Civil Proceedings Benchbook–Second Edition

Content Formerly Part of the Original MJI Circuit Court Benchbook

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Michigan Supreme Court

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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 February 21, 2024.

Acknowledgments

The *Civil Proceedings Benchbook* derives from the *Michigan Circuit Court Benchbook: Civil Proceedings,* originally authored by retired 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.

Work on the second edition of this benchbook was overseen by an Editorial Advisory Committee facilitated by MJI Publications Manager Sarah Roth. MJI Research Attorney Specialist Alessa Boes and MJI Research Attorney Danielle Y. Stackpole revised this edition of the benchbook. Amy Feinauer, MJI Program Assistant, also assisted in the publication of this benchbook.

MJI gratefully acknowledges the time, helpful advice, and expertise contributed by the Committee members, who are as follows:

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Note on Precedential Value

"A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this court rule." MCR 7.215(J)(1).

Several cases in this book have been reversed, vacated, or overruled in part and/or to the extent that they contained a specific holding on one issue or another. Generally, trial courts are bound by decisions of the Court of Appeals "until another panel of the Court of Appeals or [the Supreme] Court rules otherwise[.]" *In re Hague*, 412 Mich 532, 552 (1982). While a case that has been fully reversed, vacated, or overruled is no longer binding precedent, it is less clear when an opinion is not reversed, vacated, or overruled in its entirety. Some cases state that "an overruled proposition in a case is no reason to ignore all other holdings in the case." *People v Carson*, 220 Mich App 662, 672 (1996). See also *Stein v Home-Owners Ins Co*, 303 Mich App 382, 389 (2013) (distinguishing between reversals in their entirety and reversals in part); *Graham v Foster*, 500 Mich 23, 31 n 4 (2017) (because the Supreme Court vacated a portion of the Court of Appeals decision, "that portion of the Court of Appeals' opinion [had] no precedential effect and the trial court [was] not bound by its reasoning"). But see *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing MCR 7.215(J)(1) and stating that "a prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision." See also *People v James*, 326 Mich App 98 (2018) (citing *Dunn* and MCR 7.215(J)(1) and stating that the decision, "*People v Crear*, 242 Mich App 158, 165-166 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008), . . . [was] not binding"). Note that *Stein* specifically distinguished its holding from the *Dunn* holding because the precedent discussed in *Dunn* involved a reversal in its entirety while the precedent discussed in *Stein* involved a reversal in part.

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. Because it is unclear how subsequent case history may affect the precedential value of a particular opinion, trial courts should proceed with caution when relying on cases that have negative subsequent history. The analysis presented in a case that is not binding may still be persuasive. See generally, *Dunn*, 254 Mich App at 264-266.

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.

- 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.

- 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.

The **Michigan Judicial Institute (MJI)** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30048, Lansing, MI 48909. (517) 373-7171.**

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1.1 Access to Court Proceedings

A. Open or Closed Trial

Generally, 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." *Id.* MCL 600.1420 does not apply to cases involving national security. *Id.*

In addition, the United States 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 right to a public trial includes the right to public voir dire proceedings, pretrial hearings, and the jury selection process. *Presley v Georgia*, 558 US 209, 212-216 (2010); *Waller v Georgia*, 467 US 39, 43-47 (1984); *Vaughn*, 491 Mich at 650-652. See also *Weaver v Massachusetts*, 582 US ___, ___ (2017).

"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). "When a motion for closure is made, the judge should, at a minimum, take testimony at a hearing open to all interested parties, explore the constitutional and statutory validity of any proffered justifications for excluding the public and press from any portion of the trial, and determine whether any alternative and less restrictive mechanisms exist." *Id.*

"[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 also *People v Kline*, 197 Mich App 165, 169 (1992).

"A partial closure occurs where the public is only partially excluded, such as when family members or 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 (internal citation omitted).

"[T]he effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling reason

for the closure is required." *People v Russell*, 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*, 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, 172-173 (remanding for the trial court to articulate its reasons for partially closing the courtroom and retaining jurisdiction to evaluate whether the interests asserted to justify the partial closure were sufficient to outweigh the defendant's right to a public trial).

B. 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;
>
> (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[1] governs the proceedings for motions or objections under MCR 8.116(D)(1). MCR 8.116(D)(2).

[1] See Section 4.1 for information on filing a motion under MCR 2.119.

The court must forward a copy of the order to SCAO. MCR 8.116(D)(3).

C. Film or Electronic Media Coverage of Court Proceedings

See Administrative Order No. 1989-1, 432 Mich cxii (1989), for the guidelines applicable to film or electronic media coverage of court proceedings.

D. "Gag Orders"

The term *gag order* refers to a court order prohibiting attorneys, witnesses, and parties from discussing a case with reporters, or to a court order prohibiting reporters from publishing information related to a case. *Black's Law Dictionary* (5th pocket ed). A court order prohibiting publication of information related to a case is unconstitutional if it imposes a prior restraint on speech. *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"). See also *People v Sledge*, 312 Mich App 516, 537 (2015), in which "[t]he trial court issued 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." The Court of Appeals vacated the gag order, holding that "[t]he overbroad and vague gag order constituted a prior restraint on freedom of speech, freedom of expression, and freedom of the press, and the trial court failed to justify the gag order." *Id*.

MCR 8.116(D)(1) should be followed in assessing whether to issue a gag order prohibiting discussion of the case with reporters. See Section (B).

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*, 312 Mich App at 519, 526, 537 (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 because it prohibited any

potential trial participant from speaking with the news media regarding the case." *Id*. at 526, 528 (citations omitted).

E. Standard of Review

A trial court's decision whether to permit public access to court proceedings 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).[2]

1.2 Access to Court Files and Records

A. Personal Identifying Information (PII)

"[P]ersonal identifying information is protected and shall not be included in any public document or attachment filed with the court on or after April 1, 2022," unless otherwise provided by the Michigan Court Rules. MCR 1.109(D)(9)(a).

1. Protected PII Defined

An individual's protected PII includes the following:

- date of birth,
- Social Security number or national identification number,
- driver's license number or number of state-issued personal identification card,
- passport number, and
- financial account numbers. MCR 1.109(D)(9)(a)(*i*)-(*v*).

2. Filing and Accessing Protected PII

a. Filing a Document Containing Protected PII

When law or court rule requires protected PII, as it is defined in MCR 1.109(D)(9)(a), to be filed with the court,

[2]For more information on the precedential value of an opinion with negative subsequent history, see our note.

or when the court finds the information necessary to identify a specific individual in a case, the PII must be provided using the form and manner required by the State Court Administrative Office (SCAO).[3] MCR 1.109(D)(9)(b)(*i*).

Protected PII provided to the court in compliance with the requirements of MCR 1.109(D)(9)(b) must be entered into the case management system according to standards established by the SCAO. MCR 1.109(D)(9)(e). "The information shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history under MCR 8.119(D)(1).

Except as otherwise provided in the court rules, when a party is required to provide protected PII in a public document to be filed with the court, the party must redact the protected PII from the document and file the PII form approved by SCAO.[4] MCR 1.109(D)(9)(b)(*iii*). Unredacted protected PII may be included on Uniform Law Citations involving civil infractions filed with the court and on proposed orders submitted to the court. *Id*. If a party submits a proposed order to the court that is required to contain unredacted protected PII once issued by the court, the party must not attach the proposed order to another document. *Id*.

The SCAO form must contain the information redacted from the document and must assign an appropriate reference to the information contained in the SCAO form that uniquely associates each item redacted from the document with the corresponding personal identifying information provided on the SCAO form.[5] MCR

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[3] SCAO Form MC 97, *Protected Personal Identifying Information* (for an individual who is a defendant, respondent, or decedent), and SCAO Form MC 97a, *Addendum to Protected Personal Identifying Information* (for an individual who is a plaintiff, petitioner, or other individual).

[4] SCAO Form MC 97, *Protected Personal Identifying Information* (for an individual who is a defendant, respondent, or decedent), and SCAO Form MC 97a, *Addendum to Protected Personal Identifying Information* (for an individual who is a plaintiff, petitioner, or other individual).

[5] A specific form for protecting personal identifying information must be filed when a petition is filed in child protective proceedings. See SCAO Form MC 97b, *Protected Personal Identifying Information*. SCAO Form MC 97b is the form listing the birthdates, which are protected PII under MCR 1.109(D)(9)(a), of the children and other parties named on a petition to initiate child protective proceedings. Birthdates appear on SCAO Form MC 97b in fields designated by number and letter. Those number and letter combinations are noted on SCAO Form JC 04b so that actual birthdates do not appear on the petition; instead, the petition contains only the letter and number designation that corresponds to a party's particular birthdate as it is listed on SCAO Form 97b.

1.109(D)(9)(b)(*iii*). When a reference is made in a case to the identifier representing the personal identifying information on the SCAO form, the reference to the identifier is understood to refer to the complete information related to the identifier appearing on the form. *Id*. The SCAO form may include fields for the PII, and the information inserted into the fields will be protected.[6] *Id*.

Providing a Social Security number. When a Social Security number is required to be filed with the court, the number must be limited to the last four digits, except when the documents being filed are required by the Friend of the Court and will not be placed in the court's legal file under MCR 8.119(D). MCR 1.109(D)(9)(b)(*ii*).[7]

b. Amending Protected PII

An individual may amend as of right the protected PII provided in the SCAO form. MCR 1.109(D)(9)(b)(*iii*).

c. Access to a Document Containing Protected PII

Limited access to protected PII. Protected PII under MCR 1.109(D) is nonpublic. MCR 1.109(D)(9)(b)(*iv*). Protected PII is available for purposes of case activity or as otherwise required by law or court rule. *Id*. The protected PII provided is available only to the parties in a case, to interested persons described in the court rules, and to other persons, entities, or agencies authorized by law or court rules to access nonpublic records that have been filed with the court. *Id*.

3. Consenting to the Access of Protected PII

A party may stipulate in writing to permit any person, entity, or agency to access to his or her protected PII. MCR 1.109(D)(9)(b)(*v*)(A). Any person, entity, or agency attempting to access the protected PII must provide the court with the stipulation permitting access. *Id*.

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[6]Local court forms are prohibited from containing fields in which protected PII may be entered. MCR 1.109(D)(9)(c). A court must not reject a document to be filed, dismiss a case, or otherwise take negative action against a party if the party has failed to provide protected PII on a local court form. *Id*.

[7]See also MCR 1.109(D)(10)(b), which provides that a court's dissemination of social security numbers is limited to the purposes permitted under federal or state law. If a request is filed on or after March 1, 2006, for a copy of a public document, "the court must review the document and redact all social security numbers on the copy." *Id*. "This requirement does not apply to certified copies or true copies when they are required by law, or copies made for those uses for which the social security number was provided." *Id*.

a. Access to a Party's Date of Birth

Obtaining authority to access a party's date of birth. For the purpose of confirming a particular person's identity and with the person's consent, an individual may be authorized to access a party's date of birth without having to present a stipulation as is required under MCR 1.109(D)(9)(b)(*v*)(A) in order to access protected PII. MCR 1.109(D)(9)(b)(*v*)(B)(1).

Possession of the party's consent. The individual authorized to access a birthdate must retain possession of the consent, or the consent must be retained by the entity for which the individual works, or the person or organization (or someone acting on their behalf) seeking a party's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(1).

b. List of Individuals Authorized to Access a Party's Date of Birth

SCAO list of authorized individuals. The SCAO will maintain a list of the individuals having the authority to access a party's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(1). To appear on the SCAO list, an individual must provide in writing the name of the entity for which the individual works and an assurance that on each occasion the individual seeks to confirm a party's birthdate, it will be in the course of the individual's work and with the consent of the person whose date of birth is sought. *Id*. The assurance must be updated within every six months from the date of the original submission. *Id*.

Additional information required for placement on the SCAO list. In addition, an individual attempting to be placed on the SCAO list of individuals authorized to access birthdates must provide proof of his or her employer's or hiring entity's professional liability insurance in effect during the time the individual is seeking the person's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(2). The proof of insurance is nonpublic and must be updated upon the expiration or termination of the insurance policy. *Id*.

Court's duty to verify identity. A court must verify the identity of an individual claiming to be authorized to obtain a person's birthdate by matching the name appearing on the individual's state-issued identification card with the individual's name on the SCAO list. MCR 1.109(D)(9)(b)(*v*)(B)(3). Courts and SCOA may create

secure, individualized accounts that allow authorized individuals to access a party's date of birth electronically. *Id*. After confirming the identity of the individual seeking information about a person's birthdate, a court must supply the authorized individual with a public register of actions or other public document that includes the person's date of birth. *Id*.

4. No Exemptions for Service of Protected PII

Except by a court order issued under MCR 1.109(D)(9)(b)(*vii*) making the PII confidential, there is no exemption from the requirement that a court or a party serve a nonpublic document that was filed with the court and includes the protected PII that must be provided to the court as stated in MCR 1.109(D)(9)(b)(*i*). MCR 1.109(D)(9)(b)(*vi*).

