(3). Otherwise, the person must comply with the subpoena and appear, unless excused by the court or the party who had the subpoena issued. MCR 2.506(H)(4).

E. Foreign Subpoenas

The Uniform Interstate Depositions and Discovery Act (UIDDA)[6], defines *subpoena* as "a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

> (*i*) Attend and give testimony at a deposition.
>
> (*ii*) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.
>
> (*iii*) Permit inspection of premises under the control of the person." MCL 600.2202(e).

A court must honor a foreign subpoena[7] by issuing a subpoena upon proper application by a party. See MCL 600.2203(1)-MCL 600.2203(2). "To request issuance of a subpoena under [MCL 600.2203], a party must submit a foreign subpoena to the clerk of the circuit court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under [MCL 600.2201 *et seq*.] does not constitute an appearance in the courts of this state." MCL 600.2203(1).

"When a party submits a foreign subpoena to a clerk of the circuit court in this state, the clerk, in accordance with the court's procedures, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed." MCL 600.2203(2). A subpoena under [MCL 600.2203(2)] must "(a) [i]ncorporate the terms used in the foreign subpoena[,] [and] (b) [c]ontain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel." MCL 600.2203(3).

"A subpoena issued by a clerk of the circuit court under [MCL 600.2203] shall be served in compliance with Michigan court rules." MCL 600.2204.

"Michigan court rules and statutes of this state applicable to compliance with subpoenas and requests for the production of documents and things or entry on land apply to subpoenas issued under [MCL 600.2203]." MCL 600.2205.

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[6] Effective April 1, 2013, 2012 PA 362 enacted the UIDDA, MCL 600.2201 et seq. The legislation applies to requests for discovery in actions pending on April 1, 2013. MCL 600.2208

[7] For purposes of the UIDDA, a *foreign subpoena* is "a subpoena issued under authority of a court of record of a foreign jurisdiction." MCL 600.2202(b).

"A motion for a protective order or an order to enforce, quash, or modify a subpoena issued by a clerk of the circuit court under [MCL 600.2203] shall comply with Michigan court rules and be submitted to the circuit court in the county in which discovery is to be conducted." MCL 600.2206.

"In applying [MCL 600.2201 *et seq.*], consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact the [UIDDA]." MCL 600.2207.

6.7 Conducting the Trial

"The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court." MCR 2.513(B).[8]

A. Stipulations

1. On the Record or in Writing

Stipulations must be made in open court or must be in writing and signed by the parties or the parties' attorneys on the parties' behalf. MCR 2.116(A); MCR 2.507(G). The terms of a stipulation must be certain and definite. *Whitley v Chrysler Corp*, 373 Mich 469, 474 (1964). Approving an order or judgment as to form and content does not constitute a stipulation as to the outcome, unless there is an indication that the parties have stipulated to the outcome. See *Ahrenberg Mechanical Contracting, Inc v Howlett*, 451 Mich 74, 77-78 (1996). Generally, rules of contract construction apply to stipulated orders. *Phillips v Jordan*, 241 Mich App 17, 21 (2000).

2. Stipulation of Fact and Stipulations of Law

Stipulations of fact are permissive, not mandatory. See MCR 2.116(A)(1) (the parties *may* submit stipulations of fact to the court). Stipulations of fact are binding on the court. *Staff v Johnson*, 242 Mich App 521, 535 (2000).

Stipulations of law are not binding on the court. *Staff v Johnson*, 242 Mich App 521, 535 (2000). "It is within the inherent power of a court, as the judicial body, to determine the applicable law in

[8] See Section 6.9 for information on jury matters during trial. See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 1, for discussion of limitations on evidence.

each case. To hold otherwise could lead to absurd results; for example, parties could force a court to apply laws that were in direct contravention to the laws of this state. It would also allow the parties to stipulate to laws that were obsolete, overruled, or unconstitutional. On the appellate level, this would result in a tremendous waste of judicial resources, since such case law would have no precedential value." *In re Finlay Estate*, 430 Mich 590, 595-596 (1988).

3. Enforcement

Courts should encourage and enforce stipulations "that are designed to simplify, shorten or settle litigation and save costs to the parties" unless there is good cause not to do so. *Conel Dev*, *Inc v River Rouge Savings Bank*, 84 Mich App 415, 419 n 5 (1978). A trial court has the "equitable power to relieve a party from a stipulation where there is evidence of mistake, fraud or unconscionable advantage taken by one party over the other." *Valentino v Oakland Co Sheriff*, 134 Mich App 197, 206 (1984), rev'd on other grounds 424 Mich 310, 325 (1986).

A fraud occurs when a party conceals some material fact from the court or makes some material misrepresentation to the court. *Valentino*, 134 Mich App at 207. The court must conduct an evidentiary hearing to determine if the allegations of fraud are true. *Id.*

B. Opening Statements

Opening statements are meant to help jurors understand the evidence and the way in which each side sees the case. M Civ JI 2.02.

"Unless the parties and the court agree otherwise, the plaintiff . . . , before presenting evidence, must make a full and fair statement of the case and the facts the plaintiff . . . intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a similar statement. The court may impose reasonable time limits on the opening statements." MCR 2.513(C) (only applicable to jury trials). See also MCR 2.507(A), which is applicable to both jury and nonjury trials (Opening statements "must [be] a full and fair statement of [the] party's case and the facts the party intends to prove."). Parties have the right to present opening statements whether the trial is a bench trial or a jury trial. See MCR 2.507(A); MCR 2.513(C). However, "[o]pening statements may be waived with the consent of the court and the opposing attorney." MCR 2.507(A). See also MCR 2.513(C).

"The trial court is given very wide discretion in ruling upon the content and presentation of opening statements." *Haynes v Monroe Plumbing & Heating Co*, 48 Mich App 707, 712 (1973). It is within the trial court's discretion to allow counsel to use visual aids during opening statements. *Haynes*, *supra* at 714. Attorneys should present their case in a way that the jury will clearly understand. *Campbell v Menze Const Co*, 15 Mich App 407, 409 (1968).

The court may impose reasonable time limits on opening statements and closing arguments. MCR 2.513(C); MCR 2.513(L); *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 625 (1992). The court "must give adequate time for argument, taking into consideration the complexity of the action." *Warden*, *supra* at 625.

Opening statements must be limited to the issues that are supported by the evidence. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 503 (2003). However, where the statements made are not supported by the evidence, reversal is not required unless the reviewing court finds that the aggrieved party was prejudiced by the statements. *Wiley*, *supra* at 503-504.

1. Prejudicial or Inflammatory Remarks

It is reversible error to present arguments that contain irrelevant issues not before the court and that are designed to "appeal[] to the jury's bias and prejudice." *Kakligian v Henry Ford Hosp*, 48 Mich App 325, 328-329 (1973). In *Kakligian* (a medical malpractice action), the defendants' attorney repeatedly stated that the plaintiff brought suit solely out of vengeance and the jury found for the defendants. *Kakligian*, *supra* at 327-328. Because the trial court did not give a timely curative instruction and because the statements were aimed at arousing the jury's bias and prejudice, the Michigan Court of Appeals concluded that the plaintiff was entitled to a new trial. *Id.* at 329.

2. Motion on Opening Statement

A motion for directed verdict[9] may be based upon the opposing party's opening statement. *Jones v Hicks*, 358 Mich 474, 485 (1960). The trial court should construe the evidence in the light most favorable to the party against whom the motion is directed. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 71 (1999). However, "a directed verdict after an opening statement is a limited and disfavored action, which is only proper where an opening statement, in addition to the pleadings, fails to establish

[9] See Section 6.10 on directed verdict.

a plaintiff's right to recover." *Young v Barker*, 158 Mich App 709, 720 (1987). See also *Fenton Country House, Inc v Auto-Owners Ins Co*, 63 Mich App 445, 448-449 (1975) (granting the *plaintiff* a directed verdict after the *defendant's* opening statement, where the defendant's pleadings and opening statement were insufficient to establish the claimed affirmative defense).

3. Dismissal, Mistrial, or Retrial

Where an error cannot be cured by an instruction from the court, a motion for mistrial[10] is appropriate, but not mandatory. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102 (1982). The Court explained this conclusion by stating:

"A party may have such an investment in time and money in a trial at the point when incurable error arises that he [or she] would rather see the case go to the jury, hoping that the jurors will be able to ignore the improper argument. Such a decision is eminently reasonable, both for the individual litigant and the judicial system as a whole. A trial which has consumed valuable private and public resources need not be aborted because the jury *may* have been improperly influenced or distracted by closing argument." *Reetz*, supra at 102.

A defendant may be entitled to a mistrial where he or she demonstrates that the plaintiff made inaccurate statements during the opening statement, which prejudiced the defendant. See *Schutte v Celotex Corp*, 196 Mich App 135, 142 (1992).

"[T]he cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought 'to prejudice the jury and divert the jurors' attention from the merits of the case.'" *Yost v Falker*, 301 Mich App 362, 363-367 (2013), quoting *Kern v St. Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978) (holding that although defense counsel "intended to prejudice the jury[]" through his repeated suggestions during opening statement, cross-examination, and closing argument "that the jury should find for [the] defendant to deter the filing of lawsuits[,]" retrial was not required "because a note sent by the jury to the court during deliberations unequivocally demonstrated that [defense counsel's] efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim[]").

[10] See Section 6.11 on mistrial.

C. Interim Commentary

"Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial." MCR 2.513(D) (only applicable in jury trials). See M Civ JI 3.16, which provides for instructions to the jury at the time interim commentary is allowed.

D. Objections

"In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." MRE 103(c). "Evidentiary objections that go beyond recitation of the pertinent rule of evidence being invoked risk prejudice." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 22 (2013).

E. Witness Examination[11]

1. Direct Examination

Unless otherwise ordered by the court, the plaintiff must introduce its testimony first. MCR 2.507(B).

Leading questions are only permissible on direct examination as "necessary to develop the witness's testimony." MRE 611(c)(1). See, e.g., *In re Susser Estate*, 254 Mich App 232, 239-240 (2002), where reversal was not required when the plaintiff asked leading questions of an elderly and infirm witness only to the extent necessary to develop her testimony.

Only one attorney for a party is permitted to examine a witness, unless otherwise ordered by the court. MCR 2.507(C).

2. Cross-Examination

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(b). However, the trial court may limit cross-examination regarding matters not testified to on direct examination. *Id*. See, e.g., *Beadle v Allis*, 165 Mich App 516, 522-523 (1987), where the trial court did not abuse its discretion in limiting the plaintiff's cross-examination of the defendant's expert witness about issues that were "marginally relevant to the case as a whole but which [were]

[11] See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 1, for a discussion on the court's ability to limit the length of witness questioning.

beyond the scope of the witness' testimony on direct examination."

Leading questions are permissible during cross-examination. MRE 611(c)(2). However, the court is not always required to allow them. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 517-518 (2004).

"[T]he cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought 'to prejudice the jury and divert the jurors' attention from the merits of the case.'" *Yost v Falker*, 301 Mich App 362, 363-367 (2013), quoting *Kern v St. Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978) (holding that although defense counsel "intended to prejudice the jury[]" through his repeated suggestions during opening statement, cross-examination, and closing argument "that the jury should find for [the] defendant to deter the filing of lawsuits[,]" retrial was not required "because a note sent by the jury to the court during deliberations unequivocally demonstrated that [defense counsel's] efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim[]").

3. Redirect Examination

Generally, redirect examination must be limited to issues raised during cross-examination. *Gallaway v Chrysler Corp*, 105 Mich App 1, 8 (1981). However, "this general rule does not equate to an entitlement to elicit any and all testimony on such topics. Rather, the rules of evidence, which require that 'questions concerning . . . the admissibility of evidence shall be determined by the court,' continue to apply regardless of whether the questioning at issue is properly within the scope of examination." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291 (2006). In other words, the scope of redirect examination is left to the discretion of the trial court. *Gallaway*, *supra* at 8.

4. Recross-Examination

Generally, recross-examination is governed by the same rules as cross-examination. See *People v Jackson*, 108 Mich App 346, 348-349 (1981).

On recross-examination, the parties may inquire into new matters not covered during cross-examination where the new matters are in response to matters introduced during redirect examination. *People v Goddard*, 135 Mich App 128, 138 (1984), rev'd on other grounds 429 Mich 505 (1988).

F. Closing Arguments

Closing arguments are meant to help jurors understand the evidence and the way in which each side sees the case. M Civ JI 2.02.

"After the close of all the evidence, the parties may make closing arguments. The plaintiff . . . is entitled to make the first closing argument. If the defendant makes an argument, the plaintiff . . . may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments." MCR 2.513(L) (only applicable to jury trials). See also MCR 2.507(F) (applicable to jury and nonjury trials).

In making a closing argument, "counsel is permitted to draw reasonable inferences from the testimony."*In re Miller*, 182 Mich App 70, 77 (1990). Attorneys are permitted some freedom in their final argument, and they may reach different inferences and conclusions than a disinterested and unbiased judge. *Kujawski v Boyne Mtn Lodge, Inc*, 379 Mich 381, 385-386 (1967). "[The] [d]efendant ha[s] the right to ask the jury to believe his [or her] case, however improbable it may . . . seem[]." *Hunt v Freeman*, 217 Mich App 92, 99 (1996).

Either side may waive its right to present a closing argument. MCR 2.507(E). However, the court may not deny a party's right to closing argument. *United Coin Meter Co of Michigan v Lasala*, 98 Mich App 238, 242 (1980).

1. Permissible Content of Closing Arguments

Counsel may only make arguments regarding facts and issues that have been elicited during the trial. *Grewette v Great Lakes Transit*, 49 Mich App 235, 237 (1973). Neither side may comment on evidence that has not been admitted. *Gonzales v Hoffman*, 9 Mich App 522, 526 (1968). In particular, deposition testimony that is not part of the record is not a proper subject of summation. *Grewette*, *supra* at 238-239.

It is reversible error for the defense to ask the jurors to consider the effect that their judgment will have on them personally; however, an isolated invitation to the jury to put itself in the defendant's shoes is harmless error. *Duke v American Olean Tile Co*, 155 Mich App 555, 564 (1986), and *Brummitt v Chaney*, 18 Mich App 59, 65-66 (1969). It is also impermissible for an attorney to use "rhetoric that attempts to inflame passion and prejudice and that intentionally subverts the jury's fact-finding role." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 774-775 (2004).

In a personal injury action, it is not error to suggest a mathematical formula to aid the jury in determining damages for pain and suffering on a daily basis. *Yates v Wenk*, 363 Mich 311, 317-319 (1961). On the other hand, it is improper to argue that "'[n]obody would go through this pain and suffering for any sum of money[,]'" *Danaher v Partridge Creek Country Club*, 116 Mich App 305, 317 (1982), or to suggest how much it would cost to hire someone to suffer the same injuries, *Crenshaw v Goza*, 43 Mich App 437, 446 (1972).

"[T]he cumulative effect of an attorney's misconduct at trial may require retrial when the misconduct sought 'to prejudice the jury and divert the jurors' attention from the merits of the case.'" *Yost v Falker*, 301 Mich App 362, 363-367 (2013), quoting *Kern v St. Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978) (holding that although defense counsel "intended to prejudice the jury[]" through his repeated suggestions during opening statement, cross-examination, and closing argument "that the jury should find for [the] defendant to deter the filing of lawsuits[,]" retrial was not required "because a note sent by the jury to the court during deliberations unequivocally demonstrated that [defense counsel's] efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim[]").

2. Remarks Involving Witness Testimony

Repeated personal attacks on the integrity of witnesses by counsel in argument or in examination constitute reversible error. *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 352-354 (1978). In *Kern*, the defense counsel repeatedly attacked the plaintiffs' expert witnesses' integrity during cross-examination and closing arguments by suggesting (with no evidentiary support) that the witnesses had colluded with the plaintiff's attorney to provide false testimony. *Kern*, *supra* at 346. The Court ultimately concluded that these arguments warranted a new trial because the Court "perceive[d] a studied purpose to prejudice the jury and divert the jurors' attention from the merits of the case." *Id.* at 354.

A prosecutor's statement suggesting that a witness's testimony was "highly credible" is improper, but was not per se reversible error. *United States v Henry*, 545 F3d 367, 380 (CA 6, 2008). The Sixth Circuit Court of Appeals stated that such "'blunt comments' of personal belief constitute improper vouching." *Henry*, *supra* at 380. However, where the statement is an isolated statement, it may not be flagrant enough to warrant reversal. *Id.* The Court concluded that reversal was not warranted in *Henry* because:

> "[T]he isolated improper vouching statement, whether accidental or deliberate, was not likely to mislead the jury or prejudice [the defendant]. [The witness's] testimony was only a small part of the evidence that the jury heard relating to [the defendant's] involvement in the [crime]. [The witness's] knowledge of the workings of the [crime] was limited. We therefore conclude that the improper statement was not flagrant and does not reach the level of reversible error." *Id.*

3. Remarks Involving Opposing Counsel

It is error to call into question the honesty and integrity of opposing counsel. *Powell v St John Hosp*, 241 Mich App 64, 81-82 (2000). See also *People v Unger*, 278 Mich App 210, 238 (2008), where the Court found that "[t]he prosecution . . . clearly exceeded the bounds of proper argument when it suggested (1) that defense counsel had attempted to 'confuse the issue[s]' and 'fool the jury' by way of 'tortured questioning,' 'deliberately loaded questions,' and 'a deliberate attempt to mislead,' (2) that defense counsel had attempted to 'confuse' and 'mislead' the jury by using 'red herrings' and 'smoke and mirrors,' and (3) that defense counsel had attempted 'to deter [the jury] from seeing what the real issues [were] in this case.'" However, because "the trial court instructed the jury that '[t]he attorneys' statements and arguments are not evidence' and that '[y]ou should only accept things the attorneys say that are supported by the evidence or by your own common sense and general knowledge[,]'" and because a timely objection and curative instruction may have mitigated the prejudicial effect of the prosecutor's statements, there was no error requiring reversal. *Unger*, *supra* at 238.

G. Rebuttal

After opposing counsel's final argument, the party who first presented the evidence is entitled to present a rebuttal argument to the court or jury. MCR 2.507(E); MCR 2.513(L). It may not extend "beyond the issues raised in the preceding arguments." *Id.* "The trial judge has broad power and discretion concerning the conduct of the arguments before the jury." *Heintz v Akbar*, 161 Mich App 533, 537-538 (1987).

H. Summation of Evidence by Court

"After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury." MCR 2.513(M) (applicable only to jury trials). See M Civ JI 3.17, which provides instructions to the jury regarding the court's summation of the evidence.

I. Standard of Review

The trial court has discretion to determine what constitutes a fair and proper opening statement. *Hunt v Freeman*, 217 Mich App 92, 97 (1996).

Where a party's improper conduct affects the outcome of a trial, an appellate court may reverse even if the appellant's attorney did not attempt to cure the error through objection. *Reetz*, 416 Mich at 102. The Michigan Supreme Court explained how these types of cases are reviewed:

> "When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action." *Id.* at 102-103.

The trial court's decision to limit the time allotted for argument is reviewed for an abuse of discretion. *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 625 (1992).

6.8 Questions or Comments by Judge

A. Generally Permissible Conduct

"A trial judge has a duty to exercise reasonable control over the interrogation of witnesses and the presentment of the evidence in order to make the interrogation and presentment effective for the ascertainment of the truth. Further, the court may properly interrogate witnesses, whether called by the party or the court itself. Questions designed to clarify points and to elicit additional relevant evidence, particularly in a nonjury trial, are not improper." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 24 (1989) (internal citations omitted).

B. Judicial Impartiality During a Bench Trial

A trial judge is afforded more discretion when questioning witnesses during a bench trial than during a jury trial. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 153 (1992). "Nevertheless, a judge's comments and conduct can indicate a possible bias." *Id*. In order to prove bias, a litigant must "show that the judge's views controlled his [or her] decision-making process." *Id*. at 154.

C. Judicial Impartiality During a Jury Trial

1. Factors for Consideration

"A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality[,]" and "[a] judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *People v Stevens*, 498 Mich 162, 170-171 (2015) (citations omitted).

A variety of factors should be considered when evaluating the totality of the circumstances, "including, but not limited to[:]

- the nature of the trial judge's conduct,
- the tone and demeanor of the judge,
- the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein,
- the extent to which the judge's conduct was directed at one side more than the other, and

- the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial." *Id*. at 164 (bullets added).

2. Structural Error

"When the issue is preserved and a reviewing court determines that a judge has pierced the veil of judicial impartiality, a structural error has been established that requires reversing the judgment and remanding the case for a new trial." *Stevens*, 498 Mich at 178 (citations omitted). "[J]udicial partiality can never be held to be harmless and, therefore, is never subject to harmless-error review." *Id*. at 179-180 ("overrul[ing] *People v Weathersby*, [204 Mich App 98 (1994)], and all other cases applying harmless-error analysis to questions of judicial partiality[]") (citations omitted).

6.9 Issues Affecting the Jury During Trial

A. Reference Document

"The court may authorize or require counsel in civil . . . cases to provide the jurors with a reference document or notebook, the contents of which should include, but which is not limited to, a list of witnesses, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury instructions, admitted exhibits, and other admissible information to assist jurors in their deliberations." MCR 2.513(E). See M Civ JI 2.14, which provides instructions to the jury on the use and destruction of a reference document or notebook.

B. Jury Note Taking

MCR 2.513(H) states:

> "The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and

destroyed when the trial is concluded." See also M Civ JI 2.13.

C. Juror Discussion

In civil cases only, jurors may be permitted to discuss the evidence among themselves in the jury room during recess. MCR 2.513(K). If a court elects to allow juror discussion, it must first "inform[] the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel[.]" *Id.* In addition, "[t]he jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument." *Id.*

D. Jury Questions

The court may allow the jury to ask questions of any witness. MCR 2.513(I). If the court allows jury questions, it must ensure that the questions are asked by the court itself. *Id.* In addition, it must ensure "that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions." *Id.* The court must inform the jury "of the procedures to be followed for submitting questions to witnesses." *Id.* See also *People v Heard*, 388 Mich 182, 188 (1972), ("The questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. The trial judge may permit such questioning if he [or she] wishes, and it was error for a judge to rule that under no circumstances might a juror ask any questions."). If a court decides to permit the jury to ask questions, a jury instruction has been created:

> "During the testimony of a witness, you might think of an important question that you believe will help you better understand the facts in this case. Please wait to ask the question until after the witness has finished testifying and both sides have finished their questioning. If your question is still unanswered, write the question down, raise your hand, and pass the question to the bailiff. The bailiff will give it to me. Do not ask the witness the question yourself, show the question to the other jurors, or announce what the question is.
>
> "There are rules of evidence that a trial must follow. If your question is allowed under those rules, I will ask the witness your question. If your question is not

allowed, I will either rephrase it or I will not ask it at all." M Civ JI 2.11.

E. Jury View

The purpose of the jury view is not to furnish new evidence, but to enable the jurors to understand the evidence presented in the courtroom. *Valenti v Mayer*, 301 Mich 551, 558 (1942). See also M Civ JI 3.12. The court has discretion whether to permit a jury view. *West v Livingston Co Road Comm'n*, 131 Mich App 63, 67 (1983). In exercising its discretion, the court may consider whether there has been a change in the interim and whether exhibits have been introduced to show the condition of the scene. See *West*, *supra* at 67.

A jury view "of property or of a place where a material event occurred" may be ordered on motion of either party, by the court on its own initiative, or at the request of the jury. MCR 2.513(J). In a civil case, all parties are entitled to be present at a jury view. *Id.* During the view, only "the officer designated by the court[] may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion." *Id.*

F. Standard of Review

The decision whether to permit a jury view is reviewed for an abuse of discretion. *West*, 131 Mich App at 67.

Whether to permit jury notetaking is within the court's discretion. *People v Carter*, 462 Mich 206, 220 (2000) (involving former criminal court rule MCR 6.414(C)).

Whether to permit jurors to ask questions also lies within the court's discretion. *Heard*, 388 Mich at 188.

6.10 Directed Verdict

A. Rule

A party may move for a directed verdict at the close of the opposing party's proofs. MCR 2.516. Specific grounds must be stated. *Id.* If the motion is denied, the moving party may offer evidence "as if the motion had not been made." *Id.* In addition, a denied motion "is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts." *Id.*

B. Test Applied by the Court

The court must view the evidence presented at trial "in the light most favorable to the nonmoving party and make all reasonable inferences in favor of the nonmoving party[.]" *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1, 11 (2006), rev'd in part on other grounds 480 Mich 913 (2007). "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Meagher v Wayne State Univ*, 222 Mich App 700, 708 (1997). "[A] directed verdict for the defendant technically orders the jury to find no cause of action." *Auto Club Ins Ass'n v Gen Motors Corp*, 217 Mich App 594, 601 (1996).

The court should state its reasons or grounds for granting a motion for directed verdict. *Turner v Mut Benefit Health & Accident Ass'n*, 316 Mich 6, 27 (1946). The court is not required to rule immediately on the motion and may take it under advisement. See *Jones v Powell*, 462 Mich 329, 332 (2000).

C. Motion on Opening Statement

A motion for directed verdict may be based on the opposing party's opening statement. *Jones v Hicks*, 358 Mich 474, 485 (1960). The trial court should construe the evidence in the light most favorable to the party against whom the motion is directed. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 71 (1999). However, "a directed verdict after an opening statement is a limited and disfavored action, which is only proper where an opening statement, in addition to the pleadings, fails to establish a plaintiff's right to recover." *Young v Barker*, 158 Mich App 709, 720 (1987). See also *Fenton Country House, Inc v Auto-Owners Ins Co*, 63 Mich App 445, 448-449 (1975) (granting the *plaintiff* a directed verdict after the *defendant's* opening statement, where the defendant's pleadings and opening statement were insufficient to establish the claimed affirmative defense).

D. Bench Trials

In a bench trial, a directed verdict motion should be treated as a motion for involuntary dismissal under MCR 2.504(B)(2). *Stanton v Dachille*, 186 Mich App 247, 261 (1990). The standard on this motion is different than that for a directed verdict in a jury trial. MCR 2.504(B)(2) "permit[s a] court to make credibility evaluations and factual findings[,]" and the court, in determining whether to dismiss an action under MCR 2.504(B)(2), is not "required to view the evidence in the light most favorable to [the defendant], to resolve all conflicts of evidence in his [or her] favor, or to determine whether there [is] a genuine issue of material fact." *Williamstown Twp v Hudson*, ___ Mich App ___, ___ (2015). "The involuntary dismissal of

an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Samuel D Begola Svcs, Inc v Wild Bros*, 210 Mich App 636, 639 (1995), quoting MCR 2.504(B)(2). The court may determine the facts and render a judgment against the plaintiff or may decline to render judgment until the close of all evidence. MCR 2.504(B)(2). If the court grants the motion, it must make findings under MCR 2.517. MCR 2.504(B)(2).

E. Standard of Review

The trial court's decision on a motion for directed verdict is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131 (2003). The evidence and all legitimate inferences are reviewed "in the light most favorable to the nonmoving party. A motion for directed verdict . . . should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Sniecinski*, 469 Mich at 131.

Appellate review of a motion for involuntary dismissal involves a de novo review of the trial court's legal rulings and a review of the trial court's factual findings for clear error. *Samuel D Begola Services*, 210 Mich App at 639 (equitable action).

6.11 Mistrial

A. Generally

Where an error cannot be cured by an instruction from the court, a motion for mistrial is appropriate, but not mandatory. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102 (1982). The Court explained this conclusion by stating:

"A party may have such an investment in time and money in a trial at the point when incurable error arises that he [or she] would rather see the case go to the jury, hoping that the jurors will be able to ignore the improper argument. Such a decision is eminently reasonable, both for the individual litigant and the judicial system as a whole. A trial which has consumed valuable private and public resources need not be aborted because the jury *may* have been improperly influenced or distracted by closing argument." *Reetz*, supra at 102.

"A mistrial should be granted only when the error prejudices one of the parties to the extent that the fundamental goals of accuracy and fairness are threatened." *In re Flury Estate*, 249 Mich App 222, 229 (2002).

B. Sanctions

Declaring a mistrial as a way to sanction a party is within the inherent authority of the court. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 640 (1999). The court may also "award attorney fees as sanctions when the egregious misconduct of a party or an attorney causes a mistrial. The ability to impose such sanctions serves the dual purposes of deterring flagrant misbehavior, particularly where the offending party may have deliberately provoked a mistrial, and compensating the innocent party for the attorney fees incurred during the mistrial." *Persichini*, *supra* at 640-641. In *Persichini*, the plaintiff's attorney asked the defendant-doctor about other pending malpractice lawsuits against him. *Id.* at 629. The defendant moved for a mistrial and an award of costs, and the trial court ultimately granted the motion. *Id.* at 629-631. The Michigan Court of Appeals stated that the trial court properly limited the attorney fees to only the fees associated with time spent during trial. *Id.* at 643. An award of attorney fees as mistrial sanctions cannot include the fees associated with trial preparation or the retrial itself. *Id.*

C. Standard of Review

A decision on a motion for a mistrial is within the trial court's discretion and will be reversed on appeal only for an abuse of discretion that resulted in a miscarriage of justice. *In re Flury Estate*, 249 Mich App at 228. The standard for granting a mistrial is whether the party has had a fair and impartial trial. *Vaughan v Grand Trunk W R Co*, 153 Mich App 575, 579 (1986).

6.12 Jury Instructions

A. Generally

The court should be careful to characterize the instructions given to the jury as the court's instructions rather than as instructions requested by a party. *Reetz v Rigg*, 367 Mich 35, 39-40 (1962).

B. Types of Instructions

1. Pretrial Instructions

"After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably

necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims . . . , as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) [(requiring copies of model civil jury instructions be given to jury)] does not apply to such preliminary instructions." MCR 2.513(A).

2. Interim Instructions

"At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict." MCR 2.512(B)(1).

The court must also instruct the jury on the applicable law, issues presented, and if requested under MCR 2.512(A)(2), a party's theory of the case. MCR 2.512(B)(2). These instructions may be given "[b]efore or after arguments, or at both times, as the court elects." *Id.*

3. Final Instructions

a. Required Instructions

The trial court is required to instruct the jury *after* closing arguments are made or waived. MCR 2.513(N)(1). However, the trial court has the discretion (after giving notice to the parties) to instruct the jury *before* the parties give their closing arguments. *Id*. If instructions are given before closing arguments, the trial court may give any appropriate further instructions afterwards. *Id*.

b. Providing Copies of Instructions

The court must provide the jury with a written copy of the final instructions to take into the jury room during deliberations. MCR 2.513(N)(3). If a juror requests additional copies, the court may provide them as necessary. *Id.* The court also has discretion to provide the jury with a copy of electronically recorded instructions." *Id.*

c. Clarifying or Amplifying Instructions

"When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or

> confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4).

C. Model Civil Jury Instructions

"A model jury instruction does not have the force and effect of a court rule." MCR 2.512(D)(1).

MCR 2.512(D)(2) provides:

> "Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions . . . or [its] predecessor committee must be given in each action in which jury instructions are given if
>
> > "(a) they are applicable,
> >
> > "(b) they accurately state the applicable law, and
> >
> > "(c) they are requested by a party."

If the court decides to give an instruction when no instruction is recommended, the court must specifically find "for reasons stated on the record that (a) the instruction is necessary to state the applicable law accurately, and (b) the matter is not adequately covered by other pertinent model jury instructions." MCR 2.512(D)(3).

D. Additional Instructions

MCR 2.512(D)(4) provides:

> "This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative."

Accordingly, "[a] trial judge has discretion regarding whether or not to give specific additional instructions requested by a party." *Hawkeye Security Ins Co v Harnischfeger Corp*, 102 Mich App 190, 194 (1980).

"'There is no requirement that when a jury has asked for supplemental instruction on specific areas that the trial judge is obligated to give all the instructions previously given. The trial judge need only give those instructions specifically asked.'" *People v Katt*, 248 Mich App 282, 311 (2001), quoting *People v Darwall*, 82 Mich App

652, 663 (1978). If a juror exhibits confusion, the trial court is obligated to provide guidance by stating the relevant legal criteria in an understandable manner. *People v Martin*, 392 Mich 553, 558 (1974), overruled in part on other grounds 416 Mich 581, 621 (1982). The decision to provide additional instructions at the request of the jury is within the discretion of the trial court. *Martin*, *supra* at 558. If there is confusion about the verdict and the jury has not been discharged, the court has the authority to reinstruct the jury and have it clarify, after further deliberation, its intended verdict. *People v Henry*, 248 Mich App 313, 320 n 20 (2001).

E. Requests to Clarify Instructions

Jurors may submit questions about the court's jury instructions. See MCR 2.513(N)(2). As part of its final instructions, the court must "advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations." *Id.* In addition, after giving its final instructions, the court must "invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate." *Id.* If the jurors have questions, "the court and the parties shall convene, in the courtroom or by other agreed-upon means." *Id.* The question must be read aloud on the record, and the attorneys must offer suggestions for an appropriate response. *Id.* The court has discretion whether to provide the jury with a specific response. *Id.* No matter what it decides, the court must respond to all questions asked by the jury, "even if the response consists of a directive for the jury to continue its deliberations." *Id.*

F. Objections to Instructions

If a party wishes to object to the giving or the failure to give a jury instruction, it must be done "on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations). MCR 2.512(C). Objections must be "stat[ed] specifically to the matter to which the party objects and [must state] the grounds for the objection." *Id.* The court must give the objecting party the opportunity to make the objection without the jury present. *Id.*

G. Standard of Review

Claims of instructional error are reviewed de novo. *Cox v Flint Bd of Hosp Mgrs (On Remand)*, 243 Mich App 72, 88-89 (2000), rev'd on other grounds 467 Mich 1 (2002).

"[T]he trial court's determination whether a standard jury instruction or special jury instruction is applicable and accurate is reviewed for an abuse of discretion." *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 304 Mich App 174, 195 (2014), rev'd in part on other grounds 497 Mich 265 (2015).

Appellate review of assignments of error claiming a violation of MCR 2.512 (jury instruction rule) will be tested according to the standard adopted in MCR 2.613 (the harmless error rule). *Cox*, 243 Mich App at 88-89. "While the appellate court should not hesitate to reverse for a violation of [MCR] 2.512, it should not do so unless it concludes that noncompliance with the rule resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'" *Johnson v Corbet*, 423 Mich 304, 327 (1985). See also *Cox*, *supra* at 85-89.

"Without an objection to the trial court's instructions, appellate review is foreclosed unless the complaining party has suffered manifest injustice." *Hickey v Zezulka*, 177 Mich App 606, 616 (1989). "Manifest injustice occurs where the defect in instruction is of such magnitude as to constitute plain error, requiring a new trial, or where it pertains to a basic and controlling issue in the case." *Phinney v Perlmutter*, 222 Mich App 513, 557 (1997).

6.13 Jury Matters During Deliberations

A. Separation of the Jury

"[S]eparation of the jury after submission of the case by consent of counsel will not warrant a reversal where it appear[s] that neither party was prejudiced by such action." *Hampton v Van Nest's Estate*, 196 Mich 404, 411 (1917).

B. Communication with the Jury

There are three categories of communication with a deliberating jury. *People v France*, 436 Mich 138, 142-143 (1990)[12]. See also *Meyer v City of Center Line*, 242 Mich App 560, 565-566 (2000). These categories are discussed in the following sub-subsections. Ordinarily, any communication with a jury should occur in open court and in the presence of, or after notice to, the parties or their attorneys. *Wilson v Hartley*, 365 Mich 188, 189 (1961). However, absence of the parties or their attorneys may prevent reversal where the communication

[12] The Michigan Supreme Court expressly stated that the *France* holding applies to both criminal and civil proceedings. *France*, *supra* at 142, n 3.

occurred in open court and was recorded. *Salvatore v City of Harper Woods*, 372 Mich 14, 20-21 (1963). The Michigan Supreme Court stated:

"[C]ounsel's absence from the courtroom when a jury returns for further instructions does not bar the trial judge from proceeding, [but he or she] should not do so unless *undue* delay of the jury's deliberations would result or unless counsel have agreed by stipulation on the record to permit such further instruction in their absence." *Salvatore*, *supra* at 21.

Practice Note: Committee Tips:

When preparing a written response to a written jury question:

- *Provide the jury with envelopes and paper for questions;*
- *Meet with attorneys to see if an agreement can be reached on a response;*
- *Have attorneys review the written response;*
- *When next on the record, describe the question, the agreement with counsel, and the response;*
- *Always obtain consent of counsel, on the record, for written, substantive communications with the jury.*

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1. Substantive

"Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an *absence* of prejudice." *France*, 436 Mich at 143.

2. Administrative

"Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial. Upon an objection, the burden of persuasion lies with the

nonobjecting party to demonstrate that the communication lacked any prejudicial effect." *France*, 436 Mich at 143.

When the trial court instructs the jury on how to complete the verdict form, it engages in administrative communication. *Meyer*, 242 Mich App at 565.

3. Housekeeping

"Housekeeping communications are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general 'housekeeping' needs that are unrelated in any way to the case being decided. A housekeeping communication carries the presumption of no prejudice. First, there must be an objection to the communication, and then the aggrieved party must make a firm and definite showing which effectively rebuts the presumption of no prejudice." *France*, 436 Mich at 144.

C. Materials in Jury Room

The court *must* allow the jurors to take their notes (if they were permitted to take notes)[13] and final jury instructions[14] into the jury room when retiring to deliberate. MCR 2.513(O). The court *may* allow the jurors to take the reference document (if prepared under MCR 2.513[E]) and any exhibits or writings admitted into evidence into the jury room when retiring to deliberate. MCR 2.513(O).

Submitting documents to the jury that have not been admitted into evidence may be harmless error, "unless the error operated to substantially prejudice the party's case." *Phillips v Deihm*, 213 Mich App 389, 402 (1995). Substantial prejudice exists where the evidence that was submitted to the jury was either inadmissible or had not been presented to the jury during trial. See *Phillips*, *supra* at 403. In *Phillips*, the defendant objected to the jury's consideration of charts that were not introduced at trial, but were used in the plaintiff's closing argument. *Id.* The Michigan Court of Appeals concluded that the charts "contained nothing that the jury had not already seen without objection in open court," and that the charts did not contain "anything unfairly prejudicial to [the] defendant[.]" *Id.*

A defendant may be granted a new trial when the jury considers material not in evidence if the defendant can show "(1) that the jury was . . . exposed to an extraneous influence and (2) that the influence

[13] See Section 6.9(A) for information on jury note taking.

[14] See Section 6.12(B)(3) for information on providing copies of final jury instructions to the jurors.

'created a real and substantial possibility [that] could have affected the jury's verdict.' [Citation omitted.] With respect to the second element, a defendant must 'demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.'" *Unibar Maintenance Services, Inc v Saigh*, 283 Mich App 609, 627 (2009), quoting *People v Budzyn*, 456 Mich 77, 89 (1997). In *Unibar*, the trial court properly denied the defendants' motion for a new trial on the basis of the jury's consideration of extraneous evidence, because the defendants failed to show that the jury foreperson's chart and summary of the trial testimony were prepared outside of the jury room or that the foreperson's material contained information not presented at trial. *Unibar*, *supra* at 627-628.

D. Requests to Review Testimony or Evidence

If, after retiring to deliberate, the jury requests to review any testimony or evidence that has not been allowed into the jury room under MCR 2.513(O), "the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request." MCR 2.513(P).

If a court decides to permit the jury to review requested testimony or evidence, it may "make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration." MCR 2.513(P).

If a court decides not to permit the jury to review requested testimony or evidence, it may order the jury to continue deliberating, "as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." MCR 2.513(P).

E. Hung Jury

"When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions." MCR 2.513(N)(4). However"[t]he court may discharge a jury from the action . . . whenever the jurors have deliberated and it appears that they cannot agree." MCR 2.514(C)(4). If the jury is discharged, the court may order a new trial before a new jury. MCR 2.514(C).

See also Principle 16 of the Principles for Juries and Jury Trials, Commission on the American Jury Project, which provides that "deliberating jurors should be offered assistance when an apparent impasse is reported":

> "(A) If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to determine whether and how the court and the parties can assist them in their deliberative process. After receiving the jurors' response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.
>
> "(B) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue its deliberations. The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> "(C) If there is no reasonable probability of agreement, the jury may be discharged."

A hung jury does not constitute an adjudication on the merits or a final judgment. *Andrews v Donnelly (After Remand)*, 220 Mich App 206, 209-210 (1996).

Committee Tips:

If a jury appears to be deadlocked, first read M Civ JI 60.02 to see if that prompts a verdict.

Consider asking the jury certain questions, such as:

- *Is the jury deadlocked?*
- *How long has it been deadlocked?*
- *Has there been any change in the voting one way or the other?*
- *Do the jurors appear to have fundamental differences that cannot be resolved?*
- *Also, consider asking the lawyers if they wish to inquire of the foreperson.*

If the trial court decides to declare a mistrial, explain to the jury on the record that the declaration of a mistrial is discretionary with the court, and that the court is exercising its discretion in light of the information received regarding the state of the jury deliberations.

F. Standard of Review

The decision to submit documents to the jury that have not been admitted into evidence is reviewed for harmless error. *Phillips*, 213 Mich App at 402. Reversal is required where "the error operated to substantially prejudice [a] party's case." *Id.*

A trial court's decision to read testimony back to the jury is reviewed for an abuse of discretion. *Whitney*, 100 Mich App at 712.

6.14 Verdict

A. Number

Unless the parties agree otherwise, a verdict in most civil cases will be that of five of the six jurors. MCR 2.514(A). The parties may stipulate to a jury of all jurors impaneled or a jury of less than six, and a verdict by an agreed majority. MCR 2.514(A). For less-than-unanimous juries, the same jurors who agree on liability must also agree on damages. *Klanseck v Anderson Sales & Svc, Inc*, 136 Mich App 75, 84 (1984).[15]

B. Polling the Jury

When the jury returns its verdict, "[a] party may require a poll to be taken by the court asking each juror if it is his or her verdict." MCR 2.512(B). "[O]nce a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict." *Hoffman v Monroe Pub Schools*, 96 Mich App 256, 261 (1980). After a jury has been polled and discharged, testimony and affidavits by the jury members may only be used to challenge the verdict with regard to extraneous matters, like undue influence, or to correct clerical errors in the verdict in matters of form. *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 293-294 (1992). Clerical errors include transcription or transmission of the jury's verdict. *Id.* at 294.

A jury may change the form and substance of a verdict to coincide with its intention as long as the jury has not yet been discharged; the jury may be allowed to reconvene where, after the jury has announced its verdict, a poll of the jurors indicates that they might be confused. *Put v FKI Industries, Inc*, 222 Mich App 565, 569 (1997). Allowing the jury to resume deliberations furthers the purpose of MCR 2.514(B)(2). *Put*, *supra* at 570.[16]

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[15] See the Michigan Judicial Institute's verdict checklist.

[16] Effective September 1, 2011, ADM 2005-19 amended several court rules as part of an effort to promote jury reform. Some rules were affected substantively, and some were only affected ministerially. *Put*, 222 Mich App at 565 discussed former MCR 2.512(B)(2), which was renumbered and only affected ministerially.

C. Special Verdict

"'The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury really has done. The general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial.'" *Sudul v City of Hamtramck*, 221 Mich App 455, 458-459 (1997), quoting *Sahr v Bierd*, 354 Mich 353, 365-366 (1958).

"The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict." MCR 2.515(A). The form of a special verdict must be settled on the record or in writing, "in advance of argument and in the absence of the jury[.]" *Id.* "The court may submit to the jury:

> "(1) written questions that may be answered categorically and briefly;
>
> "(2) written forms of the several special findings that might properly be made under the pleadings or evidence; or
>
> "(3) the issues by another method, and require the written findings it deems most appropriate." *Id.*

The court must adequately instruct the jury on the matter submitted so that the jury is able to make findings on each issue. *Id.*

The court must enter judgment in accordance with the special verdict. MCR 2.515(B).

Where the court omits from the special verdict form an issue of fact that was raised in the pleadings or the evidence, a party must demand its submission before the jury retires, or else the party is deemed to have waived the right to a jury trial on that issue. MCR 2.515(C). "The court may make a finding as to an issue omitted without a demand; or, if the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict." *Id.*

D. Inconsistent Verdicts

"'Ordinarily, a verdict may and should be set aside and a new trial granted where [the verdict] is self-contradictory, inconsistent, or incongruous, and such relief should, as a rule, be granted where more than one verdict [is] returned in the same action and they are inconsistent and irreconcilable.'" *Harrington v Velat*, 395 Mich 359, 360

(1975), quoting 66 CJS, New Trial, §66, pp 197-198. However, every attempt must be made to harmonize a jury's verdicts; the verdicts should be disturbed only where they are "'so logically and legally inconsistent that they cannot be reconciled[.]'" *Lagalo v Allied Corp*, 457 Mich 278, 282 (1998), quoting *Granger v Fruehauf Corp*, 429 Mich 1, 9 (1987). If there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent. *Lagalo*, 457 Mich at 282. "Moreover, the Court Rules do not provide an avenue to a new trial based "on an inconsistency or incongruity in the jury's conclusions. *Zaremba Equip*, *Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 29 (2013).

E. Standard of Review

Whether a special verdict form should be submitted to the jury is within the trial judge's discretion. *Ketola v Frost*, 375 Mich 266, 274 n 4 (1965).

Chapter 7: Postjudgment Proceedings

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7.1 Judgment Notwithstanding the Verdict (JNOV) and New Trial

A. Generally

After a verdict in a civil case, a party may move for judgment notwithstanding the verdict (JNOV) under MCR 2.610, request a new trial under MCR 2.611, or request relief under both court rules. MCR 2.610(A). Such motions may be an opportunity to clarify issues for possible appeal.

Timing. A motion under either court rule must be filed within 21 days after entry of a judgment. MCR 2.610(A)(1); MCR 2.611(B).

Decision. Under either court rule, "the court must give a concise statement of the reasons for the ruling, either in a signed order or opinion filed in the action, or on the record." MCR 2.610(B)(3); MCR 2.611(F).

B. Motion for JNOV Standard

Within 21 days after entry of a judgment, a party may move for JNOV. MCR 2.610(A). A motion for a new trial may accompany the JNOV motion or may be filed as an alternative to the JNOV. MCR 2.610(A).

A motion for JNOV should only be granted where the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Reed v Yackell*, 473 Mich 520, 528 (2005). "If reasonable jurors could have honestly reached different conclusions . . . , the trial court may . . . [not] substitute its judgment for that of the jury." *Hamann v Ridge Tool Co*, 213 Mich App 252, 254 (1995).