5. Protected PII May Be Made Confidential

For just cause found, a court may, on its own motion or by motion of a party, order that PII be made confidential. MCR 1.109(D)(9)(b)(*vii*). The order must identify the person, party, or entity whose access to the PII is restricted. *Id*. When a party's home address or telephone number is made confidential, the court order must provide an alternative address for service on the party or an alternative phone number by which the party may be contacted about case activity. *Id*.

6. Failing to Comply With Requirements to Protect PII

If a party files his or her protected PII in a public document and does not provide the information in the form and manner established by the SCAO under MCR 1.109(D)(9), the party waives the protection available for his or her PII. MCR 1.109(D)(9)(d)(*i*). When a party fails to comply with the requirements of MCR 1.109(D) the court, on its own initiative or by a party's motion, may have the improperly filed documents sealed and order that new documents with redactions be prepared and filed. MCR 1.109(D)(9)(d)(*ii*).

7. Redacting Protected and Unprotected PII

a. Protected PII in Documents Filed With a Court

A person whose protected PII appears in a document filed with the court may request in writing that the protected PII be redacted;[8] if a person makes such a request, the clerk of the court must promptly process the

request. MCR 1.109(D)(10)(c)(*i*). No motion fee is required for the request, the request must specify the protected PII to be redacted, and the document must be maintained as a nonpublic document in the case file. *Id*.

b. Unprotected PII in Public Documents Filed With a Court

PII not protected under MCR 1.109 may be redacted or made confidential or nonpublic. MCR 1.109(D)(10)(c)(*ii*). A party or a person having unprotected PII in a public document filed with the court may, in an ex parte motion using the appropriate SCAO-approved form,[9] request that the court direct the court clerk to redact the information specified by the party or person or to make the information confidential or nonpublic. *Id*. The court has discretion to hold a hearing on the motion. *Id*. The court must enter an order to redact the information or to make the information confidential or nonpublic "if the party or person's privacy interest outweighs the public's interest in the information."[10] *Id*.

c. Protected PII in an Exhibit Offered for Hearing or Trial

Protected PII may be redacted from an exhibit offered at a hearing or a trial when a person or party having protected PII in the exhibit requests in writing to have the PII redacted. MCR 1.109(D)(10)(c)(*iii*). No motion fee is required. *Id*. The person or party seeking redaction must identify in the request the specific protected PII to be redacted, and the request must be maintained as a nonpublic document in the case file. *Id*. The court must order the information redacted "if the party or person's privacy interest outweighs the public's interest in the information." *Id*.

d. Unredacted Protected PII in Transcripts Filed With a Court

Unredacted protected PII may be included on transcripts filed with the court; however, the clerk of the court must redact protected PII if a person submits a written request

[8] SCAO Form MC 97r, *Request for Redaction of Protected Personal Identifying Information*.

[9] SCAO Form MC 97m, *Ex Parte Motion to Protect Personal Identifying Information*.

[10] SCAO Form MC 97o, *Order Regarding Ex Parte Motion to Protect Personal Identifying Information*.

identifying the page and line number for each place in the transcript where the PII is located. MCR 1.109(D)(10)(c)(*iv*).

8. Responsibility for Redaction

The parties and their attorneys are *solely* responsible for excluding or redacting the PII listed in MCR 1.109(D)(9) from all documents filed with or offered to the court. MCR 1.109(D)(10)(a). There is no requirement that at the time of filing, a court clerk review, redact, or screen documents for PII, whether protected or unprotected, without regard to whether the documents are filed electronically or on paper. *Id*.

Except as otherwise provided in the court rules, a court clerk is not required to redact protected PII from documents filed with or offered to the court[11] before providing a copy of the document requested, whether in-person or via the internet, or before making available at the courthouse via a publicly accessible computer that gives a person direct access to the document. MCR 1.109(D)(10)(a).

9. Certifying a Record

"The clerk of the court may certify a redacted record as a true copy of an original record on file with the court by stating that information has been redacted in accordance with law or court rule, or sealed as ordered by the court." MCR 1.109(D)(10)(d).

10. Maintaining a Document After Redacting PII

Documents from which PII has been redacted, or to which access has been restricted, must be maintained according to the standards established by the SCAO. MCR 1.109(D)(10)(e).

B. Record of Proceedings Required

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;

[11]This provision applies equally to documents filed with or offered to the court before or after April 1, 2022. MCR 1.109(D)(10)(a).

> (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 prepare without delay, in legible English, a transcript of the records taken by him or her (or any part thereof): (1) to any party on request, [or] . . . (2) on order of the trial court." *Id*. If the transcript is prepared in response to a party's request, "[t]he reporter or recorder is entitled to receive the compensation prescribed in the statute on fees from the person who makes the request." MCR 8.108(E)(1). If the transcript is prepared on order of the court, "[t]he court may order the transcript prepared without expense to either party." MCR 8.108(E)(2).

MCR 8.109(A) indicates that a trial court is "authorized to use audio and video recording equipment for making a record of court proceedings" if the equipment meets the standards published by the State Court Administrative Office (SCAO)[12] 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) requires specific steps that an appellant must 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 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)(a)(*iii*). "When, after remand, it is clear that no settlement of the facts is possible, then the grant of a new trial is permissible to preserve a defendant's right to appeal." *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich App 247, 250 (1987).

[12] See SCAO's *Standards for Digital Video and Audio Recording*.

For answers to questions about public access during the COVID-19 public health emergency, see SCAO's *Frequently Asked Questions Regarding Expansion of Remote Proceedings*.

C. Access to Court Records

MCR 1.109(F) 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:

> "Except as otherwise provided in [MCR 8.119](F),[13] only case records as defined in [MCR 8.119](D) are public records, subject to access in accordance with these rules."[14]

Additionally, MCR 8.119(H)(7) 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),[15] any person may inspect that record and may obtain copies as provided in [MCR 8.119](J)."[16] For instance, MCL 552.6a(1) restricts public access to "a complaint for divorce filed with the court . . . until the proof of service has been filed with the court."[17]

"Information on set aside convictions is nonpublic and access is limited to a court of competent jurisdiction, an agency of the judicial branch of state government, the department of corrections, a law enforcement agency, a prosecuting attorney, the attorney general, and the governor upon request and only for the purposes identified in MCL 780.623. Access may also be provided to the individual

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[13] 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)(8)(b)]." MCR 8.119(H)(8)(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[.]"

[14] MCR 8.119(H)(4) provides that "[i]f a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record"; "[h]owever, the records cannot be provided through a publicly accessible website if protected personal identifying information has not been redacted from those records." "If a public document prepared or issued by the court on or after April 1, 2022, or a Uniform Law Citation filed with the court on or after April 1, 2022, contains protected personal identifying information, the information must be redacted before it can be provided to the public, whether the document is provided upon request via a paper or electronic copy, or direct access via a publicly accessible computer at the courthouse. Upon receipt by the court on or after April 1, 2022, protected personal identifying information included in a proposed order shall be protected by the court as required under MCR 8.119(H) as if the document was prepared or issued by the court." MCR 8.119(H)(5). See Section 1.2(A) for discussion of protected personal identifying information.

[15] See Section 1.2(D) for discussion of sealing records under MCR 8.119(I).

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

whose conviction was set aside, that individual's attorney, and the victim(s) as defined in MCL 780.623. The court must redact all information related to the set aside conviction or convictions before making the case record available to the public in any format." MCR 8.119(H)(9).

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)."

Administrative Order No. 2006-2, 474 Mich cliv (2006) 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)(6)[18].]" *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(I)(6)] 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*, 290 Mich App at 342-347 (trial court properly held that it did not have the authority to seal a personal protection order pursuant to MCR 8.119(I)(6)).

Access to court records can be restricted by the Legislature. *In re Midland Publishing Co, Inc*, 420 Mich 148, 159 (1984). 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 *Michigan Trial Court Records Management Standards*.

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

[17] "An entity administering or providing services under . . . 42 USC 651 to [42 USC 669b] may access a complaint for divorce made nonpublic under [MCL 552.6a]." MCL 552.6a(2). Although 2022 PA 175 became effective July 21, 2022, MCL 552.6a is not applicable until October 1, 2022.

[18] Formerly MCR 8.119(F)(5); MCR 8.119(I)(6) 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 1.2(D) for discussion of sealing records under MCR 8.119(I).

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 & Addresses*, 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. *Id.* at 630. Jurors' privacy concerns alone are insufficient to deny access to jurors' names. *Id*.

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 access to the record is limited by statute, court order, or court rule. See the Nonpublic and Limited-Access Court Records chart.

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).

D. Sealing Court Records

MCR 8.119(I)(1)-(3) provide information on sealing court records, 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."

Committee Tip:

MCR 8.119(I) grants the court limited discretion to seal records. Courts should be cautious of sealing records unless the limiting factors set forth in MCR 8.119(I) have been satisfied.

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, or require that a protective order issued under MCR 2.302(C) be filed with the Clerk of the Supreme Court and the State Court Administrative Office (SCAO). MCR 8.119(I)(8). "A protective order issued under MCR 2.302(C) may authorize parties to file materials under seal in accordance with the provisions of the protective order without the necessity of filing a motion to seal under this rule." MCR 8.119(I)(8).

"[A] court is prohibited from sealing court orders and court opinions under [the plain language of MCR 8.119(I)(6)[19].]" *Jenson v Puste*, 290 Mich App 338, 347 (2010). "Significantly, [MCR 8.119(I)(6)] does not give 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)[20]] allows when a motion involves other court records." *Jenson*, 290 Mich App 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)(6)).

"Any person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order. MCR 2.119[21] governs the proceedings on such a motion or objection." MCR 8.119(I)(9).

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 SCAO. 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 must be held under seal pending the court's disposition of the motion."*Id*.

MCR 8.119(D) sets out procedures to protect the confidentiality of a sealed record:

> "Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court [sealing a record] pursuant to [MCR 8.119](I) must be designated accordingly 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 under [MCR 8.119](I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed."

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[19] Formerly MCR 8.119(F)(5); MCR 8.119(I)(6) 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."

[20] Formerly MCR 8.119(F)(1).

[21] See Section 4.1 for a discussion of MCR 2.119.

See also MCR 2.518(C), which provides:

> "**Confidentiality.** If the court retains discovery materials filed pursuant to MCR 1.109(D) 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."

E. Record Retention

"The State Court Administrative Office [(SCAO)] shall establish and maintain records management policies and procedures for the courts, including a records retention and disposal schedule, in accordance with [S]upreme [C]ourt 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).

"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).

MCR 8.119(K) provides:

> "Retention Periods and Disposal of Court Records. For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) 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 disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court. Before disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such in the Michigan trial courts approved records retention and disposal schedule. An order disposing of court records shall comply with the retention periods established by the [SCAO] and approved by the state court administrator, Attorney General, State Administrative Board, Archives of Michigan, and Records Management Services of the

> Department of Management and Budget, in accordance with MCL 399.811."

For additional information on records management, and for links to records retention and disposal schedules, see SCAO's Records Management website.

F. Access and Reproduction Fees[22]

1. Documents

"A court may not charge a fee to access public case history information or to retrieve or inspect a case document irrespective of the medium in which the record is retained, the manner in which access to the case record is provided (including whether a record is retained onsite or offsite), and the technology used to create, store, retrieve, reproduce, and maintain the case record." MCR 8.119(J)(1). "A court may charge a reproduction fee for a document pursuant to MCL 600.1988, except when required by law or court rule to provide a copy without charge to a person or other entity." MCR 8.119(J)(2). "The court may provide access to its public case records in any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to [MCL] 24.403." MCR 8.119(J)(3).

"Reproduction of a case document means the act of producing a copy of that document 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 document and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce the document.
>
> (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

[22] See SCAO's 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.

to [MCR 8.119(H)(8)], for providing copies of documents on file." MCR 8.119(J)(4).

2. Court Recordings

"Every court, shall adopt an administrative order pursuant to MCR 8.112(B) to establish a policy for whether to provide access for records defined in [MCR 8.119(F), which include court recordings, log notes, jury searing charts, and media] and if access is to be provided, outline the procedure for accessing those records[.]" MCR 8.119(H)(8)(b). The administrative order must also set forth the reasonable cost of reproduction and specify the process for determining costs under [MCR 8.119(J)]." MCR 8.119(H)(8)(c)-(d).[23]

Committee Tip:

If the court decides to provide access to court recordings in its administrative order, the court should consider whether an audio copy of the court proceeding may be provided upon request, or if access to the recording will be limited to a certified transcript.

G. Standard of Review

A trial court's decision to permit public access to court 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).

1.3 Access to Judge

A. 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

[23] See Section 1.2(A) for additional information on proceedings that are required to be recorded.

impending proceeding, except" in the limited circumstances set out in MCJC 3(A)(4). The exceptions include communications for scheduling, administrative matters, 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. See MCJC 3(A)(4)(a)-(e).

Committee Tips:

• 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.

• It is further recommended that court staff return an ex parte communication to the sender (if a return address is provided) advising that the court is precluded from considering the information without both parties having the opportunity to review and respond to the communication pursuant to the MCJC 3(A)(4). If court staff is unable to return the communication, it is suggested that the communication be sealed in an envelope clearly marked "ex parte communication" so it is not inadvertently reviewed by the court.

• Ex parte 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.

B. Judge's Appearance by Video Communication Equipment[24]

"The State Court Administrative Office is authorized . . . to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that

[24]See Section 1.15 for additional information on videoconferencing.

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, 493 Mich cx (2013).

"Notwithstanding any other provision in [MCR 2.407], until further order of the Court, AO No. 2012-7 is suspended." MCR 2.407(E).

1.4 Form of Address

Parties and attorneys may include a preferred form of address —Ms., Mr., or Mx. — in the name section of a document's caption. MCR 1.109(D)(1)(b). Parties and attorneys may also include one of the following personal pronouns: he/him/his, she/her/hers, or they/them/theirs. *Id*. When addressing, referring to, or identifying a party or attorney, either orally or in writing, courts must use the individual's name, designated salutation or personal pronouns, or other respectful means consistent with the individual's designated salutation or personal pronouns. *Id*.

1.5 Americans With Disabilities Act (ADA) Compliance

The Americans With Disabilities Act (ADA), 42 USC 12101 *et seq*. is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life. The linked video details the requirements of the ADA. A PDF version of the material covered in the ADA video is available here.

1.6 Attorney Conduct

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Preamble to the Michigan Rules of Professional Conduct. "Many of a

lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service." *Id*. "Every lawyer is responsible for observance of the Rules of Professional Conduct[, and a] lawyer should also aid in securing their observance by other lawyers." *Id*. "Neglect of these responsibilities compromises the independence of the profession and public interest in which it serves. *Id*.

A. Disciplinary Proceedings

"The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court." MCR 9.103(A). Grounds for discipline are set forth in MCR 9.104.

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, 395 (1972), citing Const 1963, art 6 § 5. 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 Mich Pub Serv Comm*, 243 Mich App 487, 491-492 (2000). This tradition is reflected in the Michigan Code of Judicial Conduct; MCJC 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." The Michigan Rules of Professional Conduct require lawyers to report attorney misconduct. MRPC 8.3.

B. Motion to Disqualify Attorney

Although not specifically addressed by court rule, caselaw 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, PLC v Lizza*, 251 Mich App 187, 193-203 (2002). Typically, a motion to disqualify is based on an alleged conflict of interest. See MRPC 1.7; MRPC 1.8; MRPC 1.9. 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, 117-118 (2009). First, it must "determine whether a lawyer's representation of a client will be 'directly adverse' to the interest of another client." *Id.* at 117. The Court explained that "[c]lients' interests are directly adverse when one client sues another client." *Id.* Second, the court must evaluate reasonable belief and consent. *Id.* at 118. 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.*

C. Standard of Review

Whether a conflict of interest exists is a question of fact that is reviewed for clear error. *Avink v SMG*, 282 Mich App 110, 116 (2009). "A trial court's findings of fact are clearly erroneous only if [the Court] is left with a definite and firm conviction that a mistake was made." *Id.* The application of "ethical norms" to a decision whether to disqualify counsel is reviewed de novo. *Id.*

1.7 Plaintiff's Conduct - Wrongful Conduct Rule

The wrongful-conduct rule "may preclude a civil cause of action if in order to establish his cause of action, a plaintiff must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party." *Soaring Pine Cap Real Estate and Debt Fund II LLC v Park Street Group Realty Servs LLC*, ___ Mich ___, ___ (2023) (cleaned up). The rule "stems from the sound public policy that 'courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct.'" *Varela v Spanski*, 329 Mich App 58, 81 (2019), quoting *Orzel v Scott Drug Co*, 449 Mich 550, 559 (1995).

The wrongful-conduct rule "operates to deny relief if the claim is based on the plaintiff's illegal conduct, a casual connection exists between that conduct and the damages sought, and the defendant is not more culpable than the plaintiff." *Varela*, 329 Mich App at 83 (holding the wrongful-conduct rule was applicable to plaintiff's various claims regarding a partnership agreement to develop a marijuana grow operation that fell outside the confines of the Michigan Medical Marihuana Act). "For the wrongful-conduct rule to apply to a given case, plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. . . . However, the mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule. Where an act amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe workplace, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule." *Soaring Pine Capital Real Estate and Debt Fund II, LLC*, 337 Mich App at 553, 556 (cleaned up) (noting that the wrongful-conduct rule is not prohibited simply because a statute provides for a criminal punishment; "a criminal statute will have a criminal punishment, but . . . in addition to that potential criminal penalty, a party is also not permitted to obtain civil damages on the basis of that criminal conduct").

"In other words, the [wrongful-conduct] rule will bar recovery if (1) the plaintiff's conduct is prohibited or almost entirely prohibited under a penal or criminal statute, (2) a sufficient causal nexus exists between the plaintiff's illegal conduct and the plaintiff's asserted damages, and (3) the defendant's culpability is not greater than the plaintiff's culpability." *Masrur v Regents of the Univ of Mich*, ___ Mich App ___, ___ (2022) (cleaned up). However, under the insanity exception to the wrongful-conduct rule, "a plaintiff may, under some circumstances, pursue a cause of action based on an illegal act committed while the plaintiff was legally insane." *Id*. at ___. Nonetheless, "[a]n adjudication of criminal responsibility precludes the application of the insanity exception to the wrongful-conduct rule." *Id*. at ___. In *Masrur*, the Court held that plaintiff's *nolo contendere* but mentally ill plea in his criminal proceeding "constituted an adjudication of criminal responsibility" and "was admissible against him in [his medical malpractice action]." *Id*. at ___. Accordingly, the *Masrur* Court held that plaintiff's plea "preclude[d] a finding that he was not legally responsible for [a] homicide, or a finding that he was legally insane at the time he committed it," and concluded that plaintiff's "conduct bars plaintiff's recovery under the wrongful-conduct rule as a matter of law." *Id*. at ___.

1.8 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 [the Michigan Supreme Court], the Court of Appeals, and the circuit and probate courts by Const 1963, art 6, § 1." *Dougherty*, 429 Mich at 91 n 14. Further, the Michigan Legislature has enacted numerous statutes providing for the use of the contempt power. See, e.g., MCL 600.1701.

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

1.9 Judicial Disqualification

Due process "requires an unbiased and impartial decisionmaker." *Cain v Dep't of Corrections*, 451 Mich 470, 497 (1996). MCR 2.003(C) sets out the grounds for disqualification of a judge. "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)." MCJC 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 Michigan*, 474 Mich 1027, 1038-1039 (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. *Id.* at 1040-1041. "[A]n adverse ruling is not a sufficient reason for disqualification . . ., even if that ruling is later reversed." *Swain v Morse*, 332 Mich App 510, 538 (2020). The trial court's factual findings on a motion for disqualification are reviewed for an abuse of discretion; however, the applications of the facts to the law is reviewed de novo. *Van Buren Charter Twp v Garter Belt Inc*, 258 Mich App 594, 598 (2003).

For a more detailed discussion on judicial disqualification, see the Michigan Judicial Institute's publication, *Judicial Disqualification in Michigan*. See also the Michigan Judicial Institue's *Judicial Disqualification Checklist* and *Flowchart*.

1.10 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; 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) (noting that the trial court warned the defendant he should secure counsel);

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 to 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) (noting that "[a]ppearance *in pro per* does not excuse all application of court rules"). 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).

Committee Tips:

No special warnings or cautions are required; however, it is good practice to caution the pro se litigant that he or she may wish 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. See MCL 600.916 (unauthorized practice of law); *Shenkman v Bragman*, 261 Mich App 412, 416 (2004) (finding that the appellant was representing his grandfather's estate, not himself, and was therefore engaged in the unauthorized practice of law). A corporation "can appear only by attorney regardless of whether it is interested in its own corporate capacity or in a fiduciary capacity." *Peters Prod, Inc v Desnick Broadcasting Co*, 171 Mich App 283, 287 (1988), citing *Detroit Bar Ass'n v Union Guardian Trust Co*, 282 Mich 707, 711 (1938). 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*, 261 Mich App at 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). The phrase "actual attorney fees" requires that an agency relationship exist between an attorney and the attorney's client and that an attorney be acting on behalf of a client separate from the attorney. *Id.*

1.11 Waiver of Fees

Generally, filing fees are required in all cases.[25] The trial court fee schedules are available here.

When properly requested, MCR 2.002 requires a trial court to relieve an indigent person of his or her obligation to pay filing fees and assures that a person will not be denied access to the courts on the basis of indigence. See MCR 2.002. "Notwithstanding any other provision of [MCR 2.002], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." MCR 2.002(L).

Except as provided in MCR 2.002(I),[26] for purposes of MCR 2.002, *fees* applies only to fees required by MCL 600.857, MCL 600.880–MCL 600.880c, MCL 600.1027, MCL 600.1986, MCL 600.2529, MCL 600.5756, MCL 600.8371, MCL 600.8420, MCL 700.2517, MCL 700.5104, and MCL 722.717. MCR 2.002(A)(2).

A. Who Qualifies for Waiver or Suspension

"Only an individual is eligible for the waiver of fees under [MCR 2.002]." MCR 2.002(A)(1). "A private or public organization is not eligible for a waiver of fees unless an applicable statue provides that no fee(s) shall be required." *Id*.

Assuming a proper request has been made, see MCR 2.002(B),[27] certain individuals are entitled to the waiver of fees, see MCR 2.002(C)-(D) and MCR 2.002(F). "Notwithstanding any other provision of [MCR 2.002], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." MCR 2.002(L). "If a party shows that he or she is receiving any form of means-tested public assistance,[28] the clerk of the court must waive payment of fees as to that party on a form approved by the State Court Administrative Office." MCR 2.002(C). "If a party is represented by a legal services program that is a grantee of the

[25] However, there are some instances in which fees are not required. See, e.g., 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); MCR 3.703(A) (no fees for filing a personal protection action).

[26] MCR 2.002(I) provides special procedures and requirements where an indigent person requests service by publication. See Section 1.11(E) for more information.

[27] See Section 1.11(B) for more information on proper requests to waive filing fees.

[28] "[M]eans-tested public assistance includes but is not limited to: (1) Food Assistance Program through the State of Michigan; (2) Medicaid; (3) Family Independence Program through the State of Michigan; (4) Women, Infants, and Children benefits; (5) Supplemental Security Income through the federal government; or (6) Any other federal, state, or locally administered means-tested income or benefit." MCR 2.002(C).

federal Legal Services Corporation or the Michigan State Bar Foundation, or by a law school clinic that provides services on the basis of indigence, the clerk of the court must waive payment of fees as to that party on a form approved by the State Court Administrative Office." MCR 2.002(D).

"If the clerk of the court is unable to waive fees under [MCR 2.002(C) or MCR 2.002(D)], the clerk shall immediately submit the request for judicial review." MCR 2.002(E).

"If an individual shows that he or she is unable because of indigence to pay fees, the court shall order those fees waived." MCR 2.002(F). "The court must waive fees when the individual lives in a household with gross income under 125% of the federal poverty guidelines. The court must also waive fees when gross household income is above 125% of the federal poverty guidelines if the payment of fees would constitute a financial hardship on the individual." *Id*.

MCR 2.002 "places the initial burden of establishing indigence on the petitioner requesting a waiver of filing fees." *Lewis v Dep't of Corrections*, 232 Mich App 575, 579 (1998) (construing MCR 2.002(F))[29].

B. Proper Request to Waive Filing Fees

"Notwithstanding any other provision of [MCR 2.002], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." MCR 2.002(L). "Waiver of filing fees for prisoners who are under the jurisdiction of the Michigan Department of Corrections [(MDOC)] is governed by MCL 600.2963 and as provided in [MCR 2.002]." MCR 2.002(A)(3).

The individual requesting a waiver of fees under MCR 2.002(C)-(D) or MCR 2.002(F) must file SCAO's fee waiver request form.[30] MCR 2.002(B). "If the request is being made by a prisoner under the jurisdiction of the [MDOC], the prisoner must also file a certified copy of their institutional account showing the current balance and a 12-month history of any deposits and withdrawals." *Id*. "The request must be verified in accordance with MCR 1.109(D)(3)(b) and may be signed either (1) by the individual in whose behalf the request is made; or (2) by a person having knowledge of the facts required to be shown, if the individual in whose behalf the request is made is unable to sign it because of minority or other disability."

[29]Formerly MCR 2.002(D).

[30]The information contained on the form must be nonpublic. MCR 2.002(B).

MCR 2.002(B). If the court finds that the form is incomplete or has a reasonable belief that the request is inaccurate, "the court may conduct further inquiries reasonably necessary to prove indigence or financial hardship." MCR 2.002(K). Any hearing on these inquiries must be held on the record, and the notice of hearing must indicate the issues subject to further inquiry. *Id*.