C. Failure to Timely Raise Issue

A general rule of trial practice is that failure to raise an issue waives review of that issue on appeal. *Napier v Jacobs*, 429 Mich 222, 227 (1987). It is improper procedure for the defendant "to allow a civil trial to go full-term, with a jury verdict rendered in plaintiff's favor and judgment entered pursuant to that verdict, with no objection raised during trial to the sufficiency of the evidence, and then to raise a challenge to the sufficiency of the evidence for the first time on appeal and receive judgment in its favor notwithstanding the jury verdict." *Napier*, *supra* at 230.

D. Motion for New Trial Standard

A party seeking to set aside a jury verdict must show one of the grounds listed in MCR 2.611(A)(1). *Kelly v Builders Square, Inc*, 465 Mich 29, 38 (2001). "A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:

> "(a) Irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial.
>
> "(b) Misconduct of the jury or of the prevailing party.
>
> "(c) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.
>
> "(d) A verdict clearly or grossly inadequate or excessive.
>
> "(e) A verdict or decision against the great weight of the evidence or contrary to law.
>
> "(f) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial.
>
> "(g) Error of law occurring in the proceedings, or mistake of fact by the court.
>
> "(h) A ground listed in MCR 2.612 [relief from judgment or order] warranting a new trial." MCR 2.611(A)(1)(a)-(h).[1]

"By its plain language, MCR 2.611(A)(1) applies only to judgments reached following a trial." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 533 (2014) (finding that the trial court erred by addressing the parties' motion under MCR 2.611(A) to set aside a quiet title and foreclosure judgment where no trial on the merits was held).

On a motion for a new bench trial, the court may:

> "(a) set aside the judgment if one has been entered,
>
> "(b) take additional testimony,
>
> "(c) amend findings of fact and conclusions of law, or

[1]Any inquiry into the validity of a jury verdict or indictment that requires a juror's testimony or affidavit must adhere to the restrictions set out in MRE 606(b).

> "(d) make new findings and conclusions and direct the entry of a new judgment." MCR 2.611(A)(2).

E. Standard of Review

A trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131 (2003). The motion should only be granted if the evidence viewed in the light most favorable to the nonmoving party "fails to establish a claim as a matter of law." *Sniecinski*, *supra* at 131.

The court has discretion whether to grant or deny a motion for new trial under MCR 2.611. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761 (2004).

The Court of Appeals has conducted a two-step analysis when reviewing a trial court's decision to grant a motion for a new trial. "First, the reviewing court must determine if the reasons assigned for granting the motion are legally recognized. Second, the reviewing court should determine whether the reasons are supported by a reasonable interpretation of the record." *Vargo v Denison*, 140 Mich App 571, 573 (1985). The Supreme Court has never expressly adopted the two-step analysis. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 539 (1993).

7.2 Remittitur and Additur

A. Procedure and Timing

If the only error in the trial is the amount of damages (either excessive or inadequate), the trial court "may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support." MCR 2.611(E)(1).

B. Remittitur

Remittitur is the procedural process by which an excessive jury verdict is reduced. *Pippen v Denison Div of ABEX Corp*, 66 Mich App 664, 674 (1976). "In determining whether remittitur is appropriate, the proper consideration is whether the jury award was supported by the evidence." *Landin v Healthsource Saginaw*, *Inc*, 305 Mich App 519, 546 (2014). "In reviewing motions for remittitur, courts must be careful not to usurp the jury's authority to decide what amount is necessary to compensate the plaintiff[,] . . . [and] should exercise the power of remittitur with restraint." *Id.* at 547. Although the trial court may

examine other factors when considering remittitur, the inquiry "should be limited to *objective* considerations relating to the actual conduct of the trial or to the evidence adduced." *Palenkas v Beaumont Hosp*, 432 Mich 527, 532 (1989). Objective factors to take into account when considering remittitur include: """(1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions."'" *Freed v Salas*, 286 Mich App 300, 334 (2009), quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 764 (2004), quoting *Palenkas*, *supra* at 532-533.

If money damages awarded by a jury are grossly excessive as a matter of law, the judge may order (1) remittitur, (2) a complete new trial, or (3) a trial limited to the issue of damages. MCR 2.611(A)(1)(c); MCR 2.611(E)(1). See *Gilbert*, 470 Mich at 763-764, for an analysis of an excessive verdict for which relief was permitted under MCR 2.611(A)(1)(c).

When reviewing compensatory awards, the trial court must consider the principle of "recompensing the injured party for losses proven in the record." *Gilbert*, 470 Mich at 764.

C. Additur

Additur is the procedural process by which the trial court "increases the jury's award of damages to avoid a new trial on grounds of inadequate damages." Black's Law Dictionary (8th ed).

"When reviewing for additur, the appropriate inquiry is whether the evidence supports the jury's award." *Robertson v Blue Water Oil Co*, 268 Mich App 588, 595 (2005).

If money damages awarded by a jury are grossly inadequate as a matter of law, the judge may order (1) additur, (2) a complete new trial, or (3) a trial limited to the issue of damages. MCR 2.611(A)(1)(c); MCR 2.611(E)(1).

D. Standard of Review

A ruling on a motion for remittitur is reviewed for an abuse of discretion. *Palenkas*, 432 Mich at 531.

The trial court's decision on a request for additur is also reviewed for an abuse of discretion. *Hill v Sacka*, 256 Mich App 443, 460 (2003).

7.3 Costs

A. Authority

"The power to tax costs is wholly statutory; costs are not recoverable where there is no statutory authority for awarding them." *Herrera v Levine*, 176 Mich App 350, 357 (1989).

"Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(A)(1). Plaintiff is entitled to plead alternative claims pursuant to MCR 2.111(A)(2). The party needs to prevail on only one theory when alternative theories are pleaded. *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 560-561 (1999).

B. Procedure and Timing

"Costs may be taxed by the court on signing the judgment, or may be taxed by the clerk. . . ." MCR 2.625(F)(1). When costs are to be taxed by the clerk, the bill of costs must be presented to the clerk "within 28 days after the judgment is signed, or within 28 days after entry of an order denying a motion for new trial, a motion to set aside the judgment, a motion for rehearing or reconsideration, or a motion for other postjudgment relief except a motion under MCR 2.612(C)." MCR 2.625(F)(2). A copy must be served on the other party. MCR 2.625(F)(2). The clerk is required to review the bill of costs and to be satisfied "that the items charged in such bill are correct and legal; and shall strike out all charges for services, which, in his judgment, [are] not necessary to be performed." MCL 600.2461. The clerk's action on the bill of costs is reviewable by the trial court on the motion of an affected party. MCR 2.625(F)(4). The requirements for the bill of costs are governed by MCR 2.625(G).

Generally, a trial court should hold an evidentiary hearing when there is a challenge to the costs requested. *Kernen v Homestead Devel Co*, 252 Mich App 689, 691 (2002). If the parties have created a sufficient record to review the issue, an evidentiary hearing is not required. *Kernen*, *supra* at 691.

C. Attorney Fees[2]

"[A]ttorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Nemeth v Abonmarche Devel, Inc*, 457 Mich 16, 37-38 (1998). See also MCL

[2] See Section 7.4 for more information on attorney fees.

600.2405(6). An example of a common-law exception is the common-fund exception, "which only applies when a prevailing party creates or protects a common fund that benefits himself and others." *Nemeth*, *supra* at 38 n 11.

Specific statutes and court rules that have special provisions for awarding reasonable attorney fees include MCL 600.2591, MCR 2.114(E) and (F), and MCR 2.625(E).

Several statutes *require* an award of attorney fees. See MCL 500.3148(1) and MCL 600.2961.

D. Fees and Expenses as Costs

See MCL 600.2405, ~~and~~ MCL 600.2421b, and MCL 600.1990 for a list of fees and costs that may be awarded. Taxation of costs for deposition transcript fees and certified copies of records are allowed when the documents are read into evidence at trial or necessarily used. MCL 600.2549. See also *Herrera*, 176 Mich App at 358. The "necessarily used" facet of the statutory provision allows the taxation of costs for deposition transcripts submitted in support of a successful motion for summary disposition. *Portelli v IR Constr Products Co*, *Inc*, 218 Mich App 591, 606 (1996). See also *Guerrero v Smith*, 280 Mich App 647, 674 (2008), where "[t]he costs of copying the video depositions . . . were properly taxed because the depositions were filed in the clerk's office and used as evidence at trial." Fees and expenses that are *not* taxable as costs include:

- Expenses incurred to enlarge exhibits;
- Traveling expenses of attorneys or parties;
- Expenses related to the general copying of documents;
- Case evaluation fees;
- Expenses related to the copying of surveillance videos;
- Cost of transcripts prepared for an appeal;
- Expenses related to obtaining a loan as security for an appeal bond; and
- Expenses related to procuring a nonexpert witness's testimony. *Van Elslander v Thomas Sebold & Assoc*, *Inc*, 297 Mich App 204, 217-218 (2012); *Guerrero*, *supra* at 671-674.

E. Standard of Review

A court's decision whether to tax costs is reviewed for an abuse of discretion. *Portelli*, 218 Mich App at 604. Whether a particular expense is a taxable cost is a question of law that is reviewed de novo on appeal. *Guerrero*, 280 Mich App at 670.

7.4 Attorney Fees

"Michigan adheres to the general rule that awards of costs and attorney fees are recoverable only where specifically authorized by statute, the court rules, or a recognized exception." *Yuchase v Macomb Co*, 176 Mich App 9, 14 (1989).

A. "Reasonable" or Actual Fees

To calculate a reasonable attorney fee, the court should first determine "the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence." *Smith v Khouri*, 481 Mich 519, 522 (2008). The court should then multiply that number by "the reasonable number of hours expended." *Smith*, 481 Mich at 522. Finally, the court may adjust the fee up or down after considering and indicating its view of each of the factors listed in *Wood v DAIIE*, 413 Mich 573, 588 (1982), as "fine tuned" by the *Smith* Court, and Michigan Rule of Professional Conduct (MRPC) 1.5(a). *Smith*, 481 Mich at 522, 529-530.

The factors to be considered in determining a reasonable attorney fee are:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;[3]

[3] "[T]he results-obtained factor is either of little relevance to the determination of a reasonable attorney fee, or only one of many factors to be considered." *Fraser*, 304 Mich App at 224. "In the absence of authority expressly prohibiting an attorney fee award from being higher than the verdict amount for the prevailing party," the Court of Appeals upheld a trial court's award of attorney fees that was approximately $10,000 more than the jury verdict. *Id*.

(5) time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent." *Smith*, 481 Mich at 530; MRPC 1.5(a).

Smith involved case-evaluation sanctions under MCR 2.403(O); however, the framework for determining a reasonable attorney fee developed in *Smith* has been applied to cases involving other court rules and fee-shifting statutes permitting the award of attorney fees.[4] *Kennedy v Robert Lee Auto Sales*, ___ Mich App ___, ___ (2015). However, the Court of Appeals has declined to apply the *Smith* framework in certain cases.[5] *Id.* at ___. In *Kennedy*, the Court specifically considered the applicability of the *Smith* framework to attorney fee awards under the Michigan Consumer Protection Act (MCPA) and the Magnuson-Moss Warranty Act (MMWA). *Id.* at ___. The Court concluded that *Smith* provides "the most appropriate framework for honoring the remedial purpose of the MCPA and the MMWA and for achieving the goal of awarding a reasonable fee in these types of cases." *Kennedy*, ___ Mich App at ___. Accordingly, "the trial court abused its discretion by arbitrarily awarding $1,000 without considering the remedial purpose of the fee-shifting provisions of the MMWA and the MCPA as well as other factors" set out in *Smith*, 481 Mich 519. *Kennedy*, ___ Mich App at ___ (additionally opining that "the *Smith* framework applies to all fee-shifting statutes," but noting that "other [Court of Appeals] panels have declined to apply the *Smith* framework to an award of attorney fees under fee-shifting statutes or court rules beyond the [case-evaluation sanctions] fee-shifting rule that was at issue in *Smith*[]") (citations omitted).

1. Factors Must Be Analyzed by the Trial Court

~~See *McNeel v Farm Bureau Ins Co*, 289 Mich App 76, 103 (2010), where the trial court abused its discretion in determining a reasonable attorney fee when it did not consider the appropriate~~

[4] See, e.g., *Coblentz v Novi*, 485 Mich 961 (2009) (Freedom of Information Act); *Adair v State*, 494 Mich 852 (2013) (Headlee Amendment); *Silich v Rongers*, 302 Mich App 137 (2013) (MCR 3.403(C), regarding the sale of premises and division of proceeds as substitution for partition).

[5] See, e.g., *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691 (2008) (MCL 500.3148(1), no-fault act); *Riemer v Johnson*, ___ Mich App ___, ___ (2015) (MCR 3.206(C)(2)(a), regarding domestic relations actions).

~~factors in making its decision~~The trial court abused its discretion by failing to consider the appropriate factors when awarding attorney fees. *McNeel v Farm Bureau Ins Co*, 289 Mich App 76, 103 (2010). In *McNeel*, the court reduced the plaintiff's attorney's billable hours by 46 percent without providing adequate support for its decision in the record. *Id.* at 103. The Court of Appeals, on remand, directed the trial court to "examine the appropriate factors . . . based on the evidence obtained at the previous hearing." *Id.* Trial courts should "discuss the *Wood* and MRPC 1.5(a) factors in a manner sufficient 'to aid appellate review.'" *Augustine v Allstate Ins Co*, 292 Mich App 408, 436 (2011), quoting *Smith*, 481 Mich at 531.

> "A meaningful application of the factors is more than a recitation of those factors prefaced by a statement such as 'after careful review of the criteria the ultimate finding is as follows . . . .' Similarly, an analysis is not sufficient if it consists merely of the recitation of the factors followed by a conclusory statement that 'the trial court has considered the factors and holds as follows . . .' without clearly setting forth a substantive analysis of the factors on the record. The trial court should consider the interplay between the factors and how they relate to the client, the case, and even the larger legal community." *Augustine*, 292 Mich App at 436.

In *Augustine*, 292 Mich App at 436, 439, the Court of Appeals remanded the case and instructed the trial court to make specific findings under *Smith*, where the trial court "acknowledged the fee-consideration factors, but provided little analysis or insight into the application of those factors to the client or the case." See also *In re Ujlaky*, ___ Mich ___, ___ (2015) (reversing the Court of Appeals' judgment affirming the trial court and remanding to the trial court to address "the reasonableness of the fee in relation to the actual services rendered[]" where the trial court limited attorney fees to the flat rate allowed for plea cases under the county's fee schedule). The Court noted that "[a]lthough the expenditure of any amount of time beyond that contemplated by the schedule for the typical case does not, *ipso facto*, warrant extra fees, spending a significant but reasonable number of hours beyond the norm may." *Id.*

2. Determining the Reasonable Hourly Rate

"In defining what constitutes a reasonable attorney fee, . . . a 'reasonable hourly rate represents the fee customarily charged in

the locality for similar legal services, which is reflected by the market rate for the attorney's work.'" *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 233 (2012), quoting *Smith*, 481 Mich at 531. However, "an attorney's reasonable hourly fee [is not necessarily capped] at the highest amount supported by the locality." *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 304 Mich App 174, 222 (2014), rev'd in part on other grounds 497 Mich 265 (2015) (trial court did not abuse its discretion in determining that the attorney's "experience and skill justified a premium rate consistent with the 75th percentile of comparable attorneys in Michigan[,]" as opposed to the locality). The fee applicant bears the burden of "'produc[ing] satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" *Smith*, 481 Mich at 531, quoting *Blum v Stenson*, 465 US 886, 895 n 11 (1984). The fee applicant may support his or her request with "testimony or empirical data found in surveys and other reliable reports." *Smith*, 481 Mich at 531-532. See also *Van Elslander*, *supra* at 232. Because "'[t]he market rate is the rate that lawyers of similar ability an experience in the community normally charge their paying clients for the type of work in question[,]' the actual fee charged, while clearly not dispositive of what constitutes a reasonable fee, is a factor to be considered in determining market place value as it is reflective of competition within the community for business and typical fees demanded for similar work." *Id.* at 233-234. In addition, a trial court may consider other factors "in determining what constitutes a 'fee customarily charged in the locality for similar legal services[,]" including:

- Referral appreciation discounts;
- Attractive rates used to entice future business;
- Familial relationships;
- Blended fee arrangements. *Van Elslander*, 297 Mich App at 234.

3. Determining the Reasonable Number of Hours Expended

To satisfy the "reasonable number of hours expended" requirement, the fee applicant must submit detailed billing records and evidence to support the claimed hours. *Smith*, 481 Mich at 532. The court must examine these records, and the opposing party may dispute them. *Id.* If there is a factual dispute, the opposing party is entitled to an evidentiary hearing

to contest the reasonableness of the hours billed or the hourly rate. *Id.*

4. Fees for Work of a Legal Assistant

Attorney fees may include any legal assistant's time and labor in contributing "nonclerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan." MCR 2.626.

5. Settlement and Entitlement to Attorney Fees

A party cannot contest the other party's entitlement to attorney fees when payment of attorney fees is part of the settlement agreement. *Kennedy v Robert Lee Auto Sales*, ___ Mich App ___, ___ (2015) (holding that where "[the p]laintiff sued [the] defendant under the MCPA and MMWA, and the parties reached a settlement wherein they agreed that if they could not determine the amount of 'statutory attorney fees and costs on their own,' the trial court would decide the matter[,]" the plaintiff was entitled to an award of attorney fees in accordance with the settlement agreement; "any argument that [the] plaintiff was not entitled to statutory attorney fees because there was no judgment against [the] defendant [was] without merit[]").

B. Evidentiary Hearing

When an attorney fee is requested and a party challenges the reasonableness of that fee, an evidentiary hearing is required, and the court must make findings of fact on the issue. *Miller v Meijer, Inc*, 219 Mich App 476, 479-480 (1996). The court should "determine what services were actually rendered, and the reasonableness of those services. *Reed v Reed*, 265 Mich App 131, 166 (2005).

Expert testimony is not required in relatively simple legal matters. *Zeeland Farm Svcs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 198 (1996) (a simple breach of contract case).

Because the phrase "actual attorney fees" requires that there exist an agency relationship between an attorney and the attorney's client and that a fee for the attorney's services be a sum of money actually paid or charged, an award of actual attorney fees requires that an attorney be acting on behalf of a client separate from the attorney. *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 432 (2007). For this reason, "a person who represents himself or herself cannot recover actual

attorney fees even if the pro se individual is a licensed attorney." *Omdahl*, *supra* at 432.

C. Contract Provides for Attorney Fee

Parties may create a contractual stipulation for reasonable attorney fees. *Michigan Nat'l Leasing Corp v Cardillo*, 103 Mich App 427, 436 (1981). See also *Peabody v DiMeglio*, 306 Mich App 397, 409 (2014) (holding that "a contract provision providing for attorney fees is a valid exception to the American rule regarding attorney fees."). However, the fees "must be measured by the fair value of the services rendered[.]" *Michigan Nat'l Leasing Corp*, *supra* at 436. "Attorney fees that are awarded pursuant to contractual provisions are considered damages, not costs." *Talmer Bank & Trust v Parikh*, 304 Mich App 373, 403 (2014), vacated in part on other grounds 497 Mich 857 (2014).

Where an award of attorney fees is part of a contractual agreement, a trial court can only award the fees as damages on a claim brought under the contract. *Pransky v Falcon Group*, *Inc*, ___ Mich App ___, ___ (2015) (holding that the trial court "lacked the authority to order [the plaintiff] to pay [the defendant]'s attorney fees" where the defendant "did not file a counter-claim for damages under the [parties'] . . . agreement[]"). However, "[w]hen contract language specifically provides that in litigation concerning the contract, the prevailing party shall recover attorney fees, attorney fees are not special damages, and therefore are generally recoverable by the prevailing party even if there was no specific prayer for the recovery of attorney fees in the complaint." *Fleet Business Credit*, *LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 592 (2007). See also *Great Lakes Shores, Inc v Bartley*, ___ Mich App ___, ___ (2015) (holding that the trial court erred by failing to award attorney fees where the corporate bylaws, which constituted a contract between the parties, permitted the recovery of attorney fees).

"'A contractual provision for reasonable attorney fees in enforcing provisions of [a] contract may validly include allowance for services rendered upon appeal.'" *Talmer Bank & Trust*, 304 Mich App at 403, quoting *Central Transport*, *Inc v Fruehauf Corp*, 139 Mich App 536, 549 (1984) (trial court erred in denying the plaintiff's request for attorney fees where the defendants were contractually obligated to pay reasonable attorney fees incurred in litigating the case, including reasonable attorney fees associated with appeal).

D. Contingent Fee

"Where an attorney's employment is prematurely terminated before completing services contracted for under a contingency fee agreement, the attorney is entitled to compensation for the reasonable

value of his [or her] services on the basis of quantum meruit, and not on the basis of the contract, provided that his discharge was wrongful or his withdrawal was for good cause." *Plunkett & Cooney, PC v Capitol Bancorp, Ltd,* 212 Mich App 325, 329-330 (1995).

E. Attorney's Lien

An attorney may have a lien for his or her services. *George v Sandor M Gelman, PC,* 201 Mich App 474, 476-478 (1993). In describing the types of attorney's liens, the Michigan Court of Appeals stated:

> "An attorney's lien can be one of two kinds: (1) a general, retaining, or possessory lien, or (2) a special, particular, or charging lien. A general or retaining lien is the right to retain possession of all documents, money, or other property of the client until the fee for services is paid. The special or charging lien is an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit." *George, supra* at 476 (internal citation omitted).

"An attorney's lien is not enforceable against a third party unless the third party had actual notice of the lien, or unless circumstances known to the third party are such that he [or she] should have inquired as to the claims of the attorney." *Doxtader v Sivertsen,* 183 Mich App 812, 815 (1990).

F. Standard of Review

An award of attorney fees will be upheld absent an abuse of the trial court's discretion. *Ypsilanti Charter Twp v Kircher,* 281 Mich App 251, 286 (2008). "Findings of fact on which the court bases its award of attorney fees are reviewed for clear error[.]" *Ypsilanti, supra* at 286.

A trial court's decision to impose an attorney's lien is reviewed for an abuse of discretion. *Reynolds v Polen,* 222 Mich App 20, 24 (1997).

7.5 Sanctions

There are a variety of situations in which the court may or must impose sanctions ranging from security for costs, to payment of actual attorney fees, to dismissal.

"[A] trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney." *Persichini v William Beaumont Hosp,* 238 Mich App 626, 639 (1999). The trial court also has the inherent power "to control the movement of cases on its docket by a variety of

sanctions." *Persichini*, *supra* at 640. In addition, MCL 600.611 provides the trial courts with the "'jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments.'" *Persichini*, *supra* at 640.

A trial court may not delegate its sanction-imposing authority to its court clerks. *In re Credit Acceptance Corp*, 481 Mich 883 (2008) (sanctions imposed under MCR 2.114(E)[6] must be properly ordered by a judge, and the court clerks' communications to the plaintiff when returning the plaintiff's writs for noncompliance with MCR 3.101(D) did not constitute proper court orders).

Where a party fails to provide electronically stored information because it was lost "as a result of the routine, good-faith operation of an electronic information system[,]" the court may not impose sanctions under the court rules unless exceptional circumstances exist. MCR 2.313(E).