C. Domestic Relations Cases

"If a party entitled to relief in an action for divorce, separate maintenance, annulment, or affirmation of marriage is qualified for a waiver of filing fees under [MCR 2.002(C)-(D) or MCR 2.002(F)] and is also entitled to an order requiring the other party to pay attorney fees, the court shall order waiver of payment of those fees and shall require the other party to pay them, unless the other party is also qualified to have filing fees waived under [MCR 2.002(C)-(D) or MCR 2.002(F)]. MCR 2.002(H).

"Notwithstanding any other provision of [MCR 2.002], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." MCR 2.002(L).

D. Grant or Denial of a Request to Waive Fees

Waivers processed by the clerk of the court do not require an order by the judge. See MCR 2.002(C)-(D); MCR 2.002(G) (only requiring an order when the judge decides the waiver request). Waiver requests reviewed by the court, see MCR 2.002(E)-(F), require entry of an order granting or denying the request within three business days, and the order must be nonpublic. MCR 2.002(G). "If required financial information is not provided in the waiver request, the judge may deny the waiver." *Id*. Alternatively, if the court finds the waiver request incomplete or reasonably believes it is inaccurate, it may conduct further inquiries, including a hearing on the record. MCR 2.002(K).

"An order denying [the request] shall indicate the reason for denial. [An] order granting [the] request must include a statement that the person for whom fees are waived is required to notify the court when the reason for the waiver no longer exists." MCR 2.002(G).

"Except as otherwise provided in [MCR 2.002(G)(2)(a)], if the court denies a request for fee waiver, the individual may file a request for de novo review within 14 days of the notice denying the waiver." MCR 2.002(G)(2)(a). "A prisoner under the jurisdiction of the Michigan Department of Corrections may file the de novo review request within 21 days of the notice denying the waiver." *Id*. "There is no motion fee for the request. A request for de novo review

automatically stays the case or preserves the filing date until the review is decided. A de novo review must be held within 14 days of receiving the request." *Id*. The de novo review must be conducted by someone other than the judge who made the original decision. See MCR 2.002(G)(2)(c)(*i*) (requiring either the chief judge or another judge assigned by the state court administrator to conduct the de novo review).

"If the court holds a hearing on the request for de novo review, it shall be closed and held on the record. The clerk of the court shall serve notice of the review at least 9 days before the time set for the hearing if served by mail, or at least 7 days before the time set for the hearing if served by delivery under MCR 2.107(C)(1) or [MCR 2.107(C)(2).[31] The Michigan Rules of Evidence do not apply at this hearing." MCR 2.002(G)(2)(b)(*i*). "If a hearing is held, the individual shall bring documents to verify the statements made in the fee waiver request and request for de novo review. The court may question the individual regarding the statements made in the requests." MCR 2.002(G)(2)(b)(*ii)*.

"The court shall enter an order reflecting its decision on the de novo review. If the court denies the request, it shall explain its reasoning in the order." MCR 2.002(G)(2)(c)(*ii*).

E. Payment of Service Fees and Costs of Publication

"If payment of fees has been waived for an individual 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 individual files an ex parte affidavit stating facts showing the necessity for that type of service of process. If known at the time, the affidavit may be included in or with the request to waive fees." MCR 2.002(I).

F. Reinstatement of Requirement for Payment of Fees

Note: The cases discussed in this subsection were published before MCR 2.002 was amended by ADM File No. 2002-37 and 2018-20, effective January 1 and 23, 2019, respectively. Reference to suspensions have been removed from the case summaries, as well was references to costs. In addition, the amendment to MCR 2.002

[31] "Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]." MCR 2.107(G).

included amendments regarding reinstating the requirement to pay fees. It is unclear if these amendments (which now specifically require a finding of fact before reinstating the obligation to pay) impact the analysis in the cases discussed.

"If the payment of fees has been waived under [MCR 2.002], the court may on its own initiative order the individual for whom the fees were waived to pay those fees when, upon a finding of fact, the court determines the reason for the waiver no longer exists." MCR 2.002(J).

Before reinstating the requirement to pay the waived fees, the "trial court must determine whether the litigant is indigent at the time of the revocation of the waiver[.]" *Martin v Dep't of Corrections (On Remand)*, 201 Mich App 331, 335 (1993). A trial court reinstating the obligation to pay filing fees is not required to establish a petitioner's indigency in any particular manner. *Lewis v Dep't of Corrections*, 232 Mich App 575, 582 (1998) (holding that it was "proper that the court attempted to ascertain petitioner's financial status by requiring him to supply the relevant information").

G. Prisoners

Fee waiver issues frequently arise in the context of litigation initiated by prisoners. "Waiver of filing fees for prisoners who are under the jurisdiction of the Michigan Department of Corrections [(MDOC)] is governed by MCL 600.2963 and as provided in [MCR 2.002]." MCR 2.002(A)(3).

MCL 600.2963 addresses claims of indigency in connection with prisoners' civil actions. "MCL 600.2963 requires that a prisoner pursuing a civil action be liable for filing fees." *Johnson v Lakeland Correctional Facility Warden*, 501 Mich 920 (2017). "If the request is being made by a prisoner under the jurisdiction of the [MDOC], the prisoner must also file a certified copy of their institutional account showing the current balance and a 12-month history of any deposits and withdrawals." MCR 2.002(B); MCL 600.2963(1). MCL 600.2963 sets out requirements for payment of filing fees based on the prisoner's financial records. MCL 600.2963(2)-(6). Incarceration cannot be the "sole basis" for a determination of indigency, but a prisoner must be permitted to commence a civil action or file an appeal even if he or she has no assets and no means by which to pay the initial partial filing fee, and the court may suspend or waive the filing fees and costs under MCL 600.2963(1). MCL 600.2963(7). However, if the reason for waiver no longer exists, the court must reinstate the order to pay the fees. *Id*. A trial court's "discretion regarding the claim of indigency is limited to whether the prisoner must pay the filing fee in full immediately, in part, over a period, or

at a later time." *Keenan v Dep't of Corrections*, 250 Mich App 628, 635 (2002), citing MCL 600.2963(2), MCL 600.2963(3), MCL 600.2963(5), and MCL 600.2963(7). If the court denies a request for a fee waiver from a prisoner under the jurisdiction of the MDOC, "the clerk's notice shall indicate that the prisoner must pay the full or partial payment ordered by the court within 21 days after the date of the order, or the filing will be rejected." MCR 2.002(G)(1).

"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." MCL 600.2963(8). However, "MCL 600.2963(8) cannot constitutionally be applied to bar a complaint for superintending control over an underlying criminal case if the bar is based on outstanding fees owed by an indigent-prisoner plaintiff from an earlier case and the prisoner-plaintiff lacks funds to pay those outstanding fees." *In re Jackson (On Remand)*, 326 Mich App 629, 631-632 (2018). When dealing with "criminal cases," there is a "'flat prohibition' . . . against making access to 'appellate processes' turn on the ability to pay." *Id*. at 635, citing *MLB v SLJ*, 519 US 102, 112 (1996). "[A] complaint for superintending control over an underlying criminal case must reasonably be recognized as an 'appellate process,' . . . even though it is an original civil action, and not formally an appeal, under Michigan procedural law." *Jackson*, 326 Mich App at 637 (although the claim for superintending control was "recognized as criminal in nature for purposes of the federal constitutional right of access to the courts," the claim remained classified "as an original civil action subject to the fee-related requirements of MCL 600.2963 (apart from an unconstitutional application of MCL 600.2963(8))").

While it is possible "[c]ases might arise in which a prisoner-plaintiff in a civil action could establish entitlement to an exception to MCL 600.2963(8)," *Jackson* did not apply where prisoner-plaintiff's lawsuit sounded in tort and was not seeking mandamus or superintending control. *Grabinski v Governor*, 330 Mich App 268, 275 (2019). "The holding in *Jackson* was based on the heightened protection given to criminal defendants for access to the courts in criminal cases for purposes of securing the federal constitutional right to the appellate process, . . . [whereas i]n a general civil action, the state is not acting to take away a party's rights." *Id*. at 274 (quotation marks and citation omitted). "[A] civil litigant's status as a prisoner, without more, does not transform a civil action into a criminal matter entitled to heightened protection." *Id*. Furthermore, "MCL 600.2963(8) has a rational basis in deterring frivolous prisoner litigation by requiring a prisoner to complete payment of outstanding fees to [the Michigan Court of Appeals] for a prior civil case before being allowed to proceed with a new civil case in [that court]." *Grabinski*, 330 Mich at 275.

The agency with custody of a prisoner must remove required amounts from the institutional account. MCL 600.2963(9). See also MCL 791.268, requiring withdrawal from prisoner accounts if installment payments are ordered under MCL 600.2963.

H. Standard of Review

A trial court's decision to reinstate previously waived fees is reviewed for an abuse of discretion. See *Lewis v Dep't of Corrections*, 232 Mich App 575, 584 (1998).

1.12 Appointment of Foreign Language Interpreter

A. Court Rule Regarding Foreign Language Interpreters

The purpose of MCR 1.111 is to "provide court-appointed foreign language interpreters for . . . [limited English proficient (LEP)] persons to support their access to justice[.]"[32] ADM File No. 2012-03. 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.[33] See also MCR 1.111(B)(1).

B. Determining Whether to Appoint a Foreign Language Interpreter

An interpreter must be appointed for a testifying witness or a party if interpretation services "are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1). The court has discretion to appoint an interpreter for other persons. MCR 1.111(B)(2).

"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

[32] For a summary of MCR 1.111, see http://courts.mi.gov/siteassets/court-administration/access-temporary/foreign-language/mcr_-1_111_rulesummary.pdf. For information on Language Access, see http://courts.michigan.gov/administration/court-programs/foreign-language-interpreter-certification-program/.

[33] ADM File No. 2012-03 also added MCR 8.127 to establish a Foreign Language Board of Review for regulation of foreign language interpreters.

court, the party must submit financial information." MCR 1.111(F)(7).

Committee Tips:

A Language Access Coordinator has been designated in each court to assist with questions or requests regarding appointment of foreign language interpreters.

Whether to appoint multiple interpreters is in the discretion of the trial court. See MCR 1.111(E)(1) and MCR 1.111(F)(3). The court rules were purposefully crafted to allow the trial courts broad discretion to consider all of the facts of any circumstance and decide for themselves. For example, in a situation in which a defendant and a victim both need an interpreter, the court should seriously consider appointing separate interpreters for each. The court should avoid any appearance that proceedings are not equitable.

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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, 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." 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 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.*

"In a court having two or more judges, the chief judge shall decide the request for review de novo." MCR 1.111(H)(2)(a). "In a single-judge court, or if the denial was issued by a chief judge, the judge shall refer the request for review to the state court administrator for assignment to another judge, who shall decide the request de novo." MCR 1.111(H)(2)(b).

If there is a pending request for review under MCR 1.111(H), the underlying litigation is stayed and the request for review must be decided on an expedited basis. MCR 1.111(H)(2)(c)-(d).

"No motion fee is required for a request for review made under [MCR 1.111(H)]." MCR 1.111(H)(2)(e).

C. 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." MCR 1.111(C). "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." *Id*.

D. 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).

2. Qualified Foreign Language Interpreters

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

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 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, see 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.
>
> (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).

E. 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).

F. 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).

G. 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).

H. 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).

I. 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).

"Any time a court . . . orders reimbursement of interpretation costs, it shall do so by written order." MCR 1.111(H)(1). "An LEP individual 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.* "In a court having two or more judges, the chief judge shall decide the request for review de novo." MCR 1.111(H)(2)(a). "In a single-judge court, or if the denial was issued by a chief judge, the judge shall refer the request for review to the state court administrator for assignment to another judge, who shall decide the request de novo." MCR 1.111(H)(2)(b).

If there is a pending request for review under MCR 1.111(H), the underlying litigation is stayed and the request for review must be decided on an expedited basis. MCR 1.111(H)(2)(c)-(d).

"No motion fee is required for a request for review made under [MCR 1.111(H)]." MCR 1.111(H)(2)(e).

1.13 Appointment of Interpreter for Deaf or Deaf-Blind Person

A deaf or deaf-blind person has the right to a qualified interpreter and to meaningful participation in judicial or investigative proceedings. *People v Brannon*, 194 Mich App 121, 127 (1992); *Bednarski v Bednarksi*, 141 Mich App 15, 19 (1985); MCL 393.503(3); MCL 393.504(1).

A. Determining Whether to Appoint an Interpreter for Deaf or Deaf-Blind Person

1. Appointment for Witness or Party

"In any action before a court or a grand jury where a deaf or deaf-blind person is a participant in the action, either as a plaintiff, defendant, or witness, the court shall appoint a qualified interpreter to interpret the proceedings to the deaf or deaf-blind person, to interpret the deaf or deaf-blind person's testimony or statements, and to assist in preparation of the action with the deaf or deaf-blind person's counsel." MCL 393.503(1).

"In a proceeding before an appointing authority, other than a court, the appointing authority shall appoint a qualified interpreter to interpret the proceedings to the deaf or deaf-blind person and to interpret the deaf or deaf-blind person's testimony or statements in any proceeding before the appointing authority." MCL 393.503(2).

"The Deaf Persons' Interpreters Act . . . provides for the mandatory appointment of an interpreter in any action before a court or a grand jury where a deaf person is a participant in the action, either as a plaintiff, defendant, or witness, to perform three specific functions: (1) to interpret the proceedings to the deaf person; (2) to interpret the deaf person's testimony or statements; and (3) to assist in preparation of the action with the deaf person." *Bednarski v Bednarksi*, 141 Mich App 15, 20 (1985) (the defendant was entitled to a new trial where the procedure followed at trial only satisfied the second function).

The trial court's decision to deny the defendant's motion for a new trial based upon the failure of the court to appoint an interpreter on behalf of the defendant was insufficiently supported, and the Michigan Supreme Court remanded for "supplemental findings as to why an interpreter was not appointed on the defendant's behalf" where "the record include[d] statements by the court that it was aware that the defendant had a hearing problem at the time the defendant waived his right to a jury trial . . . and during the trial itself[.]" *People v Thomas (Michael)*, 441 Mich 879 (1992) ("[t]he record also contain[ed] an assertion by defense counsel during trial that the defendant was 80% deaf and also suggest[ed] that the court appointed an interpreter for the defendant to assist in proceedings in another case that took place at about the same time as or soon after the trial of this matter"). *Id*.

2. Notification of Need for/Right to Interpreter

"Each deaf or deaf-blind person whose appearance in an action or other proceeding entitles the deaf or deaf-blind person to a qualified interpreter shall provide reasonable notice to the appointing authority of the need of a qualified interpreter before the appearance." MCL 393.504(1).

"An appointing authority, when it knows a deaf or deaf-blind person is or will be coming before it, shall inform the deaf or deaf-blind person of the right to a qualified interpreter." MCL 393.504(2). See also *Bednarski v Bednarksi*, 141 Mich App 15, 20 (1985) ("an appointing authority . . . who knows a deaf person will be coming before it is obliged to inform the deaf person of the right to an interpreter").

3. Reasonable Proof of Deafness

"An appointing authority may require a person requesting the appointment of a qualified interpreter to furnish reasonable

proof of the person's deafness, if the appointing authority has reason to believe that the person is not deaf or deaf-blind." MCL 393.504(3).

4. Making a Determination

"A trial court's decision regarding whether an individual is a deaf person is based upon factual findings[.]" *People v Brannon*, 194 Mich App 121, 127-128 (1992).

"A qualified interpreter shall not be appointed unless the appointing authority and the deaf or deaf-blind person make a preliminary determination that the qualified interpreter is able to readily communicate with the deaf or deaf-blind person and to interpret the proceedings in which the deaf or deaf-blind person is involved." MCL 393.503(4). "[T]he record should affirmatively disclose that the required preliminary determination was made." *Bednarski v Bednarksi*, 141 Mich App 15, 22 (1985).

"If a qualified interpreter states that the interpreter is unable to render a satisfactory interpretation and that an intermediary interpreter or deaf interpreter will improve the quality of the interpretation, the appointing authority shall appoint an intermediary interpreter or deaf interpreter to assist the qualified interpreter." MCL 393.503(5).

5. Fulfilling Requests

"The appointing authority shall channel requests for qualified interpreters, intermediary interpreters, and deaf interpreters through the division." MCL 393.508(1). "The division shall compile and update annually a listing of qualified interpreters, intermediary interpreters, and deaf interpreters and shall make this listing available to an appointing authority that may need the services of a qualified interpreter, intermediary interpreter, or deaf interpreter as required by [the Deaf Persons' Interpreters Act, MCL 393.501 *et seq*.]" MCL 393.508(2).

Committee Tip:

An ADA Coordinator or contact has been designated in each court to assist with questions or requests regarding accommodations for individuals who are deaf, deaf-blind, or hard of hearing.

B. Waiver of Right to Interpreter

"The right of a deaf or deaf-blind person to a qualified interpreter shall not be waived except by a request for waiver in writing by the deaf or deaf-blind person." MCL 393.503(3).

"A written waiver of a plaintiff or defendant is subject to the approval of the deaf or deaf-blind person's counsel and the approval of the appointing authority." MCL 393.503(3). See also *Bednarski v Bednarksi*, 141 Mich App 15, 20 (1985) ("[a]ny waiver of the right to an interpreter must be in writing by the deaf person).

C. Classifications of Interpreters for Deaf Person[34]

"If an interpreter is required as an accommodation for a deaf or deaf-blind person under state or federal law, the interpreter shall be a qualified interpreter." MCL 393.503a. An interpreter may be a qualified interpreter, a qualified oral interpreter, a qualified sign language interpreter, or an intermediary interpreter or deaf interpreter. MCL 393.502(e)-(h).

D. Appointing More Than One Interpreter

In a situation where both parties and several additional witnesses were deaf, the Court of Appeals stated that "the provisions of [the Deaf Persons' Interpreters Act] require the appointment of an interpreter for each plaintiff and defendant, and a third interpreter for the court, if necessary." *Bednarski v Bednarksi*, 141 Mich App 15, 21 (1985).

E. Interpreter Oath or Affirmation

"Before a qualified interpreter participates in any action or other proceeding because of an appointment under [the Deaf Persons' Interpreters Act, MCL 393.501 *et seq.*], the qualified interpreter shall make an oath or affirmation that the qualified interpreter will make a true interpretation in an understandable manner to the deaf or deaf-blind person for whom the qualified interpreter is appointed

[34]On February 22, 2016, the Michigan Department of Civil Rights (MDCR)—Division of Deaf, Deaf-Blind, and Hard of Hearing released its policies and procedures for certified interpreters who provide American Sign Language (ASL) services enforcing Michigan's Deaf Persons' Interpreters Act and the Qualified Interpreter-General Rules. For more information, see the State Court Administrative Office's Memorandum.

and that the qualified interpreter will interpret the statements of the deaf or deaf-blind person in the English language to the best of the interpreter's skill." MCL 393.506(1).

The Court of Appeals noted that MCL 393.506(1) may have been violated where "[p]rior to trial, counsel stipulated that the interpreter would 'paraphrase' the answers of the witnesses to 'expedite' the proceeding." *Bednarski v Bednarksi*, 141 Mich App 15, 22 (1985). The Court recognized that "[d]ue to the conceptual nature of sign language, a verbatim translation of oral testimony (or vice versa) may not be possible"; "[h]owever, the very fact of the unavoidable translation difficulty renders the need for accurate and skillful interpretation even more critical." *Id*.

"The appointing authority shall provide recess periods as necessary for the qualified interpreter when the qualified interpreter so indicates." MCL 393.506(1).

"The information that the qualified interpreter, intermediary interpreter, or deaf interpreter gathers from the deaf or deaf-blind person pertaining to any action or other pending proceeding shall at all times remain confidential and privileged, unless the deaf or deaf-blind person executes a written waiver allowing the information to be communicated to other persons and the deaf or deaf-blind person is present at the time the information is communicated." MCL 393.506(2).

F. Interpreter Costs

"A court appointed interpreter, qualified interpreter, intermediary interpreter, or deaf interpreter shall be paid a fee by the court that it determines to be reasonable." MCL 393.507(1).

"A qualified interpreter, intermediary interpreter, or deaf interpreter appointed by an appointing authority other than a court shall be paid a fee by the appointing authority . . . out of funds available to the appropriate appointing authority." MCL 393.507(1)-(2).

"In addition, a qualified interpreter, intermediary interpreter, or deaf interpreter shall be paid for his or her actual expenses for travel, meals, and lodging." MCL 393.507(1).

"A qualified interpreter appointed for the deaf or deaf-blind person shall be available for the duration of the deaf or deaf-blind person's participation in the action or other proceeding." MCL 393.507(3).

1.14 Communication Equipment

"A court may, on its own initiative or on the written request of a party, direct that communication equipment be used for a motion hearing, pretrial conference, scheduling conference, or status conference. The court must give notice to the parties before directing on its own initiative that communication equipment be used." MCR 2.402(B).

"A party wanting to use communication equipment must submit a written request to the court at least 7 days before the day on which such equipment is sought to be used, and serve a copy on the other parties, unless good cause is shown to waive this requirement. The requesting party also must provide a copy of the request to the office of the judge to whom the request is directed." MCR 2.402(B).

"The court may, with the consent of all parties or for good cause, direct that the testimony of a witness be taken through communication equipment. A verbatim record of the proceeding must still be made." MCR 2.402(B).

Unless the court directs otherwise, the party initiating the use of communication equipment bears the cost for its use. MCR 2.402(C). If the court initiates the use of communication equipment, the cost must be shared equally among the parties. *Id*.

1.15 Videoconferencing[35]

Consistent with the court rules, and subject to MCR 2.407(4), "courts may determine the manner and extent of the use of videoconferencing technology and may require participants to attend court proceedings by videoconferencing technology." MCR 2.407(B)(2). "All proceedings occurring by videoconferencing are subject to requirements, standards, and guidelines published by the [SCAO] and the criteria set forth in [MCR 2.407(C)]."[36] MCR 2.407(B)(1).

Additionally, "a court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any civil proceeding." MCR 2.408(A)(1). However, "[e]xcept as otherwise provided in [MCR 2.408(A)(2)], the use of videoconferencing technology shall not be used in bench or jury trials, or any civil proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court after all parties have had notice and opportunity to be heard on the use of

[35]See Section 1.3(B) for additional information on judicial appearances by videoconferencing.

[36]See Section 1.15(C) for additional information on the criteria for videoconferencing.

videoconferencing technology. MCR 2.408 "does not supersede a participant's ability to participate by telephonic means under MCR 2.402." MCR 2.408(A)(3).

A participant may request to physically appear in person for any proceeding. MCR 2.407(B)(4). "If there is a request to appear in person, or a participant is found to be unable to adequately use the technology, to hear or understand or be heard or understood, the presiding judge and any attorney of record for said participant must appear in person with the participant for said proceeding. Subject to [MCR 2.407(B)(5)], the court must allow other participants to participate using videoconferencing technology." MCR 2.407(B)(4).

A court may determine "that a case is not suited for videoconferencing, and may require any hearing, even a proceeding categorized as presumptively subject to videoconferencing technology, to be conducted in person." MCR 2.407(B)(5). However, a court must "consider the factors listed in [MCR 2.407(C)]" and "state its decision and reasoning, either in writing or on the record, when requiring in-person proceedings in each case where there is a presumption for the use of videoconferencing technology." MCR 2.407(B)(5)(a)-(b).

Courts "must provide reasonable notice to participants of the time and mode of a proceeding. If a proceeding will be held using videoconferencing technology, the court must provide reasonable notice of the way(s) to access that proceeding." MCR 2.407(B)(6). Courts must also "allow a party and their counsel to engage in confidential communication during a proceeding being conducted by videoconferencing technology." MCR 2.407(B)(7).

"If, during the course of a videoconference proceeding, the court or a participant is unable to proceed due to failure of technology, the court must reschedule the proceeding and promptly notify the participants of the rescheduled date and time and whether the proceeding will be held using videoconferencing technology or in person." MCR 2.407(B)(8). "All proceedings that are held using videoconferencing technology or communication equipment must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law." MCR 2.407(B)(9). "Courts must provide access to a proceeding held using videoconferencing technology to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule." MCR 2.407(B)(10).

See also MCL 600.2164a, which addresses videoconference testimony by an expert witness at trial.

A. Use of Videoconferencing in Circuit Court

In circuit court, "[s]ubject to a determination by the court that the use of videoconferencing technology is inappropriate for a particular case under an analysis as contained in MCR 2.407(C), the use of videoconferencing technology shall be presumed for:

(1) civil pretrials;

(2) early scheduling conferences under MCR 2.401(B);

(3) motions filed pursuant to MCR 2.119 regarding discovery;

(4) adjournments;

(5) modifications to scheduling orders;

(6) motions in limine;

(7) postjudgment collection or discovery matters;

(8) testimonial proofs for hearings under MCR 3.210(A)(4);

(9) motions to correct, strike, or amend pleadings; and

(10) motions pursuant to MCR 2.116." MCR 2.407(B).

B. Use of Videoconferencing in District Court

In district court, "[s]ubject to a determination by the court that the use of videoconferencing technology is inappropriate for a particular case under an analysis as contained in MCR 2.407(C), the use of videoconferencing technology shall be presumed for:

(1) civil pretrials;

(2) early scheduling conferences under MCR 2.401(B);

(3) motions filed pursuant to MCR 2.119 regarding discovery;

(4) adjournments;

(5) postjudgment collection matters; and

(6) motions to correct, strike, or amend pleadings." MCR 2.407(C).

C. Criteria for Videoconferencing

"In determining in a particular case 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 and the parties to participate in a videoconference.

(2) Whether a specific articulable prejudice would result.

(3) The convenience of the parties and the proposed witness(es), the cost of producing the witness in person in relation to the importance of the offered testimony, and the potential to increase access to courts by allowing parties and/or their counsel to appear by videoconferencing technology.