A. Security for Costs

On motion of a party, the court may order security for costs. MCR 2.109(A). The court on its own may also require security. *Zapalski v Benton*, 178 Mich App 398, 404 (1989). Whether to require security is discretionary and requires a substantial reason. *In re Surety Bond for Costs*, 226 Mich App 321, 331-333 (1997). A substantial reason may exist when "there is a 'tenuous legal theory of liability,' or where there is good reason to believe that a party's allegations are 'groundless and unwarranted.'" *In re Surety Bond for Costs*, *supra* at 331-332[7].

Security for costs may not be required where "the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond." MCR 2.109(B)(1). In addition, the court cannot require security for costs from certain governmental entities and their officers. MCR 2.109(B)(2)(a)-(c).

B. Attorney Fees and Costs

Attorney fees and/or costs[8] may be awarded to a party as part of the opposing party's sanctions. Specific statutes and court rules govern when such sanctions are appropriate. See, for example, the following:

- MCL 600.2591 and MCR 2.114(F) (frivolous claim and defense sanctions);

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[6] MCR 2.114(E) allows the court to impose sanctions for filing documents with the court that have improper signatures. See MCR 1.109(D) for guidance on what constitutes a proper signature.

[7] See Section 3.3 on security for costs.

[8] See Section 7.3 and Section 7.4 on costs and attorney fees.

- MCR 2.114(E) (sanctions for improper signature on documents filed with the court);[9]
- MCR 2.313(B)(2) (sanctions for failing to comply with court's order regarding discovery);
- MCR 2.403(O) (case evaluation sanctions); and
- MCR 2.405(D) and (E) (offer of judgment sanctions).

The court has the inherent power to sanction an attorney who causes a mistrial by his or her misconduct by ordering them to pay attorney fees resulting from the misconduct. *Persichini*, 238 Mich App at 640-641.

A trial court does not have jurisdiction to tax costs and fees incurred on appeal to the Court of Appeals. *Edge v Edge*, 299 Mich App 121, 129 (2012).

C. Dismissal

When a party fails to comply with the court rules or a court order, the court, on its own initiative or on the opposing party's motion, may enter a default judgment against the noncomplying party or dismiss the noncomplying party's claim or action. MCR 2.504(B)(1).

Dismissal is a drastic sanction. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506 (1995). In deciding whether to dismiss the case, the court must "evaluate all available options on the record and conclude that the sanction of dismissal is both just and proper." *Vicencio*, *supra* at 506.[10]

A trial court has the authority to impose appropriate sanctions, including dismissal, in order to "contain and prevent abuses so as to ensure the orderly operation of justice." *Maldonado v Ford Motor Co*, 476 Mich 372, 375 (2006).

An involuntary dismissal due to the plaintiff's failure to comply with the court rules or any court order will operate as an adjudication on the merits unless:

- the order of dismissal provides otherwise,
- the case was dismissed for lack of jurisdiction, or

[9] See MCR 1.109(D) for guidance on what constitutes a proper signature.

[10] See Section 3.7 on dismissal.

- the case was dismissed for failure to join a party under MCR 2.205. MCR 2.504(B)(3). See also *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 414 (2007).

Reasons for dismissing a case as a sanction include:

- Failure to permit discovery. MCR 2.313(B)(2)(c).
- Failure to appear at a scheduled conference or for lacking adequate information or authority to effectively participate in the conference. MCR 2.401(G).
- Failure to make progress in the case. MCR 2.502(A)(1).
- Failure to pay previously assessed fees, including attorney fees. MCR 2.504(D); *Sirrey v Danou*, 212 Mich App 159, 160-161 (1995).

D. Frivolous Claim or Defense

The court must award reasonable costs and attorney fees against any attorney or party, or both, if it determines the claim or defense in a civil action was frivolous. MCL 600.2591. See also MCR 2.114(E), MCR 2.114(F); MCL 600.2421c (unless the state is the prevailing party); and *Kitchen v Kitchen*, 465 Mich 654, 661-662 (2002). The objective of punishing the introduction of frivolous claims and defenses with sanctions "is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purposes." ~~"The purpose for punishing with sanctions the introduction of frivolous claims 'is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose.'" *Harrison v Munson Healthcare, Inc*, 304 Mich App 1, 41 (2014) (overruled in part on other grounds by *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 263 (2015), and quoting~~ *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 722-723 (1988).~~). "Sanctions may be assessed without regard to whether the pleader harbored an improper purpose." *Harrison*, 304 Mich App at 41.~~ The attorney's law firm may also be sanctioned. *In re Attorney Fees & Costs (Septer v Tjarksen)*, 233 Mich App 694, 706-707 (1999). Sanctions are mandatory if the court finds a violation of MCR 2.114 occurred. *In re Goehring*, 184 Mich App 360, 367 (1990).

"To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made. *In re Costs & Attorney Fees (Powell Production, Inc v Jackhill Oil Co)*, 250 Mich App 89, 94-95 (2002). "MCR 2.114 ~~'~~"provides for an award of sanctions against both a party and his [or

her] counsel for not making reasonable inquiry as to whether a pleading is well grounded in fact and warranted by either existing law or a good-faith argument for extension, modification or reversal of existing law."~~'" *Harrison*, 304 Mich App at 40, quoting~~ *Briarwood v Faber's Fabrics, Inc*, 163 Mich App 784, 792 (1987).

"Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case." *Kitchen*, 465 Mich at 662. See also *In re Costs & Attorney Fees (Powell Production, Inc v Jackhill Oil Co)*, 250 Mich App 89, 94-95 (2002) ("[t]he factual determination by the trial court depends on the particular facts and circumstances of the claim involved"). The evidence (or lack thereof) produced during the proceedings may be used to evaluate whether the action was frivolous. See *Davids v Davis*, 179 Mich App 72, 89-90 (1989).

A trial court properly ordered sanctions against the plaintiffs and the plaintiffs' attorney where the court determined that the plaintiffs "knew at the outset" of litigation that the claims were frivolous and proceeded anyway. *BJ's & Sons Const Co, Inc v Van Sickle*, 266 Mich App 400, 408 (2005).~~ See also *Harrison*, 304 Mich App at 41-42 (plaintiff's "conduct in creating an 'accident' defense scenario despite its possession of direct evidence contrary to that position qualific[d] as a violation of MCL 600.2591(3)(a)(*ii*), which prohibits a party from advancing a claim or defense when the party has 'no reasonable basis to believe that the facts underlying the party's legal position were in fact true'"), overruled in part on other grounds by *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 263 (2015).~~

"The plain language of the statute states that costs and fees can be awarded 'if a court finds that *a* civil action or defense' is frivolous, and the court rule uses similar language. The statute and court rule do not use the phrase '*the*' to modify the word 'defense.'" *In re Costs and Attorney Fees (Powell Production, Inc)*, *supra* at 102. Therefore, "sanctions may issue if any defense is frivolous." *Id.* at 103. However, the plain language of MCL 600.2591 also shows that a circuit court cannot award appellate attorney fees and costs. *Edge v Edge*, 299 Mich App 121, 134 (2012). "MCL 600.2591 states that 'if a court finds that a civil action or defense to a civil action was frivolous, *the court that conducts the civil action* shall award to the prevailing party the costs and fees incurred . . . .'" *Edge*, 299 Mich App at 134 (because "the circuit court was not the court that conducted the appeal[,]" "it could not award sanctions under MCL 600.2591 for a frivolous appeal[]"). However, the *Edge* Court "did not state that a party could invoke MCL 600.2591 to claim costs and attorney fees at [the] Court [of Appeals] as long as the request was made at [the] Court; rather, appellate sanctions "'must be considered by [the] Court [of Appeals] under MCR 7.216.'" *Fette v Peters Constr Co*, 310 Mich App 535, 553

(2015), quoting *Edge*, 299 Mich App at 135. Any expenses incurred on appeal cannot be fairly attributed to the filing of a frivolous complaint in the circuit court. *Edge*, 299 Mich App at 134, citing *DeWald v Isola*, 188 Mich App 697, 703 (1991).

Pro se litigants. Pro se parties are not eligible for attorney fee sanctions under MCR 2.114 or MCL 600.2591. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 719 (1998). However, the language of MCR 2.114(E) affords the court sufficient discretion to design an appropriate sanction. *FMB-First Michigan Bank*, *supra* at 726-727. In contrast, the language of MCL 600.2591 does not allow the court discretion to create any other sanctions. *FMB-First Michigan Bank*, *supra* at 727.

E. Standard of Review

Some sanctions are mandatory while others are discretionary. The applicable statute, court rule, or case should be consulted.

A dismissal with prejudice is reviewed for abuse of discretion. *North v Dep't of Mental Health*, 427 Mich 659, 661 (1986).

The court reviews the amount of sanctions awarded for an abuse of discretion. *In re Costs and Attorney Fees (Powell Production, Inc)*, 250 Mich App at 104.

A trial court's finding that a claim or defense was frivolous is reviewed for clear error. *Szymanski v Brown*, 221 Mich App 423, 436 (1997). "A decision is clearly erroneous if [the reviewing court] is left with a definite and firm conviction that a mistake has been made." *Szymanski*, *supra* at 436.

The trial court has the discretion to decide if a motion for sanctions was timely. *In re Attorney Fees and Costs (Septer)*, 233 Mich App at 699. The standard is "whether the motion was filed within a reasonable time after the prevailing party was determined." *In re Attorney Fees and Costs (Septer)*, *supra* at 699.

7.6 Judgments

A. Entry of Judgment (Order)

An order or judgment must be entered at one of the following times:

> (1) At the time the court grants the relief. MCR 2.602(B)(1).

(2) When all parties approve the form of the judgment or order, and the court determines that it is consistent with the court's decision. MCR 2.602(B)(2).

(3) When all parties have received a copy of and agreed to a proposed judgment or order subject to the provisions in MCR 2.602(B)(3) (the seven-day rule).

(4) Upon preparing the proposed judgment or order and noticing it for settlement before the court. MCR 2.602(B)(4).

"The rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions." *Tiedman v Tiedman*, 400 Mich 571, 576 (1977).

B. Correction of Judgment

The court may correct clerical mistakes in judgments or orders at any time, either on its own initiative, or on motion of a party. MCR 2.612(A)(1). "[I]f a handwritten judgment contains a simple numerical transposition error, [a party] may simply ask either the trial court, pursuant to MCR 2.612(A)(1), or [the Court of Appeals], pursuant to MCR 7.216(A)(1), to correct the error[.]" *Souden v Souden*, 303 Mich App 406, 422-423 (2013). Once a claim of appeal is filed, MCR 7.208(A) and (C) govern procedures for correcting errors. MCR 2.612(A)(2).

"An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for . . . disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A).

A judgment or order may be set aside, vacated, or stayed only by the judge who entered it. MCR 2.613(B). However, "[i]f the judge who entered the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter." MCR 2.613(B).

Judgments or orders may also be corrected *nunc pro tunc* (i.e., retroactively) when "supply[ing] an omission in the record of action really had, but omitted through inadvertence or mistake." *Shifferd v Gholston*, 184 Mich App 240, 243 (1990). In *Shifferd*, the parties participated in mediation and agreed upon the mediator's award. *Shifferd*, *supra* at 241. The defendant submitted a timely proposed judgment to the judge, but the judge did not sign it until over a month later. *Id.* In the meantime, a computer-generated dismissal was issued to the parties for failing to have a timely judgment entered. *Id.* at 241-

242. After failing to receive payment under the mediation agreement, the plaintiff sought to garnish the defendant's wages. *Id.* at 242. The defendant moved to dismiss the garnishment proceedings because of the earlier order dismissing the case. *Id.* The trial court properly held that the plaintiff was entitled to judgment based on the mediation agreement. *Id.*

C. Default Judgment

1. Notice[11] of Request for Judgment

If the plaintiff seeks relief different from or in excess of the amount requested in the complaint, a hearing must be scheduled and notice provided to the defaulted party as provided in MCR 2.603(B)(1). MCR 2.601(B).

The defaulted party must be given notice of a request for default judgment if:

- the defaulted party has appeared in the action;
- the judgment seeks relief different in kind from or in a greater amount than the pleadings state; or
- the pleadings do not demand a specific amount of damages. MCR 2.603(B)(1)(i)–(iii).

2. Entry of Default Judgment

By clerk. The amount that the plaintiff is seeking must be supported by an affidavit, and:

- the plaintiff's claim is for a sum certain or an amount that can be certain by computation;
- the defendant was defaulted for failure to appear;
- the defendant is not an infant or incompetent person; and
- "the damages amount requested is not greater than the amount stated in the complaint." MCR 2.603(B)(2).

By court. The court has authority to enter default judgments in all other cases. MCR 2.603(B)(3).

[11] See Section 3.8 on default and default judgments.

- The party seeking the default judgment must file a motion to make the request. MCR 2.603(B)(3)

- In certain instances, it may be necessary to conduct more proceedings before the judgment may be entered. See MCR 2.603(B)(3)(b).

> **Notice.** Once a default judgment is entered, the clerk mails notice of the entry of default judgment to all parties. MCR 2.603(B)(4). The clerk is required to "keep a record that notice was given." *Id.*

D. Service

The party seeking the judgment or order must serve a copy of the signed order or judgment on all parties within 7 days of it being signed and must file proof of service with the court clerk. MCR 2.602(D)(1).

E. Enforcement of Judgment

~~Except as provided in MCR 2.614, a judgment may not be executed and proceedings may not be taken to enforce a judgment unless 21 days have passed since the judgment was entered~~"Except as provided in [MCR 2.614], execution may not issue on a judgment and proceedings may not be taken for its enforcement until 21 days after a final judgment (as defined in MCR 7.202(6)) is entered in the case." MCR 2.614(A)(1). "If a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from judgment is filed and served within 21 days after entry of the judgment or within further time the trial court has allowed for good cause during the 21-day period, execution may not issue on the judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after the entry of the order deciding the motion, unless otherwise ordered by the court on motion for good cause." *Id.* The court may still enjoin the transfer or disposition of property during the 21-day period. *Id.*

The statutes and court rules provide a variety of methods for enforcing a judgment including garnishment, execution, and judgment debtor discovery proceedings. MCL 600.6107; MCL 600.6201 *et seq.*; MCR 3.104.

Enforcement proceedings involving hearings include:

- proceedings on judgment debtor discovery subpoenas, MCL 600.6110; MCR 2.621;

- requests for installment payments, MCL 600.6201 *et seq.* (see also MCL 600.6107); and
- challenges to garnishments, MCR 3.101(K).

F. Satisfaction of Judgment

A judgment may be shown satisfied in whole or in part by:

> (1) filing with the clerk a satisfaction of judgment by the party or parties or their attorneys in whose favor the judgment was rendered;
>
> (2) paying the judgment, interest, and costs to the clerk, if it is a money judgment only; or
>
> (3) filing a motion and having an order entered that the judgment has been satisfied. MCR 2.620(1)-(3).

The clerk must indicate in the court records, in each instance, whether the judgment has been satisfied in whole or in part. MCR 2.620.

G. Renewal of Judgment

Judgments from courts of record must be renewed after 10 years; judgments from courts not of record must be renewed after 6 years. MCL 600.5809(3). The renewal can occur by ex parte motion. *Van Reken v Darden*, *Neef & Heitsch*, 259 Mich App 454, 458 (2003).

Chapter 8: Rules in Particular Actions

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8.1 Arbitration Under the Uniform Arbitration Act[1] (UAA)

A. Generally

MCR 2.116(C)(7) specifically states that an agreement to arbitrate is a valid bar to litigation.

Michigan's former arbitration law, set out at MCL 600.5001 *et seq.*, was repealed effective July 1, 2013. 2012 PA 370.

> "Michigan's arbitration law, as reflected in former Chapter 50 (Arbitrations) of the Revised Judicature Act [(RJA)], was adopted in 1961 and was patterned after the Federal Arbitration Act adopted by the U.S. Congress in 1925. Unlike 49 other jurisdictions, Michigan did not adopt the Uniform Arbitration Act promulgated in 1955 by the National Conference of Commissioners on Uniform States Laws, or Uniform Law Commission (ULC). More recently, the ULC promulgated an update of the uniform law, the 2000 Revised Uniform Arbitration Act. The uniform law has been adopted in at least 17 other jurisdictions, and Chapter 50 of the RJA had not been substantially modified since its enactment. It was suggested that Michigan modernize its arbitration law to address deficiencies and promote consistency with arbitration laws in other states, by adopting the uniform arbitration law proposed by the ULC in 2000." Uniform Arbitration Act Bill Analysis, Public Acts 369, 370, & 371 of 2012, p 1, 8/22/13.

The Uniform Arbitration Act (UAA), 2012 PA 371, became effective on July 1, 2013, and is set out at MCL 691.1681 *et seq*. "While the UAA provides that it 'governs an agreement to arbitrate whenever made,' MCL 691.1683(1), it also provides that '[t]his act does not affect an action or proceeding commenced . . . before this act takes effect,' MCL 691.1713." *Fette v Peters Constr Co*, 310 Mich App 535, 542 (2015) (applying the Michigan Arbitration Act, MCL 600.5001 *et seq.*, because the arbitration proceeding was commenced before July 1, 2013 where the defendant filed its claim for arbitration before July 1, 20133).

[1] For information on domestic relations arbitration, see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 7.

B. Arbitration Agreements

"On or after July 1, 2013, the [Uniform Arbitration Act (UAA)] governs an agreement to arbitrate whenever made."[2] MCL 691.1683(1). "Th[e] act does not apply to an arbitration between members of a voluntary membership organization if arbitration is required and administered by the organization." MCL 691.1683(2). "However, a party to such an arbitration may request a court to enter an order confirming an arbitration award and the court may confirm the award or vacate the award for a reason contained in [MCL 691.1703(1)(a), MCL 691.1703(1)(b), or MCL 691.1703(1)(d)]." MCL 691.1683(2).

Arbitration agreements are subject to the rules applicable to the construction of contracts. *Grazia v Sanchez*, 199 Mich App 582, 586 (1993). Whether a contract to arbitrate exists and whether one that existed has terminated are questions to be decided by the courts, not by the arbitrator. *36th District Court v Mich AFSCME Council 25*, 295 Mich App 502, 515 (2012), rev'd in part, lv den in part 493 Mich 879 (2012). A statutory arbitration agreement is irrevocable except by mutual consent. *Hetrick v David A Friedman, DPM, PC*, 237 Mich App 264, 268 (1999). However, a common-law arbitration agreement may be revoked unilaterally "at any time before the announcement of an award[.]" *Id*. at 268-269.

C. Waiver of Requirements or Restriction of Rights Under Uniform Arbitration Act (UAA)

1. Authority to Waive or Alter Requirements

"Except as otherwise provided in [MCL 691.1684(2) and MCL 691.1684(3)[3]], a party to an agreement to arbitrate or to an arbitration proceeding may waive or the parties may vary the effect of the requirements of [the Uniform Arbitration Act (UAA)] to the extent permitted by law." MCL 691.1684.

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[2]However, the federal arbitration act (FAA) preempts state law when the agreement to arbitrate arises out of a contract involving interstate commerce. *Circuit City Stores, Inc v Adams*, 532 US 105, 111-112 (2001). Accordingly, the UAA governs an agreement to arbitrate only when it does not involve interstate commerce, in which case the FAA applies. See *id.* A full discussion of federal preemption regarding the UAA is outside the scope of this benchbook.

[3] Both provisions prohibit the waiver of certain requirements contained in the Uniform Arbitration Act (UAA).

2. Exceptions

"Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not do any of the following:

> (a) Waive or agree to vary the effect of the requirements of [MCL 691.1685(1), MCL 691.1686(1), MCL 691.1688, MCL 691.1697(1), MCL 691.1697(2), MCL 691.1706, or MCL 691.1708].
>
> (b) Agree to unreasonably restrict the right under [MCL 691.1689] to notice of the initiation of an arbitration proceeding.
>
> (c) Agree to unreasonably restrict the right under [MCL 691.1692] to disclosure of any facts by a neutral arbitration.
>
> (d) Waive the right under [MCL 691.1696] of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this act, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration." MCL 691.1684(2).

In addition, under MCL 691.1684(3), "[a] party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of [MCL 691.1684] or [MCL 691.1683(1) or MCL 691.1683(3),[4] MCL 691.1687, MCL 691.1694, MCL 691.1698, MCL 691.1700(4) or MCL 691.1700(5), MCL 691.1702, MCL 691.1703, MCL 691.1704, MCL 691.1705(1) or MCL 691.1705(2), MCL 691.1709, MCL 691.1710, or MCL 691.1711]."

D. Waiver of Right to Arbitrate

"An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and *irrevocable* except on a ground that exists at law or in equity for the revocation of a contract." MCL 691.1686(1) (emphasis added). Waiver of a contractual right to arbitration is not favored. *Kauffman v The Chicago Corp*, 187 Mich App 284, 291 (1991). "A party arguing there has been a waiver of the right to arbitration bears a heavy burden of proof. The party must

[4] MCL 691.1684 refers to "section 3(1) or (3)[;]" however, there does not appear to be a subsection (3) in MCL 691.1683.

demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the arbitration right, and prejudice to the party opposing arbitration resulting from the inconsistent acts." *Id*. at 292.

E. Authority to Review and Enforce Arbitration Agreements

Arbitrators and judges have different roles as it relates to reviewing arbitration agreements: "The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate[]" whereas "[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable."[5] MCL 691.1686(2)-(3).

"If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders." MCL 691.1686(4).

1. Jurisdiction

"An agreement to arbitrate that provides for arbitration in this state confers exclusive jurisdiction on the [circuit[6]] court to enter judgment on an award under [the Uniform Arbitration Act (UAA)]." MCL 691.1706(2).

"A [circuit] court of this state that has jurisdiction over the controversy and the parties may enforce an agreement to arbitrate." MCL 691.1706(1).

2. Request for Judicial Relief

In order to receive judicial relief under the UAA, a party must request it:

> "Except as otherwise provided in [MCL 691.1708[7]], a request for judicial relief under [the UAA] must be made by motion to the [circuit[8]] court and heard

[5] Detailed discussion of the arbitrator's role and the actual arbitration proceeding is beyond the scope of this benchbook. Those topics will only be addressed in the context of judicial review of the arbitrator's actions or decisions..

[6] See MCL 691.1681(2)(c).

[7] MCL 691.1708 governs appeals of decisions made under the UAA.

[8] See MCL 691.1681(2)(c).

> in the manner provided by court rule for making and hearing motions." MCL 691.1685(1).

"Unless a civil action is already pending between the parties, a complaint regarding the agreement to arbitrate must be filed and served as in other civil actions." MCL 691.1685(2).

"A motion under [MCL 691.1685] shall be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held." MCL 691.1707. "Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business in this state, or if no adverse party has a residence or place of business in this state, in the court of any county in this state." *Id.* "All subsequent motions shall be made in the court that heard the initial motion unless the court otherwise directs." *Id.*

F. Specific Motions Heard by Court

If a party motions the court to order arbitration, "the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under [MCL 691.1687]." MCL 691.1687(6).

"The court shall not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established." MCL 691.1687(4).

1. Other Party Refuses to Arbitrate

Where a party motions the court showing an arbitration agreement and alleging that another party refuses to arbitrate as agreed, the court must do the following:

> "(a) If the refusing party does not appear or does not oppose the motion, order the parties to arbitrate.
>
> (b) If the refusing party opposes the motion, proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." MCL 691.1687(1).