(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 court has reason to believe that the participants in this hearing will not be able to maintain the dignity, solemnity, and decorum of court while using videoconferencing technology, or that the use of videoconferencing technology will undermine the integrity, fairness, or effectiveness of the proceeding.

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

(7) Whether the court can sufficiently control the participants in this hearing or matter 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 person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.

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

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

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

D. Request for Videoconferencing and Participant Contact Information

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 will be using videoconferencing technology must provide the court with the participant's contact information, including mobile phone number(s) and email address(es), in advance of the court date when videoconferencing technology will be used. A court may collect the contact information using an SCAO-approved form. The contact information form used under this provision shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan.
>
> (3) There is no motion fee for requests submitted under this rule." MCR 2.407(D).

Chapter 2: Jurisdiction, Venue, and Standing

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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 are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding." *In re Fraser Estate*, 288 Mich 392, 394 (1939). See also *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 228 (2016).

Courts with jurisdiction may decline to exercise it based on forum non conveniens, which is "the 'discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.'" *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 604 (2006), quoting *Black's Law Dictionary* (6th ed).

2.2 Subject-Matter Jurisdiction in General

"Subject-matter jurisdiction refers to a court's power to act and authority to hear and determine a case." *Usitalo v Landon*, 299 Mich App 222, 228 (2012). Every court is required to confirm that subject-matter jurisdiction exists, either upon challenge or sua sponte. *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 560 (2013). "'Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending.'" *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, (2018), quoting *Altman v Nelson*, 197 Mich App 467, 472-473 (1992). "[A] judgment entered by a court that lacks subject-matter jurisdiction is void[.]" *Clohset*, 302 Mich App at 561.

Parties may not waive defects in subject matter jurisdiction. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204 (2001). Accordingly, 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). See also *In re Brody Living Trust*, 321 Mich App 304, 309 (2017) (holding that "subject-matter jurisdiction cannot be waived and can be raised at any time by any party or the court") (citations, alterations, and quotation marks omitted), vacated in

part on other grounds, 501 Mich 1094, 1094 (2018).[1] "Although parties have no time constraints when challenging subject-matter jurisdiction, procedurally a nonparty wishing to do so must first be a party to the action in the action's normal course." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 380 (2019).

"The existence of subject-matter jurisdiction does not depend on the correctness of the trial court's ultimate legal conclusions." *Usitalo*, 299 Mich App at 228. "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.

A. Transfer

"Except as otherwise provided in [MCR 2.227]," a court lacking subject matter jurisdiction may transfer the case to another Michigan court with proper jurisdiction. MCR 2.227(A). See also MCR 4.002 (transfer of actions from district court to circuit court). 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." MCR 2.227(A).

"A circuit court may not transfer an action to district court under [MCR 2.227] based on the amount in controversy unless:

> (a) the parties stipulate in good faith to the transfer and to an amount in controversy not greater than the applicable jurisdictional limit of the district court; or
>
> (b) 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." MCR 2.227(B)(1).

1. Order Transferring Jurisdiction, Case Records, and Required Fees

"The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court" and "order the plaintiff to pay the applicable statutory filing fee directly to the receiving court, unless fees have been waived in accordance with MCR 2.002."[2] MCR

[1] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[2] "Notwithstanding any other provision of [MCR 2.002], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." MCR 2.002(L). See Section 1.11 for more information on waiver of fees.

2.227(C)(1). "The [transferring] court may also order the plaintiff to pay reasonable compensation and attorney fees to the defendant for filing the case in the wrong court." *Id*.

"The transferring court must serve the order [of transfer] on the parties and send a copy to the receiving court. The clerk of the court must prepare the case records for transfer in accordance with the orders entered under [MCR 2.227(C)(1)] and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method." MCR 2.227(C)(2). "If part of the action remains pending in the transferring court, certified copies of the papers filed may be forwarded, with the cost to be paid by the plaintiff." MCR 2.227(E)(1). "The receiving court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the transferring court. The receiving court must notify the plaintiff of the new case number in the receiving court, the amount due, and the due date." MCR 2.227(C)(3).

Jury trial waivers entered in the original court are not effective after transfer; however, jury trial demands are preserved. MCR 2.227(E)(3). "A party who had waived trial by jury may demand a jury trial after transfer by filing a demand and paying the applicable jury fee within 28 days after the filing fee is paid under [MCR 2.227(D)(1)]." MCR 2.227(E)(3). If a jury fee was paid prior to transfer, "the clerk of the transferring court must forward it to the clerk of the receiving court as soon as possible after the case records have been transferred." MCR 2.227(D)(2).

2. Proceedings After Transfer

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(E)(1).[3] The receiving court must dismiss the action if the plaintiff fails to pay the filing fee or fails to submit proof of the payment of any expenses ordered by the transferring court within 28 days of the date of the transfer order. MCR 2.227(D)(1).

The time for filing any further pleadings runs from the date the filing fee is paid under MCR 2.227(D)(1). MCR 2.227(E)(1). The receiving court must issue a new summons to the plaintiff if a defendant was not served with process when the action was transferred. MCR 2.227(E)(2).

[3]Formerly MCR 2.227(B)(1).

B. Internal Affairs of Foreign Corporations Doctrine

The internal affairs of foreign corporations doctrine "is the rule that the courts of one State will not exercise the power of deciding controversies relating merely to internal management of the affairs of a corporation organized under the laws of another State or of determining rights dependent upon such management, but will leave questions relating to the management of the internal affairs of a foreign corporation to be settled by the tribunals of the State which created the corporation." *Wojtczak v American United Life Ins Co*, 293 Mich 449, 452 (1940) (quotation marks and citation omitted). However, "circuit courts in Michigan have broad subject-matter jurisdiction over claims involving corporations," MCL 600.3605, and "*Wojtczak* should not be read as negating the subject-matter jurisdiction the trial court otherwise holds under MCL 600.605." *Daystar Seller Fin, LLC v Hundley*, 326 Mich App 31, 37 (2018). Rather, "*Wojtczak* simply recognizes that the choice-of-law considerations implicated by the internal affairs doctrine should guide a trial court's discretion in determining whether it ought to decline jurisdiction over certain actions involving foreign corporations that would be more appropriately adjudicated in another forum." *Id*. at 37-38 ("the trial court erred as a matter of law in dismissing [the] case for want of subject-matter jurisdiction" because "the claims [of the] case [did] not require the trial court to become involved in the management of the internal affairs of a foreign business entity").

C. Ecclesiastical Abstention Doctrine

"The ecclesiastical abstention doctrine arises from the Religion Clauses of the First Amendment of the United States Constitution and reflects [the Michigan Supreme] Court's longstanding recognition that it would be inconsistent with complete and untrammeled religious liberty for civil courts to enter into a consideration of church doctrine or church discipline, to inquire into the regularity of the proceedings of church tribunals having cognizance of such matters, or to determine whether a resolution was passed in accordance with the canon law of the church, except insofar as it may be necessary to do so, in determining whether or not it was the church that acted therein." *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 337-338 (2017) (quotation marks and citations omitted).

The ecclesiastical abstention doctrine "requires a case-specific inquiry that informs how a court must adjudicate certain claims within its subject matter jurisdiction; it does not determine whether the court has such jurisdiction in the first place." *Winkler*, 500 Mich at 327. "The existence of subject matter jurisdiction turns not on the particular facts of the matter before the court, but on its general legal classification." *Id.* "What matters . . . is whether the actual

adjudication of a particular legal claim would require the resolution of ecclesiastical questions; if so, the court must abstain from resolving those questions itself, defer to the religious entity's resolution of such questions, and adjudicate the claim accordingly." *Id.* at 341-342 (holding that "[i]t is for the circuit court, in the first instance, to determine whether and to what extent the adjudication of the legal and factual issues presented by the plaintiff's claim would require the resolution of ecclesiastical questions").

D. Standard of Review

Whether a court has subject-matter jurisdiction is a question of law that is reviewed de novo. *Mich Ass'n of Home Builders v City of Troy*, 497 Mich 281, 285 (2015).

2.3 District Court Subject-Matter Jurisdiction

The district court has the following jurisdiction:

- **Civil claims of $25,000 or less**. MCL 600.8301(1).

  - "[I]n its subject-matter jurisdiction inquiry, a district court determines the amount in controversy using the prayer for relief set forth in the plaintiff's pleadings, calculated exclusive of fees, costs, and interest." *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 223-224 (2016). In the absence of bad faith in the pleadings, even if a plaintiff's proofs exceed the $25,000 jurisdictional limit of the district court under MCL 600.8301(1), "the prayer for relief controls when determining the amount in controversy, and the limit of awardable damages." *Hodge*, 499 Mich at 221, 224 (concluding that "in adopting MCL 600.8301, the Legislature intended to continue the longstanding practice of determining the jurisdictional amount based on the amount prayed for in the complaint"; thus, where a district court plaintiff pleads a case of damages for $25,000 or less and obtains a verdict for more than that amount, he or she is limited to the jurisdictional amount ($25,000)).

  - "A joint stipulation in good faith to an amount in controversy that has been approved by the court necessarily governs a court's subject-matter jurisdiction, as any pleading that contradicts such a joint stipulation is unjustifiable and cannot be proved." *Krolczyk v Hyundai Motor America*, 507 Mich 966, 966 n 2 (2021) (cleaned up) (not addressing "whether a court has subject-matter jurisdiction if the parties knowingly stipulate to an unjustifiable amount in controversy in

order to provide that court with subject-matter jurisdiction where it otherwise would not possess subject-matter jurisdiction over that action"). In *Krolczyk*, 507 Mich at 966, the parties initially filed a complaint in circuit court stating that the amount in controversy exceeded $25,000. "After defendants rejected a case evaluation award of $14,000 to plaintiffs, the parties filed a stipulation in the circuit court that the amount in controversy was less than $25,000 and requested that the case be transferred to the district court pursuant to MCR 2.227." *Krolczyk*, 507 Mich at 966. "The failure of the parties to explicitly stipulate to an appropriate amendment of the *complaint* when they requested that the circuit court transfer the case to the district court, as required by Administrative Order No. 1998-1, . . . did not deprive the district court of subject-matter jurisdiction over the action." *Krolczyk*, 507 Mich at 966 ("[a]ssuming that the circuit court should not have transferred the case pursuant to AO 1998-1 without an express stipulation to an appropriate amendment of the complaint, any error in granting the transfer without such a stipulation was a procedural error that defendants waived by failing to challenge the transfer within a reasonable time after it occurred") (emphasis added).

- Generally, under the American rule, "each party bears its own litigation expenses, including that party's own attorney fees, and therefore, [those] expenses are usually not part of the matter at controversy between the parties." *ABCS Troy, LLC v Loancraft, LLC*, 337 Mich App 125, 132 (2021). However, "the American rule is not an absolute one and . . . parties can contract around it[.]" *Id*. "When parties do this, a claim of attorney fees under a contractual fee-shifting provision is one for general damages," and "general damages count toward the amount in controversy." *Id*. at 132-133, 139-141 (noting that although a party cannot know for certain the amount of attorney fees at the beginning of a lawsuit, when "a party makes a claim for attorney fees under [a contractual] provision, then that party can submit a reasonable estimate of such fees that it expects to incur during the lawsuit for purposes of determining the amount in controversy"; additionally, "a defendant can bring a counterclaim . . . seeking relief in an amount beyond the district court's jurisdictional limit"). See Section 8.6(F) for additional information on an award of contractual attorney fees.

- The circuit court properly granted summary disposition under MCR 2.116(C)(4) because the district court had exclusive jurisdiction where, despite the plaintiff's claim

of damages in excess of $25,000, "the undisputed evidence showed that plaintiff's claim for unpaid legal services under any theory 'could not be proved' to exceed $25,000." *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 721 (2017), quoting *Hodge*, 499 Mich at 222 n 31.

- **Civil infractions**.[4] MCL 600.8301(2).

  - Although the Family Division of the Circuit Court generally has jurisdiction over all offenses committed by a person who is under 18 years of age, MCL 712A.2, it "may enter into an agreement with any or all district courts or municipal courts within the court's geographic jurisdiction to waive jurisdiction over any or all civil infractions alleged to have been committed by juveniles within the geographic jurisdiction of the district court or municipal court. The agreement shall specify for which civil infractions the court waives jurisdiction." MCL 712A.2e(1). "For a civil infraction waived under [MCL 712A.2e(1)] committed by a juvenile on or after the effective date of the agreement, the district court or municipal court has jurisdiction over the juvenile in the same manner as if an adult had committed the civil infraction." MCL 712A.2e(2). However, the family division "has jurisdiction over juveniles who commit any other civil infraction." *Id*.

- **Summary proceedings to recover land**.[5] MCL 600.5704. However, damage claims in excess of the jurisdictional limit must be removed to circuit court. *Ames v Maxson*, 157 Mich App 75, 80-81 (1987), rev'd on other grounds by *Mich Nat'l Bank v Cote*, 451 Mich 180 (1996)[6]; MCR 4.201(H)(2)(b); MCR 4.202(I)(4). "When removal of a money claim exceeding the jurisdiction of the district court takes place, the summary proceedings claim remains within the jurisdiction of the district court." *Adamski v Cole*, 197 Mich App 124, 128 (1992). "A summary proceedings action need not be removed from the court in which it is filed because

[4]See the Michigan Judicial Institute's civil infractions quick reference materials for additional information on processing civil infractions. See also the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 1 for more information on civil infractions and Chapter 2 for more information on traffic proceedings involving juveniles.