"If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under [MCL 691.1687] must be made in that court. Otherwise a

motion under [MCL 691.1687] may be made in any court as provided in [MCL 691.1707[9]]."

2. No Arbitration Agreement Exists

Where a party motions the court and alleges "that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue." MCL 691.1687(2). If the court finds that an enforceable arbitration agreement exists, it must order the parties to arbitrate. *Id.*

"If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under [MCL 691.1687] must be made in that court. Otherwise a motion under [MCL 691.1687] may be made in any court as provided in [MCL 691.1707[10]]."

3. Provisional Remedies

Two situations exist where the court may enter an order "for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action[:]"

- before an arbitrator has been appointed and authorized to act under the UAA, for good cause shown, MCL 691.1688(1); or
- after an arbitrator has been appointed and authorize to act under the UAA "only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy[,]" MCL 691.1688(2)(b).

"A party does not waive a right of arbitration by making a motion under [MCL 691.1688(1)-MCL 691.1688(2)]." MCL 691.1688(3).

4. Consolidation of Separate Arbitration Proceedings

Unless the arbitration agreement prohibits the consolidation of claims, if a party to the arbitration agreement makes a motion, the court "may order consolidation of separate arbitration

[9] See Section (E)(2) for more information on MCL 691.1707.

[10] See Section (E)(2) for more information on MCL 691.1707.

proceedings as to all or some of the claims[11] if all of the following apply:

> (a) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or 1 of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person.
>
> (b) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions.
>
> (c) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings.
>
> (d) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation." MCL 691.1690(1); MCL 691.1690(3).

5. Out-of-State Motions to Enforce

On motion by a party or the arbitrator, "[a] court may enforce a subpoena or discovery-related order for the attendance of a witness in this state and for the production of records and other evidence issue by an arbitrator in connection with an arbitration proceeding in another state on conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective." MCL 691.1697(7). The out-of-state order must be "enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state." *Id*.

6. Expedited Order to Confirm Award[12]

Under MCL 691.1698(1), after receiving a preaward ruling and requesting that the ruling be incorporated into an award, "[a] prevailing party may move the court for an expedited order to confirm the [arbitrator's] award under [MCL 691.1702], in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates,

[11] See also MCL 691.1690(2), which permits the court to "order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings."

[12] For more information on confirming an arbitrator's award, see Section (F)(7).

modifies, or corrects the award under [MCL 691.1703 or MCL 691.1704[13]]."

7. Review of Arbitrator's Award

"[J]udicial review of an arbitrator's decision is very limited; a court may not review an arbitrator's factual findings or decision on the merits." *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150 (1986).

"A reviewing court has three options when a party challenges an arbitration award: (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award." *Krist v Krist*, 246 Mich App 59, 67 (2001). See also MCL 691.1702, MCL 691.1703, and MCL 691.1704.

An arbitrator may make the following awards:

- Punitive damages "if such an award is authorized by law in a civil action involving the same claim *and* the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." MCL 691.1701(1) (emphasis added).

- Other exemplary relief "if such an award is authorized by law in a civil action involving the same claim *and* the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." MCL 691.1701(1) (emphasis added).

- Reasonable attorney fees "if such an award is authorized by law in a civil action involving the same claim *or* by agreement of the parties to the arbitration proceeding. MCL 691.1701(2) (emphasis added).

- Other reasonable expenses "if such an award is authorized by law in a civil action involving the same claim *or* by agreement of the parties to the arbitration proceeding. MCL 691.1701(2) (emphasis added).

All other remedies "that the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under [MCL 691.1702] or for vacating an award under [MCL 691.1703]." MCL 691.1701(3).

[13] See Section (F)(7) for more information.

a. Confirmation of Award

"After a party to an arbitration proceeding receives notice of an award, the party may move the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected under [MCL 691.1700 or MCL 691.1704] or is vacated under [MCL 691.1703]." MCL 691.1702.

In cases of statutory arbitration, if the award is timely filed, failure to initiate a civil action by filing a complaint within one year of the award does not automatically preclude a party from seeking confirmation of the award. *Jaguar Trading Ltd Partnership*, 289 Mich App at 326-327.

b. Vacating Award

"On motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if any of the following apply:

> (a) The award was procured by corruption, fraud, or other undue means.
>
> (b) There was any of the following:
>
> > (*i*) Evident partiality by an arbitrator appointed as a neutral arbitrator.
> >
> > (*ii*) Corruption by an arbitrator.
> >
> > (*iii*) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.
>
> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to [MCL 691.1695], so as to prejudice substantially the rights of a party to the arbitration proceeding.
>
> (d) An arbitrator exceeded the arbitrator's powers.
>
> (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under [MCL 691.1695(3)] not later than the beginning of the arbitration hearing.

> (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in [MCL 691.1689] so as to prejudice substantially the rights of a party to the arbitration proceeding." MCL 691.1703(1).

Upon timely objection by a party, a court may also vacate an award if an arbitrator fails to make certain required disclosures under MCL 691.1692(1)-(2). MCL 691.1692(4).

"A motion under [MCL 691.1703] must be filed within 90 days after the moving party receives notice of the award under [MCL 691.1699] or within 90 days after the moving party receives notice of a modified or corrected award under [MCL 691.1700], unless the moving party alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the moving party." MCL 691.1703(2).

"If the court vacates an award on a ground other than that set forth in [MCL 691.1703(1)(e)], it may order a rehearing." MCL 691.1703(3). "If the award is vacated on a ground stated in [MCL 691.1703(1)(a) or MCL 691.1703(1)(b)], the rehearing shall be before a new arbitrator." MCL 691.1703(3). "If the award is vacated on a ground stated in [MCL 691.1703(1)(c), MCL 691.1703(1)(d), or MCL 691.1703(1)(f)], the rehearing may be before the arbitrator who made the award or the arbitrator's successor." MCL 691.1703(3). "The arbitrator shall render the decision in the rehearing within the same time as that provided in [MCL 691.1699(2)] for an award." MCL 691.1703(3). However, the court may not return the matter to the arbitrator for an expansion of the record. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 558 (2004).

"If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending." MCL 691.1703(4).

"A reviewing court may vacate an arbitration award where it finds an error of law that is apparent on its face and so substantial that, but for the error, the award would have been substantially different." *Collins v BCBSM*, 228 Mich App 560, 567 (1998). See generally MCL 691.1703(1)(c).

Arbitrators have exceeded their powers "whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *DAIIE v Gavin*, 416 Mich 407, 434 (1982). For example, it is not within an arbitrator's powers to order alimony (absent a showing of fraud) in a divorce case where the parties have already agreed that it would not be awarded and would be forever barred. *Krist*, 246 Mich App at 62-65 (where the Court determined that the arbitrator did *not* exceed his authority because his award was determined to be a division of marital property, not an award of alimony).

Where the terms of the arbitration agreement limited the scope of arbitration to the issues raised in the pleadings, the arbitrator did not exceed his powers in rendering an award based on an issue in the defendant's counter-complaint even though the issue was not addressed in the parties' arbitration summaries. *Nordlund & Assoc*, *Inc v Village of Hesperia*, 288 Mich App 222 (2010). In *Nordlund*, 288 Mich App at 223, the defendant's counter-complaint sought damages for breach of contract. However, the parties never addressed the issue in subsequent arbitration summaries. *Id.* at 228-229. The Michigan Court of Appeals concluded that whether the issue was raised in the arbitration summaries was irrelevant to determining whether the arbitrator exceeded his powers because "the arbitrator did not exceed his power, *as set forth in the arbitration agreement*." *Id.* at 229 (emphasis added). See also *Cipriano v Cipriano*, 289 Mich App 361, 370-372 (2010), where the Court concluded that an arbitrator did not exceed his powers when he received ex parte communication from the defendant because "the parties made no provision regarding ex parte communication in their arbitration agreement, and the ex parte contact did not involve legal argument. . . . According to the parties' agreement, the arbitrator retained the discretion to receive information from [the defendant] in order to expedite the proceedings." In addition, the plaintiff did not show that the ex parte contact "prejudiced her rights or that the arbitration award was procured by undue means." *Id.* at 372.

If the arbitrator's jurisdiction is questioned, it must be resolved in order to have a binding arbitration award. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98-99 (1982). "The existence of a contract to arbitrate and the enforceability of its terms is a judicial question

which cannot be decided by an arbitrator." *Id*. at 99. See also MCL 691.1706(1), giving the circuit court jurisdiction to enforce an arbitration agreement if it has "jurisdiction over the controversy and the parties[.]" But see MCL 691.1686(2), which limits the court's jurisdiction to determining whether an arbitration agreement exists or whether a controversy is subject to an arbitration agreement. In addition, "[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." MCL 691.1686(3).

c. Modification or Correction of Award

"On motion made within 90 days after the moving party receives notice of the award under [MCL 691.1699] or within 90 days after the moving party receives notice of a modified or corrected award under [MCL 691.1700], the court shall modify or correct the award if any of the following apply:

> (a) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award.
>
> (b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision on the claims submitted.

(c) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted." MCL 691.1704(1).

"If a motion made under [MCL 691.1704(1)] is granted, the court shall modify or correct and confirm the award as modified or corrected." MCL 691.1704(2). "Otherwise, unless a motion to vacate is pending, the court shall confirm the award." MCL 691.1704(2).

"A motion to modify or correct an award under [MCL 691.1704] may be joined with a motion to vacate the award." MCL 691.1704(3).

8. New Judgment on Award

An arbitration agreement "that provides for arbitration in this state confers exclusive jurisdiction on the [circuit[14]] court to enter judgment on an award under [the UAA]." MCL 691.1706(2).

"On granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment that conforms with the order." MCL 691.1705(1). "The judgment may be recorded, docketed, and enforced as any other judgment in a civil action." *Id*.

"A court may allow reasonable costs of the motion and subsequent judicial proceedings." MCL 691.1705(2).

"On request of a prevailing party to a contested judicial proceeding under [MCL 691.1702, MCL 691.1703, or MCL 691.1704], the court may add reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award." MCL 691.1705(3).[15]

G. Civil Immunity for Arbitrator, Arbitration Organization, or Arbitration Organization Representative

"An arbitrator or arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity." MCL 691.1694(1). This civil immunity "supplements any immunity under other law." MCL 691.1694(2).

An arbitrator does not lose his or her civil immunity for failing "to disclose to all parties to the agreement to arbitrate and to any other arbitrators any known facts [or any facts that the arbitrator learns after accepting appointment] that a reasonable person would consider likely to affect the impartiality of the arbitrator[.]" MCL 691.1692(1)-(2); MCL 691.1694(3).[16]

In judicial, administrative, or similar proceedings, arbitrators and arbitration organization representatives are "not competent to testify,

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[14] See MCL 691.1681(2)(c).

[15] See Section (G) for information on attorney fees and expenses of litigation.

[16] Note, however, that on timely objection by a party, the court may vacate an award if the arbitrator fails to make the required disclosures under MCL 691.1692(1)-(2). MCL 691.1692(4). See Section (F)(7) for information on vacating an award.

and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this state acting in a judicial capacity." MCL 691.1694(4). However, MCL 691.1694(4) does not apply in the following situations:

- "to the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding[,]" MCL 691.1694(4)(a);

- "to a hearing on a motion to vacate an award under [MCL 691.1703(1)(b)[17] or MCL 691.1703(1)(c)[18]] if the moving party establishes prima facie that a ground for vacating the award exists[,]" MCL 691.1694(4)(b).

The court must award an arbitrator, arbitration organization, or arbitration organization representative "reasonable attorney fees and other reasonable expenses of litigation[]" in the following circumstances:

- If an individual commences a civil action against the arbitrator, organization, or representative that arises from their services, or if an individual seeks to compel an arbitrator or representative to testify or produce records in violation of MCL 691.1694(4), and

- the court determines that the arbitrator, organization, or representative has civil immunity or that the arbitrator or representative is not competent to testify. MCL 691.1694(5).

H. Appeals

"An appeal may be taken from any of the following:

(a) An order denying a motion to compel arbitration.

(b) An order granting a motion to stay arbitration.

(c) An order confirming or denying confirmation of an award.

(d) An order modifying or correcting an award.

[17] "The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision on the claims submitted."

[18] "The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted."

> (e) An order vacating an award without directing a rehearing.
>
> (f) A final judgment entered under this act." MCL 691.1708(1).

"An appeal under [MCL 691.1708] shall be taken as from an order or a judgment in a civil action." MCL 691.1708(2).

I. Standard of Review

Whether the relevant circumstances establish a waiver of the right to arbitration is a question of law that is reviewed de novo, and the trial court's factual determinations regarding the applicable circumstances are reviewed for clear error. *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 588 (2001).

A trial court's decision to enforce, vacate, or modify a statutory arbitration award is reviewed de novo. *Tokar v Albery*, 258 Mich App 350, 352 (2003).

8.2 Arbitration Procedures Under Court Rule

A. Applicability

Effective September 1, 2014, ADM File No. 2013-19 amended MCR 3.602 to apply to all forms of arbitration not governed by the Uniform Arbitration Act (UAA). Specifically, MCR 3.602(A) now provides:

> "(A) Applicability of Rule. Courts shall have all powers described in MCL 691.1681 *et seq.*, [the UAA] or reasonably related thereto, for arbitrations governed by that statute. The remainder of this rule applies to all other forms of arbitration, in the absence of contradictory provisions in the arbitration agreement or limitations imposed by statute, including MCL 691.1683(2)."[19]

B. Requesting Order Under Court Rule

"A request for an order to compel or to stay arbitration or for another order under this rule must be by motion, which shall be heard in the

[19] MCL 691.1683(2) provides: "This act does not apply to an arbitration between members of a voluntary membership organization if arbitration is required and administered by the organization. However, a party to such an arbitration may request a court to enter an order confirming an arbitration award and the court may confirm the award or vacate the award for a reason contained in [MCL 691.1703(1)(a), MCL 691.1703(1)(b), or MCL 691.1703(1)(d)]."

manner and on the notice provided by these rules for motions. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions." MCR 3.602(B)(1).

C. Compelling or Staying Arbitration

The court may compel the parties to participate in arbitration "and to take other steps necessary to carry out the arbitration agreement " upon a motion "showing an agreement to arbitrate , and the opposing party's refusal to arbitrate[.]" MCR 3.602(B)(2). Further, "[a] motion to compel arbitration may not be denied on the ground that the claim sought to be arbitrated lacks merit or is not filed in good faith, or because fault or grounds for the claim have not been shown." MCR 3.602(B)(4).

If the opposing party denies that an arbitration agreement exists, the court must "summarily determine the issue and may order arbitration or deny the motion." MCR 3.602(B)(2). Similarly, "the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate." MCR 3.602(B)(3). "If there is a substantial and good-faith dispute, the court shall summarily try the issue and may enter a stay or direct the parties to proceed to arbitration." *Id.*

"Subject to MCR 3.310(E), an action or proceeding involving an issue subject to arbitration must be stayed if an order for arbitration or motion for such an order has been made under this rule. If the issue subject to arbitration is severable, the stay may be limited to that issue. If a motion for an order compelling arbitration is made in the action or proceeding in which the issue is raised, an order for arbitration must include a stay." MCR 3.602(C).

D. Arbitration Hearings

The procedures related arbitration hearings discussed in MCR 3.602(D)-(E) and MCR 3.602(G)-(H) are outside the scope of this benchbook.

E. Discovery and Subpoenas

"The court may enforce a subpoena or discovery-related order for the attendance of a witness in this state and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state on conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. MCR 3.602(F)(1).

"A subpoena or discovery-related order issued by an arbitrator in another state shall be served in the manner provided by law for service of subpoenas in a civil action in this state and, on motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state." MCR 3.602(F)(2).

F. Arbitration Awards

An arbitration panel conducts a hearing and issues an award pursuant to MCR 3.602(H). "A party may move for confirmation of an arbitration award within one year after the award was rendered. The court may confirm the award, unless it is vacated, corrected, modified, or a decision is postponed, as provided in [MCR 3.602]." MCR 3.602(I).

1. Vacating Award

"A request for an order to vacate an arbitration award under this rule must be made by motion. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint or motion to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award." MCR 3.602(J)(1).

"On motion of a party, the court shall vacate an award if:

> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
>
> (c) the arbitrator exceeded his or her powers; or
>
> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." MCR 3.602(J)(2).

"A motion to vacate an award must be filed within 91 days after the date of the award. However, if the motion is predicated on corruption, fraud, or other undue means, it must be filed within

21 days after the grounds are known or should have been known. A motion to vacate an award in a domestic relations case must be filed within 21 days after the date of the award." MCR 3.602(J)(3).

"In vacating the award, the court may order a rehearing before a new arbitrator chosen as provided in the agreement, or, if there is no such provision, by the court. If the award is vacated on grounds stated in subrule (J)(1)(c) or (d), the court may order a rehearing before the arbitrator who made the award. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order." MCR 3.602(J)(4).

"If the motion to vacate is denied and there is no motion to modify or correct the award pending, the court shall confirm the award." MCR 3.602(J)(5).

2. Modifying or Correcting Award

MCR 3.602(K) sets out the procedures for modifying or correcting an arbitration award, it provides:

> "(1) A request for an order to modify or correct an arbitration award under this rule must be made by motion. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to correct or modify an arbitration award must be filed no later than 21 days after the date of the arbitration award.
>
> (2) On motion made within 91 days after the date of the award, the court shall modify or correct the award if:
>
> > (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;
> >
> > (b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or
> >
> > (c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

> (3) If the motion is granted, the court shall modify and correct the award to effect its intent and shall confirm the award as modified and corrected. Otherwise, the court shall confirm the award as made.
>
> (4) A motion to modify or correct an award may be joined in the alternative with a motion to vacate the award."

In *Nordlund & Assoc, Inc v Village of Hesperia*, 288 Mich App 222, 230 (2010), the Michigan Court of Appeals stated "that it must carefully evaluate claims of arbitrator error to ensure that they are not used as a ruse to induce [the Court of Appeals] to review the merits of the arbitrator's decision." In *Nordlund*, the plaintiff's allegation of miscalculation concerned the arbitrator's interpretation of the underlying contract between the plaintiff and the defendant; it did not concern any mathematical calculations. *Id*. Because "MCR 3.602(K)(2)(a) allows for modification or correction of an award only when it is based on a mathematical miscalculation, . . . the trial court properly refused to modify the arbitration award on that basis." *Nordlund*, 288 Mich App at 230.

3. Judgment

"The court shall render judgment giving effect to the award as corrected, confirmed, or modified. The judgment has the same force and effect, and may be enforced in the same manner, as other judgments." MCR 3.602(L).

4. Costs

"The costs of the proceedings may be taxed as in civil actions, and, if provision for the fees and expenses of the arbitrator has not been made in the award, the court may allow compensation for the arbitrator's services as it deems just. The arbitrator's compensation is a taxable cost in the action." MCR 3.602(M).

5. Appeals

"Appeals may be taken as from orders or judgments in other civil actions." MCR 3.602(N).

8.3 Class Action

A. Generally

One or more members of a class may sue or be sued as representative parties if:

- the class is so numerous that joinder of all members is impracticable (numerosity);
- there are common questions of law or fact (commonality);
- the claims or defenses of the representative parties are typical of the class (typicality);
- the representative parties will fairly and adequately assert and protect the interests of the class (adequacy); and
- a class action is superior to other methods of adjudication (superiority). MCR 3.501(A)(1)(a)-(e).

A helpful analysis of these factors is found in *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597-602 (2002). All of the listed requirements must be met. *A&M Supply Co*, *supra* at 597. "[A] case cannot proceed as a class action when it satisfies only some, or even most, of these factors." *Id*. The court rule and case law suggest that findings are required for both the initiation and maintenance of a class action. MCR 2.501(A)(1) and (B).

A trial court may not accept "a party's bare assertion that the prerequisites [listed in MCR 3.501(A)] have been met." *Henry v Dow Chemical Co*, 484 Mich 483, 500, 505 (2009). Rather, the party seeking class certification bears the burden of providing enough information to the court to establish that each prerequisite has in fact been met. *Henry*, 484 Mich at 502. "A court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met." *Id*. For example, pleadings alone may be sufficient "where the facts necessary to support [a particular] finding are uncontested or admitted by the opposing party." *Id*. at 502-503. If the court must look beyond the pleadings, the Michigan Supreme Court cautions that "courts must not abandon the well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage in the proceedings." *Id*. at 503.

"[P]laintiffs seeking class certification must provide objective criteria by which class membership is to be determined." *Mich Ass'n of*

Chiropractors v Blue Care Network of Mich, Inc, 300 Mich App 577, 590 (2013). "[O]therwise individuals would be able to simply decide for themselves whether they wish to be included in the class[.]" *Id*. "[W]hen examining a proposed class for certification, a court must be able to resolve the question whether class members are included or excluded from the class by reference to objective criteria." *Id*. at 595.

B. Procedure and Timing for Certification

Subject to the parties' stipulation or good cause shown, MCR 3.501(B)(1)(a) requires that a motion for class certification be made within 91 days of filing a complaint having class action allegations. See also *Hill v City of Warren*, 276 Mich App 299, 306 (2007). However, the court rule "does not forbid subsequent motions for certification or mandate any particular timing requirements for bringing them." *Hill*, *supra* at 306. In *Hill*, the defendants argued that MCR 3.501(B)(1)(a) precluded the plaintiffs from filing their renewed motion for class certification because the motion was not made within 91 days of the Supreme Court's remand order. *Hill*, *supra* at 305. Having concluded that the court rule's 91-day limit applied only to the parties' initial motion for certification, the Court of Appeals found "no clear error in the trial court's finding that class certification [was] appropriate." *Id.* at 306, 317.

"[MCR 3.501(B)(1)(a)] is properly interpreted as meaning that '[w]ithin 91 days after the filing of [*any*] complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action.'" *Badeen v Par*, *Inc*, 300 Mich App 430, 441 (2013), vacated in part on other grounds 496 Mich 75 (2014). Stated another way, a motion for class certification does not have to be filed within 91 days of the original complaint; it may be filed within 91 days of an amended complaint. *Id*. at 441-442.

The 91-day time limit in MCR 3.501(B)(1)(a) "applies to a specific plaintiff, and . . . should not and cannot be generalized to apply to unnamed putative class members." *Hanton v Hantz Fin Servs*, *Inc*, 306 Mich App 654, 662-663 (2014). Accordingly, an order denying a named plaintiff's "request to extend the time for filing a motion for class certification because [that plaintiff] did not meet the time requirements of MCR 3.501(B)[]" is not binding on an unnamed putative class member in that case who files a class action following the dismissal of the named plaintiff's case. *Hanton*, 306 Mich App at 659-660, 666 (holding that "an unnamed putative class member in [a] case[] is not bound by orders and decisions from [that] case[,]" and that "the trial court erroneously determined that [the unnamed putative class member's subsequent] class action was barred because [the named plaintiff in the prior case] failed to comply with MCR 3.501(B)(1)(a), or because of any order entered in the [prior] case[]").

Subsequent class actions are not precluded where the trial court denies a motion for class certification on the basis of procedural deficiencies without ruling on the merits of the class certification. *Hanton v Hantz Fin Servs, Inc*, 306 Mich App 654, 665 (2014) (stating that "[p]rior class actions that have been uncertified for a reason that was not substantive should not preclude subsequent actions[]").

C. Standard of Review

In determining whether to certify a proposed class, a trial court may make both factual findings and discretionary determinations. *Henry*, 484 Mich at 495-496. A trial court's findings of fact are reviewed for clear error, and its discretionary decisions are reviewed for an abuse of discretion. *Id.* at 496.

8.4 Contracts

A. Elements

"The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." *Mallory v Detroit*, 181 Mich App 121, 127 (1989).

"[T]he only contract cases involving the burden of proving some element by clear and convincing evidence [are those] deal[ing] with oral contracts, avoiding contracts, modifying existing contracts, waiving [] an existing contractual term, and reforming contracts." *Stein v Home-Owners Ins Co*, 303 Mich App 382, 390 (2013) (citations omitted). In cases "where a party endeavors only to prove that some express condition contained in a written contract actually occurred[,]" the burden of proof is preponderance of the evidence. *Id.* at 390-391.

B. Construction

"In determining contractual rights and obligations, a court must look to the intention of the parties, and a contract should always be construed so that it carries that intention into effect. When the words of a written contract are clear and unambiguous and have a definite meaning, the court has no right to look to extrinsic evidence to determine their intent. Indeed, if the language of the entire contract is clear and unambiguous, there is no room for construction by the courts, and in such case, the language must be held to express the intention of the parties and the court need not search for meanings nor indulge in inferences as to the intention of the parties." *DeVries v Brydges*, 57 Mich App 36, 41 (1974).

Where a contract's language "is subject to two or more reasonable interpretations or is inconsistent on its face, the contract is ambiguous, and a factual development is necessary to determine the intent of the parties." *Petovello v Murray*, 139 Mich App 639, 642 (1984). Generally, the language of a contract is to be construed against its drafter. *Petovello*, *supra* at 642. However, construing a contract against the drafter to resolve ambiguous contract language (called the rule of *contra proferentem*) is applicable only if the intent of the parties cannot be discerned through the use of all conventional rules of interpretation, including an examination of relevant extrinsic evidence. *Klapp v United Ins Group Agency*, *Inc*, 468 Mich 459, 472 (2003).

C. Parol Evidence Rule and Statute of Frauds

The statute of frauds requires that certain types of agreements be in writing. MCL 566.132. See also *Kloian v Domino's Pizza*, *LLC*, 273 Mich App 449, 465-458 n 3 (2006). The parol evidence rule precludes the introduction of evidence which would change an unambiguous written agreement. *Klapp*, 468 Mich at 469-470.

1. Parol Evidence Rule

Oral (parol) evidence is not admissible to contradict or change an unambiguous written agreement. *Hamade v Sunoco*, *Inc (R&M)*, 271 Mich App 145, 166 (2006), citing *UAW-GM Human Resources Ctr v KSL Recreation Corp*, 228 Mich App 486, 492 (1998).

The parol evidence rule has four exceptions. *UAW-GM*, 228 Mich App at 493. "[E]xtrinsic evidence is admissible to show (1) that the writing was a sham, not intended to create legal relations, (2) that the contract has no efficacy or effect because of fraud, illegality, or mistake, (3) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (4) that the agreement was only partially integrated because essential elements were not reduced to writing." *UAW-GM*, *supra* at 493.

Parol evidence is inadmissible to show that an agreement is not integrated when the parties have included an integration clause in the contract, unless the case involves fraud or the "agreement is obviously incomplete 'on its face[,]'" making parol evidence necessary as a gap filler. *UAW-GM*, 228 Mich App at 502.

"'[W]here the writing is not ambiguous on its face, the circumstances under which the parties contract may be looked at to establish an ambiguity, as well as to indicate the proper choice

of possible meanings; and the common knowledge and the understanding of the parties themselves as shown by their previous negotiations is sometimes such a circumstance.'" *Stark v Budwarker, Inc*, 25 Mich App 305, 315 (1970), quoting Restatement Contracts, §242, Comment a, p 341. The parol evidence rule does not preclude the introduction of evidence to establish that there was a condition precedent to the contract that was not included within the contract. *Culver v Castro*, 126 Mich App 824, 827 (1983).

Where there is evidence that a latent ambiguity[20] exists with respect to the intended scope of a release, a court may consider parol evidence regarding that scope "when an unnamed party seeks to enforce third-party-beneficiary rights based on the broad release language[.]" *Shay v Aldrich*, 487 Mich 648, 676 (2010). In *Shay*, the plaintiff claimed that he had been assaulted by several police officers. *Shay*, *supra* at 651. After accepting case evaluation awards with respect to two of the officers, the plaintiff executed two separate releases in each officer's name. *Id.* at 652-653. The releases also stated that "all other persons" were released from liability, and the other defendants filed for summary disposition claiming third-party-beneficiary rights under the release's reference to "all other persons." *Id.* at 653-654. "To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue." *Id.* at 668. The Court concluded that the extrinsic evidence presented by the plaintiff clearly showed that the broad release language was not intended to release the defendants from liability. *Id.* at 673-675.

Parties to a written agreement may, by parol evidence, extend the time for performance, especially where the contract does not make time of the essence. *Frazer v Hovey*, 195 Mich 160, 168 (1917).

As it relates to oral modification of a written agreement, there is a higher burden of proof. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373-375 (2003). Clear and convincing evidence of a mutual agreement to modify the contract is

[20] "A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the '"necessity for interpretation or a choice among two or more possible meanings."'" *Shay v Aldrich*, 487 Mich 648, 668 (2010), quoting *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575 (1964), quoting Black's Law Dictionary, 4th Ed.

required. *Id.* at 373. A departure from the written contract can be predicated on the parties' conduct, as well as on the express language of an agreement. *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718-719 (1970).

2. Statute of Frauds

Certain types of agreements are required to be in writing. See MCL 566.132 (general statute of frauds). See also MCL 566.106 *et seq.*, which states that no interest in real estate can be created or transferred, other than a lease not exceeding one year, unless by operation of law or unless it is in writing and signed by the person creating or transferring the interest.

The statute of frauds does not require the entire agreement to be in writing; "a note or memorandum of the agreement" is sufficient. MCL 566.132(1). Examples of sufficient notes or memoranda include letters, account statements, a draft or note, or a check. *Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc (On Remand)*, 265 Mich App 105, 113 (2005). This requirement may be fulfilled by presenting "'several separate papers and documents, not all of which are signed by the party to be charged, and none of which is a sufficient memorandum in itself.'" *Kelly-Stehney*, *supra* at 113, quoting 4 Corbin, Contracts, (rev ed), § 23.3, p 771. However, a note or memorandum of the agreement is not sufficient to satisfy the statute of frauds in certain actions brought against a financial institution. *The Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 510-511 (2014); MCL 566.132(2). MCL 566.132(2) provides:

> "An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> > (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
> >
> > (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

> (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation."

The Michigan Court of Appeals explained that MCL 566.132(2) was enacted to "provide greater protection to financial institutions from potentially fraudulent or spurious claims by disgruntled borrowers." *The Huntington Nat'l Bank*, 305 Mich App at 509. Specifically, the Court noted that the protection afforded to financial institutions under MCL 566.132(2) is greater than the protection afforded generally under MCL 566.132(1). *The Huntington Nat'l Bank*, 305 Mich App at 510. "Accordingly, the party seeking to enforce the promise of commitment must present evidence that the promise or commitment itself was reduced to writing and properly signed. It is not, therefore, sufficient to show that the financial institution memorialized a portion of the agreement or reduced a preliminary understanding to writing and then later orally agreed to proceed under that framework, nor is it sufficient o present a series of documents—some signed and other not signed—that together purport to be the agreement; rather, the proponent must present evidence that the financial institution actually agreed to the essential terms of the promise or commitment and each of those essential terms must be accompanied by the required signature." *Id.* at 510-511.

Judicially created exceptions to the statute of frauds include equitable estoppel, ratification, and part performance. See *Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 612-616 (2002).

D. Failure to Read Contract

It is presumed that one who signs a contract has read and understands it. *McKinstry v Valley OB-GYN Clinic, PC*, 428 Mich 167, 184 (1987). Generally, failure to read a contract is not grounds for relief absent fraud, artifice, or deception. *Moffit v Sederlund*, 145 Mich App 1, 8 (1985). It is not a defense that the party did not read the contract. *Montgomery v Fidelity & Guaranty Life Ins Co*, 269 Mich App 126, 130 (2005).

E. Release

"Summary disposition of a plaintiff's complaint is proper where there exists a valid release of liability between the parties. A release of liability is valid if it is fairly and knowingly made. The scope of a release is governed by the intent of the parties as it is expressed in the release." *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich

App 196, 201 (1988) (internal citations omitted). See also MCR 2.116(C)(7), which provides that summary disposition may be appropriate where the claim is barred because of a release.

Where the text of the release is unambiguous, the court must determine the parties' intentions using the "plain, ordinary meaning of the language of the release." *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 540 (1996). Just because the parties disagree about the meaning of the release does not mean it is ambiguous. *Gortney*, *supra* at 540. "A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. If the terms of the release are unambiguous, contradictory inferences become 'subjective, and irrelevant,' and the legal effect of the language is a question of law to be resolved summarily." *Id.* at 540-541 (internal citations omitted).

Where there is evidence that a latent ambiguity[21] exists with respect to the intended scope of a release, a court may consider parol evidence regarding that scope "when an unnamed party seeks to enforce third-party-beneficiary rights based on the broad release language[.]" *Shay v Aldrich*, 487 Mich 648, 676 (2010). In *Shay*, the plaintiff claimed that he had been assaulted by several police officers. *Shay*, *supra* at 651. After accepting case evaluation awards with respect to two of the officers, the plaintiff executed two separate releases in each officer's name. *Id.* at 652-653. The releases also stated that "all other persons" were released from liability, and the other defendants filed for summary disposition claiming third-party-beneficiary rights under the release's reference to "all other persons." *Id.* at 653-654. "To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue." *Id.* at 668. The Court concluded that the extrinsic evidence presented by the plaintiff clearly showed that the broad release language was not intended to release the defendants from liability. *Id.* at 673-675.

F. Third-Party Beneficiary

Third-party beneficiary rights are governed by MCL 600.1405. "Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he

[21] "A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the '"necessity for interpretation or a choice among two or more possible meanings."'" *Shay v Aldrich*, 487 Mich 648, 668 (2010), quoting *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575 (1964), quoting Black's Law Dictionary, 4th Ed.

would have had if the said promise had been made directly to him as the promisee." *Id.*

Whether a party is a third-party beneficiary under the terms of a release is determined *objectively*. *Shay*, 487 Mich at 675. However, where there is a latent ambiguity in the release's language, a *subjective* analysis is necessary to determine the parties' intent as to the scope of a third-party beneficiary's rights under the release. *Id.* (Emphasis added.)

A person who qualifies as a third-party beneficiary gains the right to sue for enforcement of a contract promise, but he or she "is not automatically entitled to the sought-after benefit merely by *qualifying* as a third-party beneficiary." *Shay*, 487 Mich at 666. Consequently, a court must adhere to the "basic principles of contract interpretation when determining the extent of the third party's rights under the contract." *Id.*

"A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise 'directly' to or for that person." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428 (2003). See also MCL 600.1405. Only intended beneficiaries may sue for breach of contract when his or her benefit is affected by the breach. *Schmalfeldt*, *supra* at 427. A court should limit its review to the "form and meaning" of the contract when it is deciding whether a party is a third-party beneficiary under MCL 600.1405. *Schmalfeldt*, *supra* at 428. Turning to other case law for resolution of this issue is inappropriate. *Id.* at 428-429.

In general, although a property owner ultimately benefits from the work performed by a subcontractor on the property owner's property, the property owner is not an intended third-party beneficiary of the contract between the general contractor and the subcontractor. *Kisiel v Holz*, 272 Mich App 168, 171 (2006). "Absent clear contractual language to the contrary, a property owner does not attain intended third-party-beneficiary status merely because the parties to the subcontract knew, or even intended, that the construction would ultimately benefit the property owner." *Kisiel*, *supra* at 171 (internal citations omitted). As a result, a property owner generally cannot sue for breach of contract a subcontractor who performed work on the property owner's property. *Id.* at 172.

A plaintiff was an intended third-party beneficiary of the contract between the contractor and the subcontractor where (1) the contract expressly and directly referenced the plaintiff by name, (2) the defendant (subcontractor) promised to perform work at the plaintiff's residence, and (3) the plaintiff and the defendant discussed and agreed on the work to be performed. *Vanerian v Charles L Pugh Co, Inc*, 279 Mich App 431, 434, 436 (2008).

G. Damages

"The goal in awarding damages for breach of contract is to give the innocent party the benefit of his [or her] bargain—to place him [or her] in a position equivalent to that which he [or she] would have attained had the contract been performed. The injured party, however, must make every reasonable effort to minimize the loss suffered, and the damages must be reduced by any benefits accruing to the plaintiff as a consequence of the breach. In other words, under the avoidable consequences doctrine, the plaintiff is not allowed to recover for losses he [or she] could have avoided by reasonable effort or expenditure. He [or she] has a duty to do whatever may reasonably be done to minimize his [or her] loss. Closely related to the avoidable consequences rule is the requirement that any benefit to the plaintiff arising from or as a result of the breach must reduce the damages otherwise payable." *Tel-Ex Plaza, Inc v Hardees Restaurants, Inc*, 76 Mich App 131, 134-135 (1977).

The plaintiff has a duty to mitigate his or her damages. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15, 15 n 18 (1994). The defendant has the burden of proving that the plaintiff failed to do so. *Lawrence, supra* at 15 n 18.

H. Equitable Remedies in Contract Actions

The equitable remedies of rescission, promissory estoppel, specific performance, and quantum meruit are discussed in Section 8.6 of this benchbook.

I. Standard of Review

"The existence of a contract and the enforceability of its terms is a judicial question." *McKinstry*, 428 Mich at 177 n 3. Such a question is reviewed de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465 (1998).

"Where contractual language is clear, its construction is a question of law and is therefore reviewed de novo." *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640 (1995).

A trial court's decision regarding the interpretation of a contract or the legal effect of a contractual clause is reviewed de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197 (2008).

The trial court's determination of the amount of damages for a breach of contract case is reviewed for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177 (1995).

8.5 Declaratory Judgments

A. Court's Power to Enter Declaratory Judgment

Any Michigan court of record may entertain a declaratory judgment action. MCR 2.605(A)(1). Circuit, district, and probate courts have jurisdiction in any case in which they would have jurisdiction if other relief was sought. MCR 2.605(A)(2). In other words, MCR 2.605 "neither limits nor expands the subject-matter jurisdiction of the court." *Associated Builders & Contractors v Dep't of Consumer & Industry Svcs Dir*, 472 Mich 117, 124-125 (2005).

B. Actual Controversy Required

There must be an actual controversy that causes a party to seek a declaration of rights or legal relationships. MCR 2.605(A)(1) and MCR 2.111(B)(2); *Shavers v Attorney General*, 402 Mich 554, 588-589 (1978). However, to make courts accessible to interested parties, the rule is to be liberally construed. *Recall Blanchard Comm v Sec'y of State*, 146 Mich App 117, 121 (1985).

"[A]n 'actual controversy' exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights." *Lash v Traverse City*, 479 Mich 180, 196 (2007). In *Lash*, the defendant required employees to reside within the city limits, and the plaintiff claimed that this violated state law. *Lash*, *supra* at 182-183. The Court concluded that this claim constituted an actual controversy for purposes of issuing a declaratory judgment. *Id.* at 196-197.

C. Expedited Hearing

If declaratory relief is the only relief sought, the court may order an expedited hearing. MCR 2.605(D).

D. Other Relief

Once a declaratory judgment has determined the rights of the parties, any appropriate relief may be granted, including monetary damages. MCR 2.605(F). See also *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90 (1995).

E. Standard of Review

Questions of law arising from a declaratory judgment are reviewed de novo. *Guardian Environmental Svcs, Inc v Bureau of Const Codes & Fire Safety*, 279 Mich App 1, 5-6 (2008). Whether to grant or deny

declaratory relief is reviewed for an abuse of discretion. *Guardian*, *supra* at 6.

8.6 Equity

A. Generally

The trial court's sound discretion is the controlling guide in every suit of equity. *Youngs v West*, 317 Mich 538, 545 (1947). It is up to the court to consider the circumstances of each particular case when deciding whether equity will be granted. *Youngs*, *supra* at 545. When granting equitable relief, the court may fashion a remedy warranted by the circumstances. *Three Lakes Ass'n v Kessler*, 91 Mich App 371, 377-378 (1979). The remedy must be specific and enforceable, or it will not be granted. *Three Lakes*, *supra* at 378.

The court's broad discretionary powers regarding equity are not to be used to enlarge a party's statutory rights. *Dumas v Helm*, 15 Mich App 148, 152 (1968). The court is not deprived of jurisdiction due to the mere existence of a law, unless the law is clear, complete, and would serve justice as efficiently as the equitable remedy. *Walker v Walker*, 330 Mich 332, 336 (1951).

B. Jury Trial

"There is no right to a jury trial where the relief sought is solely equitable in nature." *Thomas v Steuernol*, 185 Mich App 148, 155-156 (1990). See also *Anzaldua v Band*, 216 Mich App 561, 573 (1996). However, MCR 2.509(D) permits equitable claims to be decided by a jury with the consent of the parties. *McPeak v McPeak*, 457 Mich 311, 315 (1998). Where a party includes a jury demand with his or her complaint and pays a jury demand fee, but the complaint contains equitable counts, "the filing of the jury demand, standing by itself, certainly is not conclusive evidence that the [party] 'consented' to a jury trial on [the] equitable claims[.]" *Zurcher v Herveat*, 238 Mich App 267, 302-303 (1999).

C. Clean Hands

A party seeking equity must come with clean hands. *Rose v Nat'l Auction Group*, 466 Mich 453, 462 (2002). The purpose of this doctrine is to "'close[] the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, *however improper may have been the behavior of the defendant*.'" *Rose*, *supra* at 463, quoting *Stachnik v Winkel*, 394 Mich 375, 382 (1975). In *Rose*, the plaintiffs were attempting to sell a piece of property they

owned using the defendant-auction company. *Rose*, *supra* at 456. In an effort to secure a higher bid, the plaintiffs agreed to allow the defendant to use a planted bidder (who had no intention of buying the property) to drive up the bid. *Id.* at 457-458. When the planted bidder failed to make a bid, and the property sold for much less than the plaintiff expected, the plaintiffs sued the defendant. *Id.* at 458-460. The Court concluded that the plaintiff's involvement in the planted bidder scheme precluded them from bringing suit against the defendant, citing the clean hands doctrine. *Id.* at 464.

D. Laches

"'Estoppel by laches is the failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time.'" *Wells Fargo Bank*, *NA v Null*, 304 Mich App 508, 537 (2014), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583 (1990)."The application of the doctrine of laches requires a passage of time combined with a change in condition which would make it inequitable to enforce the claim against the defendant. In determining whether a party is guilty of laches, each case must be determined on its own particular facts." *Sedger v Kinnco*, *Inc*, 177 Mich App 69, 73 (1988) (internal citations omitted). "'To successfully assert laches as an affirmative defense, a defendant must demonstrate prejudice occasioned by the delay.'" *Wells Fargo Bank*, *NA*, 304 Mich App at 538, quoting *Schmude Oil Co*, 184 Mich App at 583.

MCL 600.5815 provides that the statutes of limitations apply equally to all legal and equitable actions, but also provides that "[t]he equitable doctrine of laches shall also apply in actions where equitable relief is sought." See also *Rowry v Univ of Michigan*, 441 Mich 1, 10-11 (1992). "The application of laches can shorten but never lengthen, the analogous statute of limitations." *Tenneco*, *Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 456-457 (2008).

E. Promissory Estoppel

The doctrine of promissory estoppel means that:

> "'[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.'" *State Bank of Standish v Curry*, 442 Mich 76, 83 (1993), quoting 1 Restatement Contracts, 2d, § 90, p 242.

The reliance must be reasonable, and it is only reasonable if it was based on an actual promise. *State Bank*, supra at 84. "To determine the existence and scope of a promise, we look to the words and actions of the transaction as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Id.* at 86.

F. Unconscionability

A contract must be both procedurally and substantively unconscionable for it to be unenforceable. *Hubscher & Son*, *Inc v Storey*, 228 Mich App 478, 481 (1998). "There is a two-pronged test for determining whether a contract is unenforceable as unconscionable: '(1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively unreasonable?'" *Stenke v Masland Dev Co*, *Inc*, 152 Mich App 562, 572-573 (1986), quoting *Ryoti v Paine*, *Webber*, *Jackson*, & *Curtis*, *Inc*, 142 Mich App 805, 809 (1985) (internal citations omitted). In evaluating the unconscionability of a contract, "[r]easonableness is the primary consideration." *Hubscher*, *supra* at 481.

G. Quantum Meruit

"The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Morris Pumps v Centerline Piping*, *Inc*, 273 Mich App 187, 194 (2006). In order to prevail on a quantum meruit claim, a plaintiff must establish:

- that the defendant received a benefit from the plaintiff, and
- the defendant retained the benefit, which resulted in an inequity to the plaintiff. *Morris*, *supra* at 195.

Where an express contract exists between two parties, a quantum meruit claim regarding the subject matter of the contract is not appropriate. *Morris*, 273 Mich App at 199.

H. Specific Performance

The court, in equity, may grant complete relief to a party in the form of specific performance, including an award of damages. *Reinink v Van Loozenoord*, 370 Mich 121, 127 (1963).

Ordinarily, tender of performance by the plaintiff is necessary before bringing an action for specific performance. *Derosia v Austin*, 115 Mich App 647, 652 (1982). However, tender is not required "where the

defendant by his words or *acts* has shown that it would not be accepted." *Frakes v Eghigian*, 358 Mich 327, 333 (1960). In *Frakes* (a real property case), the Court concluded that tender of performance was unnecessary where the defendant intentionally failed to attend several scheduled meetings at which the parties were supposed to close on the property. *Frakes*, *supra* at 333.

I. Rescission

There is no all-embracing rule governing rescission; "[e]ach case must stand on its own facts." *Dolecki v Perry*, 277 Mich 679, 682 (1936). Rescission is an acceptable remedy when there has been substantial performance on the contract or one of its essential items, or where the parties would have never created the contract had they expected or contemplated the default that occurred. *Adell Broadcasting Corp v Apex Media Sales*, *Inc*, 269 Mich App 6, 13-14 (2005).

Fraud is a basis for rescission. See *Ball v Sweeney*, 354 Mich 616 (1958). There is a contradiction in the case law on the burden of proof for rescission based on fraud. See *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 681-685 (1996), rev'd on other grounds 455 Mich 866 (1997). In recognizing this conflict, the Michigan Court of Appeals stated:

"[W]e are unable to say with any degree of certainty exactly what standard of proof courts should apply in fraud cases. The Supreme Court has alternately required fraud to be established by a preponderance of the evidence and by clear and convincing proof, with little consistency and no detailed analysis. While the most recent Supreme Court pronouncements regarding the question have stated that fraud must be proved by clear and convincing evidence, we think it unlikely that the Supreme Court would overrule a significant body of case law without at least mentioning that it was doing so."*Mina*, *supra* at 684-685.

Examples of cases that required fraud to be proven by a preponderance of the evidence include *Hayes v Weitzel*, 251 Mich 129, 130 (1930), and *Campbell v Great Lakes Ins Co*, 228 Mich 636, 641 (1924). Cases that indicate a clear and convincing burden of proof include *Youngs v Tuttle Hill Corp*, 373 Mich 145, 147 (1964), and *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 459 (1996).