[5]See the Michigan Judicial Institute's flowchart of summary proceedings for information on processing summary proceeding actions. See also the Michigan Judicial Institute's *Residential Landlord-Tenant Law Benchbook*, Chapter 4 for more information on summary proceedings to evict, and Chapter 7 for more information on summary proceedings to recover property under a forfeited land contract.

[6]For more information on the precedential value of an opinion with negative subsequent history, see our note.

an equitable defense or counterclaim is interposed." MCR 4.201(H)(2)(a).

- **Criminal**. MCL 600.8311.
  - 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*. MCL 600.8311(e). There is no preliminary examination for any misdemeanor case that will be tried in a district court. *Id.*
  - Circuit court arraignments in all felony cases and misdemeanor cases not cognizable by the district court under MCL 766.13. MCL 600.8311(f). See also MCR 6.111(A) (allowing the district court judge to take a felony plea as provided by court rule). However, sentencing for felony cases and misdemeanor cases must be conducted by a circuit judge. MCL 600.8311(f); MCL 766.4(3); MCR 6.111(A).
  - The district court may accept a plea in felony cases and misdemeanor cases not cognizable by the district court under MCL 766.4(3). However, sentencing for felony cases and misdemeanor cases must be conducted by a circuit judge. *Id*. See also MCL 600.8311(f); MCR 6.111(A). The name of the circuit judge assigned to the case must be made available to the litigants prior to entry of the plea. *Id*.
  - 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*, 298 Mich App 166, 177 (2012).

- **Small claims**[7] in which the amount claimed does not exceed the following:
  - Beginning January 21, 2021, $6,500.00.
  - Beginning January 1, 2024, $7,000.00. MCL 600.8401(d)-(e).

Generally, the district court does not have jurisdiction over actions for injunctions, divorce, or actions that are historically equitable in nature. MCL 600.8315.[8] However, the district court has been granted limited equitable jurisdiction and authority concurrent with the circuit court pursuant to MCL 600.8302(1) for the following types of matters:

- In small claims cases, injunctions and orders rescinding or reforming contracts. MCL 600.8302(2).
- In summary proceedings (Chapter 57 of the Revised Judicature Act), equitable claims regarding interests in land and equitable claims arising out of foreclosure, partition, or public nuisances. MCL 600.8302(3). See also *Mfr Hanover Mtg Corp v Snell*, 142 Mich App 548, 554 (1985) (noting the district court has jurisdiction over equitable claims and defenses involving a mortgagor's interest in property).[9]
- In municipal civil infraction actions (Chapter 87 of the Revised Judicature Act), to issue and enforce any judgment, writ, or order necessary to enforce the ordinance. MCL 600.8302(4).
- In forfeiture proceedings (Chapter 47 of the Revised Judicature Act), to issue and enforce any order or judgment relating to the forfeiture action. MCL 600.8303.
- Attachment and garnishment under certain conditions. MCL 600.8306.

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[7] See the Michigan Judicial Institute's small claims checklist for information on processing small claims actions.

[8] "However, the district court has jurisdiction and power to make any order proper to fully effectuate the district court's jurisdiction and judgments." MCL 600.8315.

[9] 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 v No Name Corp (On Remand)*, 302 Mich App 550, 561-562 (2013), 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)."

- Civil actions to recover the possession of goods or chattels which are unlawfully taken or unlawfully detained if within the limitations of the jurisdictional amount and venue otherwise applicable to the district court. MCL 600.8308.

A. Concurrent Jurisdiction

Some district courts are under concurrent jurisdiction plans pursuant to MCL 600.401.[10] However, there are some limitations on a district court's jurisdiction under a concurrent jurisdiction plan:

> "(a) The circuit court has exclusive jurisdiction over appeals from the district court and from administrative agencies as authorized by statute.
>
> (b) The circuit court has exclusive jurisdiction and power to issue, hear, and determine prerogative and remedial writs consistent with section 13 of article VI of the state constitution of 1963." MCL 600.8304.

Under a concurrent jurisdiction plan, any magistrate in any of the district courts involved in the concurrent jurisdiction plan approved by the Michigan Supreme Court is authorized to use any powers granted to them by their judge under the local administrative order (LAO), which must outline the duties that the district court magistrate is authorized to perform pursuant to statute. See MCL 600.401, MCL 600.8304, MCL 600.8501, Administrative Order No. 2009-6, 485 Mich xcv (2009). See also the Michigan Judicial Institute's *District Court Magistrate Manual*, Chapter 1, for more information on authority of district court magistrates.

B. Removal to Circuit Court

MCR 4.002 covers the transfer of an action from district court to circuit court.

1. Counterclaim or Cross-Claim in Excess of Jurisdiction

> "If a defendant asserts a counterclaim or cross-claim seeking relief of an amount or nature beyond the jurisdiction or power of the district court in which the action is pending, and accompanies the notice of the claim with a statement verified in the manner prescribed by MCR 1.109(D)(3) indicating that the defendant is justly entitled to the relief demanded, the clerk shall

[10] See Section 2.6 on concurrent jurisdiction.

record the pleadings and present them to the judge to whom the action is assigned." MCR 4.002(A)(1). "The judge shall either order the action transferred to the circuit court to which appeal of the action would ordinarily lie or inform the defendant that transfer will not be ordered without a motion and notice to the other parties." *Id.*[11]

2. Change of Condition, Circumstance, or Unknown Facts Requiring Relief in Excess of Jurisdiction

"A party may, at any time, file a motion with the district court in which an action is pending, requesting that the action be transferred to circuit court. The motion must be supported by a statement verified in the manner prescribed by MCR 1.109(D)(3) indicating that

> (a) due to a change in condition or circumstance, or
>
> (b) due to facts not known by the party at the time the action was commenced, the party wishes to seek relief of an amount or nature that is beyond the jurisdiction or power of the court to grant." MCR 4.002(B)(1).

"If the district court finds that the party filing the motion may be entitled to the relief the party now seeks to claim and that the delay in making the claim is excusable, the court shall order the action transferred to the circuit court to which an appeal of the action would ordinarily lie." MCR 4.002(B)(2).

3. Order for Transfer, Case Records, and Required Fees

"The district court must enter all necessary orders pertaining to the certification and transfer of the action to the circuit court" and "order the moving party to pay the applicable statutory filing fee directly to the circuit court, unless fees have been waived in accordance with MCR 2.002."[12] MCR 4.002(C)(1). The order must be entered on a SCAO-approved form. MCR 2.226(A). If the order "is not prepared as required under [MCR 2.226(A)], and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the clerk of the receiving court shall refuse to accept the

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[11] MCR 4.002(C), MCR 4.002(D), MCR 4.201(H)(2), and MCR 4.202(I)(4) govern transfer of summary proceedings to recover possession of premises. MCR 4.002(A)(2).

[12] "Notwithstanding any other provision of [MCR 2.002], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." MCR 2.002(L). See Section 1.11 for more information on waiver of fees.

transfer and shall prepare a notice of refusal on a form approved by the [SCAO] and return the case to the transferring court for a proper order within seven business days of receipt of the transfer order." MCR 2.226(B). Upon receipt of a refusal to accept a transfered case under MCR 2.226(B), the transferring court must "prepare a proper order in accordance with [MCR 2.226(A)] and retransfer the case within seven business days." MCR 2.226(C). "The district court may also order the party seeking transfer to pay the opposing parties the costs they have reasonably incurred up to that time that would not have been incurred if the action had originally been brought in circuit court." MCR 4.002(C)(2).

"The district court must serve the order [of transfer] on the parties and send a copy to the circuit court. The clerk of the district court must prepare the case records for transfer in accordance with the orders entered under [MCR 4.002(C)(1)] and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method." MCR 4.002(C)(3). "The circuit court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the district court. The circuit court must notify the moving party of the new case number in the circuit court, the amount due, and the due date." MCR 4.002(C)(4).

Any jury fee paid in the district court will transfer to the circuit court, and the party requesting the jury must pay the circuit court any difference in the jury fee. MCR 4.002(D)(2).

4. Proceedings After Transfer

"After transfer, no further proceedings may be conducted in the district court, and the action shall proceed in the circuit court. The circuit court may order further pleadings and set the time when they must be filed." MCR 4.002(C)(5).

"No further action may be had in the case [in circuit court] until payment [of the applicable filing fee] is made." MCR 4.002(D)(1). The circuit court must dismiss the counterclaim or cross-claimor enter an order transferring the case back to the district court if the filing fee or costs ordered by the district court are not paid within 28 days of the date of the transfer order. *Id.*; MCR 4.002(D)(3).

C. 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*.

Jurisdiction vests in the circuit court after a claim of appeal is filed or leave to appeal is granted.[13] MCR 7.107.

"Appeals from the district court shall be on a written transcript of the record made in the district court or on a record settled and agreed to by the parties and approved by the court." MCL 600.8341. "Appeals from the district court shall be to the circuit court in the county in which the judgment is rendered." MCL 600.8342(1). Appeals from final judgments are generally appeals as of right and other appeals are by application; however, all appeals from final orders and judgments based upon pleas of guilty or nolo contendere are by application. MCL 600.8342(2); MCL 600.8342(4). "All appeals to the court of appeals from judgments entered by the circuit court or the recorder's court on appeals from the district court shall be by application." MCL 600.8342(3).

2.4 Circuit Court Subject-Matter 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. See also *Schaaf v Forbes (On Remand)*, 338 Mich App 1, 12 (2021) ("jurisdiction extends to all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state") (quotation marks and citation omitted); *In re Petition of Tuscola Co Treasurer for Foreclosure*, 317 Mich App 688, 695 (2016) ("circuit courts are presumed to have subject-matter jurisdiction unless jurisdiction is expressly prohibited or given to another court by constitution or statute") (quotation marks and citation omitted).

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).

[13] See Section 2.3(B)(4) for additional information regarding the authority a district court has once jurisdiction has vested with the circuit court.

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*.[14]

The circuit court has jurisdiction over the following:

- Family division cases listed in MCL 600.1021(1) (sole and exclusive jurisdiction lies in the family division),[15] including
  - Abuse and neglect
  - Adoptions
  - 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.
  - Waiver of parental consent for abortions performed on unemancipated minors under the Parental Rights Restoration Act (PRRA), MCL 722.901 *et seq*.[16]
  - Juvenile delinquency, name changes, emancipations
  - Personal protection orders
- Felony criminal cases and misdemeanor criminal cases punishable by at least 1 year imprisonment. See MCL 600.8311; Const 1963, art 6, § 13.

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[14] See Section 2.6 on concurrent jurisdiction.

[15] See also MCL 600.601(4).

[16] "A minor may file a petition for waiver of parental consent in the probate court of the county . . . in which the minor's residence is located or the county in which the minor is found." MCL 722.904(2)(b). The family division of a county's circuit court has jurisdiction to consider a petition for a waiver of parental consent to an abortion under the PRRA "so long as [the] petitioner is physically present in the county[.]" *In re AST*, ___ Mich App ___, ___ (2022).

  - 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*, 298 Mich App 166, 177 (2012).

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

  - "The circuit courts lack jurisdiction over actions in which the amount in controversy could not exceed $25,000, as determined at the outset of the proceedings on the basis of the allegations in the complaint." *Rodriguez v Hirshberg Acceptance Corp*, 341 Mich App 349, 365 (2022). "Generally, in its subject-matter jurisdiction inquiry a court determines the amount in controversy using the prayer for relief set forth in the plaintiff's pleadings, calculated exclusive of fees, costs, and interest." *Id*. at 365 (cleaned up).Recovering less than $25,000 "does not deprive the circuit court of jurisdiction[.]" *Souden*, 303 Mich App at 412.

  - Although the plaintiff's pleadings alleged that the amount in controversy exceeded $25,000, the circuit court properly determined that it lacked subject-matter jurisdiction where "the undisputed facts showed the amount in controversy could not exceed $25,000[;]" "[a]lthough a plaintiff may claim damages in excess of $25,000, where the documentary evidence submitted to the circuit court shows by undisputed facts that the plaintiff's claim to damages exceeding the jurisdictional amount cannot be proved, summary disposition under MCR 2.116(C)(4) is proper." *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 714, 719 (2017).

- Specified juvenile violations as described in MCL 600.606.

- Appeals from inferior courts and tribunals, except as otherwise provided. Const 1963, art 6, § 13. See also Const 1963, art 6, § 13. For more information on circuit court appeals, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Chapter 2.

- 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(1).

- 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.