J. Standard of Review

"When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197 (2008). Whether equitable relief is proper under a court's factual findings is a question that is reviewed de novo. *McDonald*, *supra* at 197. The court's

decision whether to grant a specific equitable remedy is reviewed for an abuse of discretion. See *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26, 31 (1982); *Zurcher*, 238 Mich App at 300.

The decision whether to grant or deny specific performance of a contract lies within the discretion of the trial court. *Zurcher*, 238 Mich App 300, citing *Foshee v Krum*, 332 Mich 636, 643 (1952). However, "specific performance of a contract for the purchase of real estate may not be arbitrarily refused, but in the exercise of sound legal discretion should be granted, in the absence of some showing that to do so would be inequitable." *Zurcher*, *supra* at 300.

8.7 Injunctive Relief

Injunctive relief is an extraordinary remedy that should only be granted when justice requires, when no adequate legal remedy exists, and when there is a real and imminent danger of irreparable injury. *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8 (2008).

A. Temporary Restraining Order (TRO)

A TRO may be granted without notice to the adverse party. MCR 3.310(B)(1). There are three requirements that must be met for a TRO to be granted without notice:

> "(a) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage to the applicant will result from the delay required to effect notice or from the risk that notice itself will precipitate adverse action before an order can be issued;
>
> "(b) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required; and
>
> "(c) a permanent record or memorandum is made of any nonwritten evidence, argument, or other representations made in support of the application." MCR 3.310(B)(1)(a)-(c). See also *Acorn Bldg Components, Inc v UAW Local 2194*, 164 Mich App 358, 363-366 (1987).

A TRO granted without notice must:

> "(a) be endorsed with the date and time of issuance;

> "(b) describe the injury and state why it is irreparable and why the order was granted without notice;
>
> "(c) except in domestic relations actions, set a date for hearing at the earliest possible time on the motion for a preliminary injunction or order to show cause why a preliminary injunction should not be issued." MCR 3.310(B)(2)(a)-(c).

"In order to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty. The injury must be both certain and great, and it must be actual rather than theoretical. Economic injuries are not irreparable because they can be remedied by damages at law." *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998) (internal citations omitted).

"Before granting a . . . temporary restraining order, the court may require the applicant to give security, in the amount the court deems proper, for the payment of costs and damages that may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained." MCR 3.310(D)(1).

B. Preliminary Injunction

The moving party has the burden of establishing that a preliminary injunction should issue. MCR 3.310(A)(4).

The purpose of a preliminary injunction is to maintain the parties' status quo. *Bratton v DAIIE*, 120 Mich App 73, 79 (1982). The Court of Appeals summarized the reason behind the purpose and how it should apply to parties seeking a preliminary injunction:

> "The object of a preliminary injunction is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either. The status quo which will be preserved by a preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy. The injunction should not be issued if the party seeking it fails to show that it will suffer irreparable injury if the injunction is not issued. Furthermore, a preliminary injunction will not be issued if it will grant one of the parties all the relief requested prior to a hearing on the merits. Finally, a preliminary injunction should not be issued where the party seeking it has an adequate remedy at law." *Bratton*, 120 Mich App at 79 (internal citations omitted).

The court should consider four factors in determining whether to grant a preliminary injunction:

> (1) whether the injunction would harm the public interest;
>
> (2) whether the harm to the plaintiff in the absence of a stay would outweigh the harm to the defendant if the stay is granted;
>
> (3) whether the plaintiff is likely to succeed on the merits; and
>
> (4) whether the plaintiff will be irreparably harmed if a preliminary injunction is denied. *Michigan State Emp Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158 (1984).

The "four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co*, 755 F2d 1223, 1229 (CA 6, 1985). This concept was explained in *Metropolitan Detroit Plumbing & Mechanical Contractors Ass'n v Dep't of HEW*, 418 F Supp 585, 586 (ED Mich 1976), when the Court stated:

> "This apparent disparity in the wording of the standard merely reflects the circumstances that no single factor is determinative as to the appropriateness of equitable relief. In addition to assessing the likelihood of success on the merits, the Court must consider the irreparability of any harm to the plaintiff, the balance of injury as between the parties, and the impact of the ruling on the public interest. In general, the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction."

"Before granting a preliminary injunction . . . the court may require the applicant to give security, in the amount the court deems proper, for the payment of costs and damages that may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained." MCR 3.310(D)(1).

If a preliminary injunction is granted, "[t]he trial of the action on the merits must be held within 6 months after the injunction is granted, unless good cause is shown or the parties stipulate to a longer period." MCR 3.310(A)(5).

C. Permanent Injunction

A party requesting a permanent injunction has a heavier burden of proof than a party requesting a preliminary injunction. *Barkau v Ruggirello*, 100 Mich App 617, 623 (1980). The plaintiff "'must prove by a preponderance of the evidence actual or threatened invasion of his [or her] rights as alleged. Proof of mere apprehension of injury is insufficient to justify granting injunctive relief.'" *Barkau*, *supra* at 623, quoting *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280 (1939).

D. Form of Injunction

Every injunction and restraining order should state why it was issued, be specific as to its terms, and describe in reasonable detail the acts restrained. MCR 3.310(C)(1)-(3). Reference cannot be made to any other document to describe the acts restrained. MCR 3.310(C). Injunctions and restraining orders are "binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." MCR 3.310(C)(4).

E. Standard of Review

The grant or denial of injunctive relief is reviewed for an abuse of discretion. *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 534 (2000).

8.8 Interpleader

A. Availability

"Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not a ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical, but are adverse to and independent of one another, or that the plaintiff denies liability to any or all of the claimants in whole or in part." MCR 3.603(A)(1).

B. Procedure

A defendant exposed to liability may obtain interpleader by counterclaim or cross-claim. MCR 3.603(A)(2). "A claimant not

already before the court may be joined as [a] defendant, as provided in MCR 2.207 or MCR 2.209." MCR 3.603(A)(2).

C. Costs

Although no statute or court rule permits an interpleader plaintiff to recover attorney fees, the Court of Appeals has found that "a common-law exception exists allowing the recovery of attorney fees by interpleader plaintiffs." *Terra Energy, Ltd v Michigan*, 241 Mich App 393, 397-400 (2000).

D. Standard of Review

No case stating an applicable standard of review has been located.

8.9 Mandamus

A. Purpose

A writ of mandamus directs a public official to perform his or her legal duty. *Jones v Dep't of Corrections*, 468 Mich 646, 658 (2003). "Mandamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner." *Teasel v Dep't of Mental Health*, 419 Mich 390, 410 (1984).

B. Issuance

Unless a statute or court rule states otherwise, the circuit court has jurisdiction to hear all mandamus cases. MCR 3.305(A)(2). Mandamus actions against a state officer may also be brought in the Court of Appeals. MCR 3.305(A)(1).

"Although a mandamus action is based on equitable principles, it is regarded as an action at law." *Sal-Mar Royal Village, LLC v Macomb Co Treasurer (On Remand)*, 304 Mich App 405, 410 n 1 (2014), rev'd on other grounds 497 Mich 908 (2014). "[M]andamus proceedings are civil actions, not prerogative writs." *Id*.

"[A] writ of mandamus is an extraordinary remedy and will only be issued where: (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 284 (2008). The party seeking mandamus has the burden of proving all four requirements. See *Rental Props Owners Ass'n of Kent*

Co v Kent Co Treasurer, 308 Mich App 498, 518 (2014); *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367 (2012). "Mandamus is an extraordinary remedy that may lie to compel the exercise of discretion, but not to compel its exercise in a particular manner." *Hayes v Parole Bd*, ___ Mich App ___, ___ (2015).

Clear Legal Right. "[A] clear legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 519 (quotation marks and citation omitted). "Even where such a right can be shown, it has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is not possessed by citizens generally." *Id.* (quotation marks and citation omitted).

Clear Legal Duty. "A clear legal duty, like a clear legal right, is one that 'is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.'" *Hayes*, ___ Mich App at ___, quoting *Rental Props Owners Ass'n*, 308 Mich App at 518-519.

Ministerial Acts. Generally, an act is considered ministerial if it does not leave room for the exercise of discretion or judgment. Compare *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439 (2006), where the act of hiring an assistant city attorney was discretionary and thus, not ministerial, and *Coalition for a Safer Detroit*, 295 Mich App at 371, where the city clerk and election commission improperly considered the substance of a ballot initiative and had a clear legal duty to place the matter on the ballot once the clerk determined that the petition had the requisite number of qualified signatures. "If [a] [ministerial] act requested by [a] plaintiff involves judgment or an exercise of discretion, a writ of mandamus is inappropriate." *Hanlin v Saugatuck Twp*, 299 Mich App 233, 248 (2013).

C. Standard of Review

The decision to grant or deny a writ of mandamus is reviewed for an abuse of discretion. *In re MCI Telecom Complaint*, 460 Mich 396, 443 (1999). However, the court reviews de novo the first two elements required for issuance of a writ of mandamus: that the official in question has a clear legal duty to perform and that the plaintiff has a clear legal right to performance of that duty. *Coalition for a Safer Detroit*, 295 Mich App at 367.

8.10 Superintending Control

A. Purpose

An order of superintending control enforces the supervisory power of a court over lower courts or tribunals. MCR 3.302(A).

B. Extraordinary Remedy

Superintending control is an extraordinary remedy. *In re Gosnell*, 234 Mich App 326, 341 (1999). Availability of an appeal or another remedy will defeat a writ of superintending control. MCR 3.302(B) and (D)(2); *Choe v Flint Charter Twp*, 240 Mich App 662, 667 (2000).

If an appeal is available, but not adequate, then superintending control is not precluded. *In re Hague*, 412 Mich 532, 546 (1982). In *In re Hague*, the defendant, a judge from the Recorder's Court, refused to comply with four separate superintending control orders (ordering him to stop dismissing all prostitution cases) issued by the circuit court. *Hague*, *supra* at 539-543. The Court of Appeals concluded that superintending control was the proper remedy because "the case-by-case appeal to the Court of Appeals of the hundreds of prostitution cases dismissed by [the defendant] would not have been a practical, efficient or commonsense remedy for his persistent, wholesale dismissal of all prostitution cases prosecuted in the City of Detroit during his service as presiding judge." *Id.* at 547.

If a party does not have standing to appeal, superintending control may be a proper remedy. *Michigan State Police v 33rd Dist Court*, 138 Mich App 390, 394 (1984).

C. Validity

An order of superintending control entered by a court with proper jurisdiction must be obeyed even if clearly incorrect. *In re Hague*, 412 Mich at 545.

D. Limitations

Superintending control may not be used to permanently enjoin someone from holding a judicial office. *In re Evan Callanan Sr*, 419 Mich 376, 388 (1984).

E. Parties

Although a judge may be a nominal defendant in a case seeking an order of superintending control, the judge is not an aggrieved party,

and thus has no standing to appeal an order of superintending control. *Wayne Co Prosecutor v Recorder's Court Judge*, 66 Mich App 315, 316 (1975).

F. Standard of Review

"The grant or denial of a petition for superintending control is within the sound discretion of the court. Absent an abuse of discretion, [the reviewing court] will not disturb the denial of a request for an order of superintending control." *In re Goehring*, 184 Mich App 360, 366 (1990).

8.11 Medical Malpractice

A. Notice

Generally, a person alleging medical malpractice may not commence an action against a health professional or a health facility until he or she "has given the health professional or health facility written notice under [MCL 600.2912b] not less than 182 days before the action is commenced." MCL 600.2912b(1).

The 182-day notice period may be shortened to 91 days "if all of the following conditions exist:

> (a) The claimant has previously filed the 182-day notice required in [MCL 600.2912a(1)] against other health professionals or health facilities involved in the claim.
>
> (b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).
>
> (c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).
>
> (d) The claimant did not identify, and could not reasonably have identified a health professional or health facility to which notice must be sent under [MCL 600.2912a(1)] as a potential party to the action before filing the complaint." MCL 600.2912b(3)(a)-(d).

Under MCL 600.2912b(1), a plaintiff must satisfy two requirements:

> "(1) submit an NOI to *every* health professional or health facility before filing a complaint and

> (2) wait the applicable notice waiting period with respect to each defendant before he or she can commence an action." *Driver v Naini*, 490 Mich 239, 255 (2011), citing *Burton v Reed City Hosp Corp*, 471 Mich 745, 752-754 (2005).[22]

MCL 600.2912b "'unequivocally provides that a person "shall not" commence an action alleging medical malpractice against a health professional or health facility until the expiration of the statutory notice period.'" *Driver*, 490 Mich at 256-257, quoting *Burton*, 471 Mich at 752.

Typically, the proper remedy for failing to comply with the no-suit period set out in MCL 600.2912b by prematurely filing suit is dismissal without prejudice. *Ellout v Detroit Medical Ctr*, 285 Mich App 695, 698-699 (2009). However, if a plaintiff fails to comply with the no-suit period and the statute of limitations has expired, the defendant is entitled to summary disposition (i.e. plaintiff's "complaint[] must be dismissed with prejudice[]"). See, e.g., *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94 (2015), rev'g in part *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208 (2013), and *Furr v McLeod*, 304 Mich App 677 (2014) (remanding to the trial court for entry of summary disposition in favor of the defendants where the plaintiffs failed to commence actions against the defendants because they "did not wait until the applicable notice period expired before they filed their complaints and affidavits of merit," and the statute of limitations expired).

During the notice waiting period, the running of the two-year statute of limitations is tolled. MCL 600.5856(c); *Tyra*, 498 Mich at 79. "In addition, under MCL 600.5856(a), the filing of a complaint with the required affidavit of merit after the notice period has elapsed *also* tolls the running of the period of limitations." *Tyra*, 498 Mich at 79.[23] "Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely NOI [under MCL 600.2912b] and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired[; therefore, where a plaintiff does] not wait until the applicable notice period expire[s] before [filing a] complaint[] and affidavit[] of merit, [the plaintiff does] not commence [an] action[] against [the] defendant[][,]" and the statute of limitations is not tolled. *Tyra*, 498 Mich at 94.

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[22] The Michigan Supreme Court noted that nothing in *Bush v Shabahang*, 484 Mich 156 (2009) eliminates "the requirement that a plaintiff provide every defendant an NOI during the applicable limitations period before filing a complaint[.]" *Driver*, 490 Mich at 255-256.

Furthermore, contrary to the Court of Appeals' holding in *Zwiers v Growney*, 286 Mich App 38, 49 (2009), rev'd ___ Mich ___ (2015) "MCL 600.2301[24] [cannot] be used to save a medical malpractice action that was never commenced before the statute of limitations expired when the complaint was filed before the expiration of the NOI waiting period[.]" *Tyra*, 498 Mich at 90 (holding that *Zwiers*, 286 Mich App 38, was overruled by *Driver v Naini*, 490 Mich 239 (2011)). See also *Zwiers v Growney*, ___ Mich ___, ___ (2015) ("A medical malpractice complaint filed before the expiration of the 182-day notice period is ineffective to toll the statute of limitations.") In *Driver*, 490 Mich at 258, the Court found that a plaintiff cannot amend an original notice of intent (NOI) to add a nonparty defendant under MCL 600.2957 in an attempt to avoid compliance with the notice waiting period. "[W]hen an NOI fails to meet all of the *content* requirements under MCL 600.5856(c), MCL 600.2301 allows a plaintiff to amend the NOI and preserve tolling unless the plaintiff failed to make a good-faith effort to comply with MCL 600.2912b(4)." *Driver*, 490 Mich at 252-253. However, failure to comply with the notice-waiting-period requirements cannot be saved by MCL 600.2301, which applies only to pending actions or proceedings, because a medical malpractice complaint filed prior to the expiration of the waiting period does not commence the action and does not toll the running of the limitations period. *Tyra*, 498 Mich at 92.

The tacking on of additional 182-day periods is not allowed, no matter how many notices are subsequently filed or how many health professionals or health facilities are notified. MCL 600.2912b(6). "[T]he prohibition . . . against tacking only precludes a plaintiff from enjoying the benefit of multiple tolling periods. It does not . . . restrict the application of the tolling provision in [MCL 600.5856(d)[25]] to the initial notice of intent to sue if the tolling provision in [MCL

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[23] MCL 600.5856 provides in pertinent part: "The statutes of limitations or repose are tolled in any of the following circumstances:

> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given."

600.5856(d)[26]] did not even apply to the initial notice of intent to sue. Stated otherwise, if the initial notice did not toll the statute of limitations period, there would be no problem of 'successive 182-day periods' that [MCL 600.2912b(6)] prohibits." *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 7-8 (2005). See also *Hoffman v Boonsiri*, 290 Mich App 34, 43 (2010), where it was undisputed that the filing of the original NOI did not trigger the tolling provision under MCL 600.5856(c). Therefore, the filing of an amended NOI did not constitute tacking, and thus, initiated tolling. *Hoffman*, *supra* at 43. In *Hoffman*, the plaintiff filed her complaint 319 days after filing the original NOI and 123 days after filing the amended NOI. *Id.* at 37-38. The defendants argued that the plaintiff could not rely on the amended NOI to toll the statute of limitations, and at the same time rely on the original NOI to render her complaint timely under MCL 600.2912b (the 182-day rule). *Hoffman*, *supra* at 37. The Court of Appeals disagreed and "reject[ed] the [] defendants' contention that the availability of tolling is linked to the 'waiting' or 'no-suit' period." *Id.* at 49.

Where a medical malpractice claim has been properly commenced and the plaintiff files an amended complaint that does not name new defendants or set forth any new potential causes of injury, a supplemental NOI satisfies the notice requirements of MCL 600.2912b. The plaintiff is not required to file a new NOI; thus, the plaintiff does not have to comply with a new 182-day waiting period under MCL 600.2912b. *Decker v Stoiko*, 287 Mich App 666, 681 (2010).

Whether defects are present in a party's NOI is irrelevant to determining whether the statute of limitations is tolled. *Bush*, 484 Mich at 170. Rather, MCL 600.5856(c) only requires that the notice of intent comply with the "applicable notice period under [MCL 600.2912b]" in order to invoke the tolling provision. *Bush*, 484 Mich at 170.

Where a trial court is presented with a defective NOI, it must apply a two-pronged test to decide whether the defects require dismissal without prejudice or whether to employ MCL 600.2301.[27] *Bush*, 484 Mich at 177. The two-pronged test is: "first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice." *Id.* However, the Michigan Supreme Court

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[24] MCL 600.2301 provides: "The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties."

[25] Now MCL 600.5856(c).

[26] Now MCL 600.5856(c).

concluded that "no substantial right of a health care provider is implicated[]" because defective NOIs should be expected at such an early stage in the proceedings, defendants are "sophisticated health professionals with extensive medical background and training[,]" and defendants who are able to act as their own reviewing experts should have "the ability to understand the nature of the claims being asserted against him or her even in the presence of defects in the [notice of intent]." *Id.* at 178. But see *Griesbach v Ross (On Remand)*, 291 Mich App 295, 300 (2011), where the Court of Appeals found that an NOI that fails to name a party is fatally defective because the unnamed party is not given the opportunity to evaluate the claim against him or her, implicating the unnamed party's substantial rights. "Thus, the complete failure to serve [a defendant] with an NOI cannot be considered a mere defect, subject to cure." *Griesbach*, 291 Mich App at 300. A cure is in the furtherance of justice "when a party makes a good-faith attempt to comply with the content requirements of [MCL 600.2912b]." *Bush*, 484 Mich at 178. Therefore, "[a] dismissal would only be warranted if the party fails to make a good-faith attempt to comply with the content requirements." *Id.* at 180.

A plaintiff may satisfy the NOI requirements where he or she timely mails the NOI to the defendant's prior business address, as long as the defendant actually receives the NOI; *when* the defendant receives the NOI is irrelevant. *DeCosta v Gossage*, 486 Mich 116, 118 (2010) (plurality opinion). "MCL 600.2912b(2) states that '[p]roof of the mailing constitutes prima facie evidence of compliance with this section.' The statute does not require that a defendant receive an NOI before the period of limitations expires." *DeCosta*, 486 Mich at 126. In *DeCosta*, the plaintiff mailed an NOI to the defendants' prior business address two days before the statute of limitations was set to expire. *Id.* at 121. An unknown individual at the prior address accepted the NOI and forwarded it to the defendants' current business address. *Id.* The Michigan Supreme Court concluded that the NOI was not defective because the facts did not show that the defendants' current address was their sole address. *Id.* at 124. The Court reasoned that the mail was actually delivered to the prior address, someone accepted and signed for the mail, and someone promptly forwarded the documents to the defendants at their current address. *Id.* at 124-125. Based on those facts, the Court could not "infer that the [current] office address was defendants' sole business address for purposes of receiving

[27] MCL 600.2301 provides a mechanism for curing certain defects within any "'process, pleading or proceeding.'" *Bush*, 484 Mich at 176, quoting MCL 600.2301. In *Bush*, the Court concluded that the notice of intent is part of a medical malpractice proceeding, and MCL 600.2301 applies to the notice of intent process. *Bush*, 484 Mich at 176-177. The Court clarified its *Bush* holding in *Driver*, 490 Mich at 254, where it found that MCL 600.2301, by its plain language, requires the action or proceeding subject to cure to be "pending." An NOI served outside the applicable limitations period "cannot be pending if it was time-barred at the outset." *Driver*, 490 Mich at 254. Thus, MCL 600.2301 is inapplicable in such cases. *Driver*, 490 Mich at 254.

professional business correspondence." *Id.* at 125. The Court went on to conclude that assuming a defect had actually occurred, "it was a minor technical defect in the proceedings because defendants actually received the NOI. Such minor technical defects can be cured under MCL 600.2301. The second prong of MCL 600.2301 *requires* that we disregard defects in proceedings that do not affect the substantial rights of the parties. Because the NOI was promptly forwarded and defendants actually received it, no substantial right of defendants was affected." *DeCosta*, 486 Mich at 125.

Where the plaintiff filed an NOI, then subsequently filed an amended complaint which did not set out a new basis of the claims against the defendants, but only served to "clarif[y] with more specificity the manner in which the standards of care were breached[,]" the trial court did not err in refusing to grant summary disposition as to the allegations in the amended complaint. *Decker*, 287 Mich App at 680. The Court of Appeals stated:

> "The NOI, examined as a whole, must advise 'potential malpractice defendants of the basis of the claims against them.' However, because the NOI comes at an early stage of the malpractice claim, the plaintiff does not have to craft the notice 'with omniscience.' Rather, the plaintiff must 'make good-faith averments that provide details that are *responsive* to the information sought by the statute and are as *particularized* as is consistent with the early notice stage of the proceedings.'" *Decker*, *supra* at 676, quoting *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 691, 696 n 14, 701 (2004) (internal citations omitted).

The notice of intent must state, at least, all of the following:

> (a) the factual basis for the claim;
>
> (b) the alleged standard of practice or standard of care;
>
> (c) how the health facility or health professional breached the standard of practice or standard of care;
>
> (d) what should have been done to comply with the standard of practice or standard of care;
>
> (e) how the breach of the standard of practice or standard of care was the proximate cause of the claimant's injuries;
>
> (f) the names of all the health facilities and health professionals the claimant is notifying pursuant to MCL 600.2912a. MCL 600.2912b(4).

> **Note:** A notice of intent must include both notice of the nature of the claim against a defendant, and "'a statement' that provides information containing all of the enumerated requirements of MCL 600.2912b(4)[.]" *Esselman v Garden City Hosp*, 284 Mich App 209, 220 (2009). The notice of intent will be deemed insufficient if it does not contain both notice and such a statement. *Id.* at 220.

In satisfying MCL 600.2912b(4)(e), the claimant must include specific allegations regarding the conduct of any named defendants. *Roberts*, 470 Mich at 699-700. "[I]t is not sufficient under this provision to merely state that defendants' alleged negligence caused an injury. Rather, [MCL 600.2912b(4)(e)] requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury. *Roberts*, 470 Mich at 699-700 n 16.

Nothing in MCL 600.2912b(4) requires a plaintiff's notice of intent to identify the relationship between the parties being sued. *Potter v McLeary*, 484 Mich 397, 421 (2009). MCL 600.2912b(4)(f) "clearly states that all that need be done in this regard is to identify the names of the health professional and facility being notified." *Potter*, 484 Mich at 421. With regard to a claim against a professional corporation (PC), if a plaintiff files an adequate notice of intent against a PC's agent or employee based only on its vicarious liability for the conduct of its agent or employee, it is not necessary for the plaintiff to describe the legal doctrine of vicarious liability in its notice of intent to the PC. *Id.* at 422-423.

Both the claimant and the health professional or health facility receiving the notice must allow each other "access to all of the medical records related to the claim" in their control. MCL 600.2912b(5). In addition, the claimant must also "furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge." *Id.*

"Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

> "(a) The factual basis for the defense to the claim.
>
> (b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.

> (c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.
>
> (d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage." MCL 600.2912b(7)(a)-(d).

If the claimant does not receive a written response by day 154, he or she may start a medical malpractice action on the expiration of the 154-day period. MCL 600.2912b(8).

In lieu of furnishing a written response, a health professional or health facility may submit an affidavit to the court certifying that he or she was not involved in the occurrence alleged in the action. MCL 600.2912c(1). "Unless the affidavit is opposed pursuant to [MCL 600.2912c(2)], the court shall order the dismissal of the claim, without prejudice, against the affiant." MCL 600.2912c(1). "Any party to the action may oppose the dismissal or move to vacate an order of dismissal and reinstate the party who filed the affidavit if it can be shown that the party filing the affidavit was involved in the occurrence alleged in the action." MCL 600.2912c(2).

"If at any time during the applicable notice period under [MCL 600.2912b] a health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility does not intend to settle the claim within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health professional or health facility, so long as the claim is not barred by the statute of limitations." MCL 600.2912b(9).

B. Commencing an Action

"Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely NOI [under MCL 600.2912b] and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired[; therefore, where a plaintiff does] not wait until the applicable notice period expire[s] before [filing a] complaint[] and affidavit[] of merit, [the plaintiff does] not commence [an] action[] against [the] defendant[][,]" and the statute of limitations is not tolled. *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94 (2015), rev'g in part *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208 (2013), and *Furr v McLeod*, 304 Mich App 677 (2014).

1. Required Contents of the Affidavit of Merit

If the plaintiff is represented by an attorney, the affidavit of merit must be "signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]."[28] MCL 600.2912d(1). An affidavit of merit must "certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and contain a statement of each of the following:

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." MCL 600.2912d(1)(a)-(d).

It is permissible for an affidavit of merit to set out the standard of care as required by MCL 600.2912d(1)(a) and then use the exact same verbiage from the standard of care section of the affidavit to state how the defendant breached the standard of care and the actions that should have been taken or omitted in order to have complied with the applicable standard of care, in order to satisfy the requirements of MCL 600.2912d(1)(b) and MCL 600.2912d(1)(c). *Lucas v Awaad*, 299 Mich App 345, 377-380 (2013).

"There is no specific requirement concerning *which* hospital or medical provider's records must have been reviewed in order for the expert to ascertain a breach of the standard of care. . . . It is

[28] "[T]he 'reasonably believes' language [in MCL 600.2912d] demonstrates that there will be cases in which counsel had such a reasonable belief even though the expert is ultimately shown not to meet the criteria of MCL 600.2169(1)." *Jones v Botsford Continuing Care Corp*, 310 Mich App 192, 200 (2015) (holding that the two affidavits of merit in this case were based on a reasonable belief that the two experts, a registered nurse and a physician specializing in geriatric care, could offer testimony regarding the standard of care for an LPN and for a physician who appeared to specialize in geriatrics, respectively; declining to address whether either witness could actually offer such testimony at trial).

sufficient, under the plain language of the statute, for the expert to indicate that he or she has reviewed the records provided by the plaintiff's counsel and that in light of those records, the expert is willing and able to opine with respect to the defendant's negligence consistently with the elements set forth in the statute." *Kalaj v Khan*, 295 Mich App 420, 427 (2012). In *Kalaj*, the Court of Appeals held that the plaintiff's expert's failure to review the same x-ray films on which the defendant doctor had based his diagnosis, and which the plaintiff's attorney had not provided to the expert, did not invalidate the affidavit of merit because there were other records from which the expert could conclude that the defendants were negligent. *Id*. at 429. The absence of the films "may affect the weight and credibility afforded to expert testimony," but it "does not render that expert testimony inadmissible." *Id*. at 429-430.

"[I]t is insufficient to simply state the result [of the breach in the standard of care] when [MCL 600.2912d(1)(d)] require[s] [the affidavit of merit] to state *the manner in which* there was a breach: The answer to '*How* was the standard of care breached?' is never 'The standard of care was breached.'" *Ligons v Crittenton Hosp (Ligons II)*, 490 Mich 61, 77-78 (2011) (emphasis added). See also *Lucas*, 299 Mich App at 377-380.

The plaintiff's attorney must have reasonably believed that the health professional selected to address the standard of care in the affidavit "devoted a majority of his or her professional time during the year before the alleged malpractice to practicing or teaching the same health profession as the defendant health professional." *Bates v Gilbert*, 479 Mich 451, 458 (2007) (an ophthalmologist was not qualified to speak to the standard of care of an optometrist because they are two different health professions).

2. Nonconforming Affidavits of Merit

An affidavit that is timely filed is presumed valid and only a successful challenge to its validity will cause the affidavit to lose this presumption of validity. *Kirkaldy v Rim*, 478 Mich 581, 586 (2007)[29], citing *Saffian v Simmons*, 477 Mich 8, 13 (2007). Consequently, a defendant is still obligated to file a timely answer to a complaint even if the defendant believes the affidavit is defective. *Kirkaldy*, 478 Mich at 586. "A defendant's unilateral belief that the affidavit of merit does not conform to the requirements of MCL 600.2912d does not constitute 'good

[29] Overruling *Geralds v Munson Healthcare*, 259 Mich App 225 (2003), and *Mouradian v Goldberg*, 256 Mich App 566 (2003). *Kirkaldy*, 478 Mich at 583.

cause' for failing to respond timely to a medical malpractice complaint, and thus is not a proper basis to challenge the entry of a default." *Saffian v Simmons*, 477 Mich 8, 16 (2007).

"If the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If that challenge is successful, the proper remedy is dismissal without prejudice." *Kirkaldy*, 478 Mich at 586. Because MCR 2.110(A) does not include "mandatory attachments such as an affidavit of merit" in its definition of a pleading, permitting a party to amend an affidavit pursuant to MCR 2.118(A)[30] is improper. *Ligons v Crittenton Hosp (Ligons I)*, 285 Mich App 337, 370-371 (2009), aff'd 490 Mich 61, 85 (2011) (a plaintiff may not amend a deficient affidavit of merit under former MCR 2.118 because doing so "runs counter to the established statutes, court rules, and cases governing this area of law").[31]

An affidavit that fails to name the health professional whose conduct allegedly caused the injury at issue fails to conform to the requirements of MCL 600.2912d. *Glisson v Gerrity*, 274 Mich App 525, 534-535 (2007), rev'd on other grounds 480 Mich 883 (2007).

A plaintiff does not need to file an amended or additional affidavit when filing an amended complaint if the first affidavit met the requirements in MCL 600.2912d. *King v Reed*, 278 Mich App 504, 520 (2008). In *King*, the plaintiff learned additional facts during the course of discovery that prompted him to amend his complaint to include theories of negligence not included in the plaintiff's original affidavit of merit. *Id.* at 512. The defendant argued that the plaintiff's failure to file an amended or additional affidavit of merit in support of the new theories of negligence in his amended complaint precluded the plaintiff from litigating the allegations not referenced in the plaintiff's original affidavit of merit. *Id.* The Michigan Court of Appeals disagreed and stated, "Because discovery was not available until after plaintiff filed his complaint and affidavit of merit, plaintiff's affidavit of merit was not required to contain information that could not have been known to plaintiff before discovery had commenced." *Id.* at 517.

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[30] Effective May 1, 2010, ADM 2009-13 amended MCR 2.118. This case was decided based on the language of former MCR 2.118.

[31] Although the *Ligons* holding addressed affidavits of merit, "[t]his holding applies by analogy to affidavits of meritorious defense under MCL 600.2912e." *Lucas v Awaad*, 299 Mich App 345, 377 (2013). See Section 8.11(B)(4) for more information on affidavits of meritorious defense.

3. Tolling Period Under MCL 600.2912d(2)

"Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under [MCL 600.2912d(1)]." MCL 600.2912d(2).

The tolling period under MCL 600.2912d(2) is "an extension[]" that runs "from the date the complaint is filed, irrespective of when the motion is granted." *Castro v Goulet*, ___ Mich App ___, ___ (2015). "The obvious significance of the timing requirements in MCL 600.2912d(2) is that a plaintiff who makes a motion to extend time must proceed on the assumption that the motion will be granted." *Castro*, ___ Mich App at ___ (holding that the case was timely filed where the statute of limitations expired on February 9, 2013, and the plaintiffs filed their complaint and their motion to extend the time for filing an affidavit of merit on February 4, 2013, filed the affidavit of merit on February 26, 2013, and the trial court granted their motion for an extension on March 8, 2013).[32]

Motions under MCL 600.2912d(2) may be granted "for good cause shown[.]" MCL 600.2912d(2). The term *good cause* is not defined by statute, and has been found "'so general and elastic in its import that [the Court] cannot presume any legislative intent beyond opening the door for the court to exercise its best judgment and discretion in determining if conditions exist which excuse the delay when special circumstances are proven to that end.'" *Castro*, ___ Mich App at ___, quoting *Lapham v Oakland Circuit Judge*, 170 Mich 564, 570 (1912). The trial court's determination of whether good cause to grant an extension exists is discretionary and will not be disturbed on appeal unless the decision falls outside the range of principled outcomes. *Castro*, ___ Mich App at ___ (affirming the trial court's finding of good cause to grant an extension where the plaintiffs delayed filing a lawsuit because they were informed by the defendants that the patient's negative side effects from the surgery would heal on their own over time).

4. Authentication of Out-of-State Affidavits of Merit

An out-of-state affidavit of merit is properly authenticated if the affidavit complies with the certification requirements in either MCL 600.2102(4)[33] (Revised Judicature Act (RJA)), or MCL

[32]Note that a motion under MCL 600.2912d(d) cannot "resurrect a claim where the complaint itself was untimely." *Castro*, ___ Mich App at ___.

565.262 (Uniform Recognition of Acknowledgments Act (URAA)). *Apsey v Memorial Hosp*, 477 Mich 120, 130, 134 (2007). MCL 565.268 expressly states that "[the URAA] provides an additional method of proving notarial acts." Therefore, neither MCL 565.262(a) nor MCL 600.2102(4) represents an exclusive method of authenticating an out-of-state affidavit. *Apsey*, *supra* at 134. See *Vanslembrouck v Halperin*, 277 Mich App 558, 565 (2008) (the affidavit of merit was not defective because it met the requirements of the URAA, and under *Apsey*, "a party in a medical malpractice action may validate an out-of-state notarial act using the URAA").

Effective April 1, 2013, MCL 600.2102(1) provides: "[i]f by law the affidavit of a person residing in another state of the United States or in a foreign country is required or may be received in an action or judicial proceeding in this state, to entitle the affidavit to be read, it must be authenticated under the [U]niform [R]ecognition of [A]cknowledgments [A]ct, [MCL 565.261 *et seq*.], or be an unsworn declaration executed under [the Uniform Unsworn Foreign Declarations Act, MCL 600.2181 *et seq*.]."

5. Affidavit of Meritorious Defense

In response to a plaintiff's affidavit of merit under MCL 600.2912d, a defendant must file an affidavit of meritorious defense under MCL 600.2912e. MCL 600.2912e sets out the following requirements for an affidavit of meritorious defense:

> "(1) . . . The affidavit of meritorious defense shall certify that the health professional has reviewed the complaint and all medical records supplied to him or her by the defendant's attorney concerning the allegations contained in the complaint and shall contain a statement of each of the following:
>
> > "(a) The factual basis for each defense to the claims made against the defendant in the complaint.[34]

[33]Effective April 1, 2013, 2012 PA 361 amended MCL 600.2102 to delete provisions for authentication and certification of an affidavit taken out of state, and to require instead that such an affidavit be authenticated under the Uniform Recognition of Acknowledgments Act, MCL 565.261 *et seq*., or be an unsworn declaration executed under the Uniform Unsworn Foreign Declarations Act, MCL 600.2181 *et seq*.

[34]"MCL 600.2912e(1)(a) only requires a 'factual basis for *each defense*,' not a factual basis for each *claim* asserted by the plaintiff." *Lucas*, 299 Mich App at 373. "If no factual basis is applicable for a particular defense, then no factual basis needs to be, or could be, provided." *Id*.

> "(b) The standard of practice or care that the health professional or health facility named as a defendant in the complaint claims to be applicable to the action and that the health professional or health facility complied with that standard.
>
> "(c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the applicable standard of practice or care.
>
> "(d) The manner in which the health professional or health facility named as a defendant in the complaint contends that the alleged injury or alleged damage to the plaintiff is not related to the care and treatment rendered."

"Typically, defenses are based on an assertion that the defendant did not breach the applicable standard of care, which is but one element in a malpractice case."[35] *Lucas v Awaad*, 299 Mich App 345, 373 (2013). "However, defenses are not limited to this element. If any element in a malpractice claim is not met, then a plaintiff cannot prevail." *Id*. (defendants' affidavit of meritorious defense attacked the plaintiff's claim with respect to the causation element). In addition, "MCL 600.2912(1)(a) only requires a 'factual basis for *each defense*,' not a factual basis for each *claim* asserted by the plaintiff. Thus, if no factual basis is applicable for a particular defense, then no factual basis needs to be, or could be, provided." *Lucas*, 299 Mich App at 373.

C. Statute of Repose

MCL 600.5838a(2)-(3) provide a statute of repose for medical malpractice actions:

> "Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in [MCL 600.5805] or [MCL 600.5851 to MCL 600.5856], or within 6 months after the plaintiff discovers or should have discovered the existence of the

[35]To establish a claim of medical malpratice, the plaintiff must show (1) the appropriate standard of care governing the defendant's conduct; (2) that the defendant breached the standard of care; (3) that the plaintiff was injured; and (4) that the defendant's breach of the standard of care was the proximate cause of the plaintiff's injuries. *Lucas*, 299 Mich App at 373 n 4.

> claim, whichever is later. However, except as otherwise provided in section [MCL 600.5851(7) or MCL 600.5851(8)], the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. This subsection does not apply, and the plaintiff is subject to the period of limitations set forth in subsection (3), under 1 of the following circumstances:
>
> > (a) If discovery of the existence of the claim was prevented by the fraudulent conduct of the health care professional against whom the claim is made or a named employee or agent of the health professional against whom the claim is made, or of the health facility against whom the claim is made or a named employee or agent of a health facility against whom the claim is made.
> >
> > (b) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.
>
> (3) An action involving a claim based on medical malpractice under circumstances described in subsection (2)(a) or (b) may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred."

"The only exceptions to the running of this six-year statute of repose [in MCL 600.5838a(2)] are those created by the minority saving provisions of MCL 600.5851(7) and [MCL 600.5851(8)]–the *only* two exceptions specifically mentioned in the statute." *Burton v Macha*, 303

Mich App 750, 756 (2014) (holding that "the death saving provision of MCL 600.5852 does not toll or otherwise create an exception to the running of the six-year statute of repose").

D. Statute of Limitations

1. In General

Generally, a medical malpractice plaintiff has two years from the time his or her claim accrues to commence an action. *Driver*, 490 Mich at 249. A claim accrues "'at the time of the act or omission that is the basis for the claim . . . , regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.'" *Id.*, quoting MCL 600.5838a(1). "[W]hen a plaintiff fails to strictly comply with the notice waiting period under MCL 600.2912b, his or her prematurely filed complaint fails to commence an action that tolls the statute of limitations." *Driver*, 490 Mich at 256. Thus, a complaint filed before the expiration of the NOI waiting period does not commence an action or toll the running of the limitations period. *Tyra*, 498 Mich at 94.

"Because a plaintiff's injury can be causally related to multiple acts or omissions, it is possible for the plaintiff to allege multiple claims of malpractice premised on discrete acts or omissions—even when those acts or omissions lead to a single injury—and those claims will have independent accrual dates determined by the date of the specific act or omission at issue." *Kincaid v Cardwell*, 300 Mich App 513, 525 (2013). However, "courts cannot permit a plaintiff to revive the [common law] last-treatment rule [which the Legislature abrogated for medical malpractice claims, 1986 PA 178] by merely pleading that the defendant had an 'on-going' or 'continuing' duty to act throughout the duration of the patient-physician relationship." *Id*. at 528. "In order to establish that continued adherence to an initial diagnosis or treatment plan constitutes a discrete act or omission on a date after the date when the initial diagnosis or plan was adopted, the plaintiff must plead—and be able to prove—facts that would establish that the continued adherence at the later point constituted a breach of the duty owed to the plaintiff." *Id*. at 530-531.

2. Tolling Provisions

Where a plaintiff files suit during a savings or tolling period, but the statute of limitations has expired, it is proper to dismiss the case with prejudice. *Ligons II*, 490 Mich at 89-90.

a. Discovery Rule

The limitations period may be extended under MCL 600.5838a(2) if the plaintiff discovers a claim two or more years after the date of the alleged negligent act that formed the basis for the claim. *Driver*, 490 Mich at 250. Under MCL 600.5838a(2), "the plaintiff must commence an action 'within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.'" *Driver*, *supra* at 250, quoting MCL 600.5838a(2) (commonly referred to as the discovery rule).

b. Filing of Complaint and Affidavit of Merit

In most civil cases, the statute of limitations is tolled upon the filing of a complaint. *Scarsella v Pollak*, 461 Mich 547, 549 (2000). See also MCL 600.5856. However, in medical malpractice cases, the action is not initiated unless an affidavit of merit accompanies the complaint. *Scarsella*, *supra* at 549. Consequently, a complaint filed without the accompanying affidavit does not toll the statute of limitations in medical malpractice cases. *Id.* at 550, 553.

A timely filed affidavit is presumed valid and will toll the period of limitations until the validity of the affidavit is challenged successfully in a later judicial proceeding. *Kirkaldy*, 478 Mich at 586.[36] An affidavit loses its presumption of validity if it is later found deficient and the statute of limitations resumes running. *Id.* The plaintiff will have available any time that remains under the period of limitations to file a conforming affidavit. *Id.*; *Glisson*, 274 Mich App at 534-535.

Relation back of amendments to an affidavit of merit. "In a medical malpractice action, an amendment of an affidavit of merit or affidavit or meritorious defense relates back to the date of the original filing of the affidavit." MCR 2.118(D).[37]

---

[36] Overruling *Geralds v Munson Healthcare*, 259 Mich App 225 (2003), and *Mouradian v Goldberg*, 256 Mich App 566 (2003). *Kirkaldy, supra* at 583.

[37] Effective May 1, 2010, ADM 2009-13 amended MCR 2.118(D) to specify that an amendment of an affidavit of merit or affidavit of meritorious defense in a medical malpractice action relates back to the date of the original filing of the affidavit; this amendment unequivocally stated it became effective May 1, 2010, and therefore it is not retroactive. *Ligons II*, 490 Mich at 89.

c. Death of a Party

"If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run." However, no action under MCL 600.5852 "shall [] be commenced . . . later than 3 years after the period of limitations has run." MCL 600.5852(4). "[T]he death saving provision of MCL 600.5852 [does] not toll or otherwise prevent the running of the six-year statute of repose[38] contained in MCL 600.5838a(2)." *Burton*, 303 Mich App at 757.

For medical malpractice claims, "the 2-year period under MCL 600.5852(1) runs from the date letters of authority are issued to the first personal representative of an estate." MCL 600.5852(2).[39] "Except as provided in [MCL 600.5852(3)], the issuance of subsequent letters of authority does not enlarge the time within which the action may be commenced." MCL 600.5852(2).

"If a personal representative dies or is adjudged by a court to be legally incapacitated within 2 years after his or her letters are issued, the successor personal representative may commence an action alleging medical malpractice that survives by law within 1 year after the personal representative died or was adjudged by a court to be legally incapacitated." MCL 600.5852(3).

E. Procedure for Challenges

MCR 2.112(L)(2) provides specific timeframes for challenging an NOI, an affidavit of merit, or an affidavit of meritorious defense. The court rule states, in part:

> "(2) In a medical malpractice action, unless the court allows a later challenge for good cause:
>
> > "(a) all challenges to a notice of intent to sue must be made by motion, filed pursuant to MCR 2.119, at the time the defendant files its first response to the complaint, whether by answer or motion, and

[38] See Section 8.11(C) for more information on the statute of repose.

[39] Effective March 28, 2013, 2012 PA 609 amended MCL 600.5852 to limit the period of time for bringing a medical malpractice action on behalf of a deceased person.

> "(b) all challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the signer, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301."[40]

F. Judgment

"After a verdict is rendered by a trier of fact in favor of a plaintiff in a medical malpractice action, an order of judgment shall be entered by the court." MCL 600.6306a(1). The order of judgment[41] shall be entered against each defendant, including a third-party defendant, in the following order and in the following amounts:

- "All past economic damages, less collateral source payments as provided in [MCL 600.6303;]"
- "All past noneconomic damages, reduced subject to the limitations in [MCL 600.1483;]"
- "All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under [MCL 600.6303], reduced to gross present cash value[;]"
- "All future medical and other health care costs, reduced to gross present cash value[;]"
- "All future noneconomic damages, reduced to gross present cash value and reduced subject to the limitations in [MCL 600.1483;]"
- "All taxable and allowable costs, including interest as permitted by [MCL 600.6013 or MCL 600.6455] on the judgment amounts." MCL 600.6306a(1).[42]

---

[40] Effective May 1, 2010, ADM 2009-13 amended MCR 2.112(L) to specify timeframes within which an NOI, affidavit of merit, or affidavit or meritorious defense may be challenged. This amendment is not retroactive in cases where "compliance with the newly prescribed time limits is impossible." *Ligons II*, 490 Mich at 89.

[41] Subject to MCL 600.2959, which requires the court to reduce damages by the percentage of comparative fault of the person who died or was injured.

[42] MCL 600.6306a is only applicable to actions in which the cause of action arose on or after March 28, 2013. 2012 PA 608.

G. Standard of Review

"[Q]uestions of law relating to the sufficiency of an affidavit of merit" are reviewed de novo. *Vanslembrouck,* 277 Mich App at 560-561.

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