- Authority to determine real property rights/interests. MCL 600.2932(1); MCL 600.3301. "[B]y having set forth and retaining specific statutory authorization for the circuit court to hear and decide matters concerning rights to real property [(MCL 600.2932(1); MCL 600.3301)], the Legislature provided that its grant of exclusive jurisdiction to the probate court over the administration and distribution of trusts [does] not extend to . . . real property claims." *Schaaf*, 338 Mich App at 13 (concluding "that the circuit court ha[s] subject-matter jurisdiction to hear and decide" real property claims stemming from the administration and distribution of a trust). See Section 2.5 for additional information on probate court subject-matter jurisdiction.

- Claims of breach of a mortgage agreement, nuisance, and dangerous building, as well as requests for receivership or foreclosure. *Southfield v Shefa, LLC*, 340 Mich App 391, 407 (2022), citing MCL 554.1016; MCL 600.2926; MCL 600.2927; MCL 600.2940; MCL 125.542; MCL 600.3101; MCL 600.601; MCL 600.605.

A. Removal to District Court

MCR 2.227 covers transfer of actions upon a finding of lack of jurisdiction. See Section 2.2(A) for a discussion of MCR 2.227.

"A circuit court may not transfer an action to district court under [MCR 2.227] based on the amount in controversy unless:

> (a) the parties stipulate in good faith to the transfer and to an amount in controversy not greater than the applicable jurisdictional limit of the district court; or
>
> (b) 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." MCR 2.227(B)(1).

An order for transfer of jurisdiction must be entered on a SCAO-approved form. MCR 2.226(A). If the order "is not prepared as required under [MCR 2.226(A)], and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the clerk of the receiving court shall refuse to accept the transfer and shall prepare a notice of refusal on a form approved by the [SCAO] and return the case to the transferring court for a proper order within seven business days of receipt of the transfer order." MCR 2.226(B). Upon receipt of a refusal to accept a transfered case under MCR 2.226(B), the transferring court must "prepare a proper order in accordance with [MCR 2.226(A)] and retransfer the case within seven business days." MCR 2.226(C).

B. Aggregating Claims

In an action that is not a class action, multiple plaintiffs cannot aggregate their claims to establish the jurisdictional limit for circuit court. *Boyd v Nelson Credit Ctrs, Inc*, 132 Mich App 774, 780-781 (1984) (distinguishing *Crippen v Fletcher*, 56 Mich 386 (1885) and *Henderson v Detroit & Mackinac R Co*, 131 Mich 438 (1902) because those cases permitted a *single* plaintiff to aggregate claims and did not address the aggregation of multiple plaintiffs' claims). See also *Mich Head & Spine Institute PC v Auto-Owners Ins Co*, 338 Mich App 721, 727 (2021) (holding that "based on treatment it provided to 39 separate patients," plaintiff was "indisputably a single plaintiff attempting to aggregate its various claims," and "applying the rule from *Boyd*," plaintiff could "aggregate its various claims for the purposes of determining jurisdiction"); *Moody v Home Owners Ins Co*, 304 Mich App 415, 443 (2014) (holding that under the specific facts of the case, there was "such an identity between the providers' and [the plaintiff's] claims that consolidation for trial resulted in merging the claims" to determine the amount in controversy; further, "the providers' claims [were] derivative of [the plaintiff's] claims," thus, the rule allowing a single plaintiff to aggregate claims to determine subject-matter jurisdiction applied), rev'd on other grounds by *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211 (2016).[17]

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.

[17]For more information on the precedential value of an opinion with negative subsequent history, see our note.

C. Business Courts

"A business court has jurisdiction over business and commercial disputes in which equitable or declaratory relief is sought or in which the matter otherwise meets circuit court jurisdictional requirements." MCL 600.8035(1).

"Business and commercial disputes include, but are not limited to, the following types of actions:

> (a) Those involving the sale, merger, purchase, combination, dissolution, liquidation, organizational structure, governance, or finances of a business enterprise.
>
> (b) Those involving information technology, software, or website development, maintenance, or hosting.
>
> (c) Those involving the internal organization or business entities and the rights or obligations of shareholders, partners, members, officers, directors, or managers.
>
> (d) Those arising out of contractual agreements or other business dealings, including licensing, trade secret, intellectual property, antitrust, securities, noncompete, nonsolicitation, and confidentiality agreements if all available administrative remedies are completely exhausted, including, but not limited to, alternative dispute resolution processes prescribed in the agreements.
>
> (e) Those arising out of commercial transactions, including commercial bank transactions.
>
> (f) Those arising out of business or commercial insurance policies.
>
> (g) Those involving commercial real property." MCL 600.8031(2).

See MCL 600.8031(3) for a list of actions that are specifically *not* business or commercial disputes.

1. Initial Assignment to Business Court

"An action must be assigned to a business court if all or part of the action includes a business or commercial dispute. An action that involves a business or commercial dispute that is filed in a court with a business docket must be maintained in a business

court although it also involves claims that are not business or commercial disputes, including excluded claims under [MCL 600.8031(3)]." MCL 600.8035(3).

2. Removal to Business Court

"An action that does not initially include a business or commercial dispute but that subsequently includes a business or commercial dispute as a result of a cross-claim, counterclaim, third-party complaint, amendment, or any other modification of the action must be reassigned by blind draw to a business court after the action is modified to include a business or commercial dispute as prescribed by the plan submitted under [MCL 600.8033(1) or MCL 600.8033(2)], as applicable." MCL 600.8035(6).

3. Reassignment from Business Court

"An action assigned to a business court judge may be reassigned by blind draw to another judge as prescribed by the plan submitted under [MCL 600.8033(1) or MCL 600.8033(2)], as applicable, if the action ceases to include a business or commercial dispute." MCL 600.8035(5).

4. Venue, Fees, and Appeals

"Venue of a suit in the business court is as provided in [MCL 600.1601 *et seq.*]." MCL 600.8035(2).[18] "The fees payable in civil actions in circuit court apply to cases in a business court, unless otherwise provided by law." MCL 600.8045. An appeal from a business court is to the Court of Appeals and is governed by [MCR 7.200 *et seq.*]. MCL 600.8041. However, "[a]n order concerning the assignment of a case to the business court under [MCL 600.8001 *et seq.*] is not appealable to the court of appeals." MCL 600.308(3).

D. Jurisdiction Pending Appeal

"[T]he filing of a claim of appeal typically divests the circuit court of its jurisdiction to amend its final orders and judgments." *Cary Investments, LLC v Mount Pleasant*, ___ Mich App ___, ___ (2022) (quotation marks and citation omitted). In *Cary*, "[b]ecause plaintiff's motion requested permission to file an amended complaint after the trial court had dismissed the original complaint, the motion asked the circuit court to alter the

[18] See Section 2.14 for additional information about venue.

> order plaintiff had already appealed. Thus, the trial court lacked jurisdiction to address plaintiff's motion to amend its complaint during the pendency of [the] appeal." *Id*. at ___.

2.5 Probate Court Subject-Matter Jurisdiction

The probate court has the jurisdiction, powers, and duties as provided by law. Const 1963, art 6, § 15. See also *Manning v Amerman*, 229 Mich App 608, 611 (1998) ("[t]he probate court . . . is a court of limited jurisdiction, deriving all of its power from statutes"). There must be a probate court in each county organized for judicial purposes. Const 1963, art 6, § 15.

Probate courts have jurisdiction as conferred by:

- the Estates and Protected Individuals Code (EPIC);
- the Mental Health Code;
- the Revised Judicature Act; and
- any other law or compact. MCL 600.841(1).

The probate court "has exclusive legal and equitable jurisdiction of all of the following:

> (a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered, including, but not limited to, all of the following proceedings:
>
> (*i*) The internal affairs of the estate.
>
> (*ii*) Estate administration, settlement, and distribution.
>
> (*iii*) Declaration of rights that involve an estate, devisee, heir, or fiduciary.
>
> (*iv*) Construction of a will.
>
> (*v*) Determination of heirs.
>
> (*vi*) Determination of death of an accident or disaster victim under [MCL 700.1208].
>
> (b) A proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust

> beneficiary, including, but not limited to, proceedings to do all of the following:
>
> (*i*) Appoint or remove a trustee.
>
> (*ii*) Review the fees of a trustee.
>
> (*iii*) Require, hear, and settle interim or final accounts.
>
> (*iv*) Ascertain beneficiaries.
>
> (*v*) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust.
>
> (*vi*) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.
>
> (*vii*) Release registration of a trust.
>
> (*viii*) Determine an action or proceeding that involves settlement of an irrevocable trust.
>
> (c) Except as otherwise provided in . . . MCL 600.1021, a proceeding that concerns a guardianship, conservatorship, or protective proceeding.
>
> (d) A proceeding to require, hear, or settle the accounts of a fiduciary and to order, upon request of an interested person, instructions or directions to a fiduciary that concern an estate within the court's jurisdiction." MCL 700.1302.

"[B]y having set forth and retaining specific statutory authorization for the circuit court to hear and decide matters concerning rights to real property [(MCL 600.2932(1); MCL 600.3301)], the Legislature provided that its grant of exclusive jurisdiction to the probate court over the administration and distribution of trusts [does] not extend to . . . real property claims." *Schaaf v Forbes (On Remand)*, 338 Mich App 1, 13 (2021). "The Legislature declined to grant the probate court exclusive jurisdiction over *every* cause of action that might incidentally touch on such issues as a settlor's intentions but, instead, confined that grant of exclusive jurisdiction to a *proceeding* that concerns the distribution of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary." *Id*. at 14 (cleaned up). "The statutory reference to 'a proceeding' that 'concerns' trust matters suggests that the exclusive jurisdiction of the probate court under MCL 700.1302(b)(*vi*) covers not every issue that might arise from involvement of a trust, but rather to whole causes of action fundamentally arising from issues concerning the distribution of trusts or the rights and duties of affected persons." *Schaaf*, 338 Mich App at 14.

Although a petition filed under the EPIC for the removal of a trustee involved "claims relating to two family businesses," the trust action was not "within the mandatory jurisdiction of the business court under MCL 600.8035."[19] *In re Brody Living Trust*, 321 Mich App 304, 309 (2017), vacated in part on other grounds, 501 Mich 1094, 1094 (2018).[20]. "[T]he probate court had exclusive jurisdiction over [the petitioner's] claims under MCL 700.1302 and MCL 700.1303" because the "petition was brought under the EPIC[.]" *Brody I*, 321 Mich App at 314.

Committee Tip:

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

A. Concurrent Jurisdiction

"In addition to the jurisdiction conferred by [MCL 700.1302] and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust:

(a) Determine a property right or interest.

(b) Authorize partition of property.

(c) Authorize or compel specific performance of a contract in a joint or mutual will or of a contract to leave property by will.

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[19] "Matters brought under the EPIC are specifically excluded from the definition of 'business or commercial dispute' in MCL 600.8031(1)(c)[;]" "[t]o the extent the petition involved transactions of the . . . family businesses or existing contracts, these matters arose only tangentially to the central issue of [the trustee's alleged] breach of fiduciary duty[.]" *In re Brody Living Trust*, 321 Mich App 304, 311 (2017), vacated in part on other grounds, 501 Mich 1094, 1094 (2018) (declining to interpret MCL 600.8035(3) "as requiring every case affecting or affected by a business matter, including a trust case, to be brought before the business court[;]" rather, MCL 600.8035(3) "indicate[s] a Legislative intent to retain cases *originally* filed in the business court for the entirety of the proceedings, regardless of whether the business dispute also involves, or comes to involve, excluded subject matter") (emphasis added). See Section 2.4(C) for additional information on business or commercial disputes.

[20] For more information on the precedential value of an opinion with negative subsequent history, see our note.

> (d) Ascertain if individuals have survived as provided in this act.
>
> (e) Determine cy pres or a gift, grant, bequest, or devise in trust or otherwise as provided in . . . MCL 554.351 to [MCL] 554.353.
>
> (f) Hear and decide an action or proceeding against a distributee of a fiduciary of the estate to enforce liability that arises because the estate was liable upon some claim or demand before distribution of the estate.
>
> (g) Impose a constructive trust.
>
> (h) Hear and decide a claim by or against a fiduciary or trustee for the return of property.
>
> (i) Hear and decide a contract proceeding or action by or against an estate, trust, or ward.
>
> (j) Require, hear, or settle an accounting of an agent under a power of attorney." MCL 700.1303(1).

Some probate courts are under concurrent jurisdiction plans pursuant to MCL 600.401.[21] MCL 600.841(2). However, there are limitations on a probate court's jurisdiction under a concurrent jurisdiction plan:

> "(a) The circuit court has exclusive jurisdiction over appeals from the district court and from administrative agencies as authorized by law.
>
> (b) The circuit court has exclusive jurisdiction and power to issue, hear, and determine prerogative and remedial writs consistent with section 13 of article VI of the state constitution of 1963." MCL 600.841(2).

B. 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).

An order for transfer of jurisdiction must be entered on a SCAO-approved form. MCR 2.226(A). If the order "is not prepared as

[21] See Section 2.6 on concurrent jurisdiction.

required under [MCR 2.226(A)], and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the clerk of the receiving court shall refuse to accept the transfer and shall prepare a notice of refusal on a form approved by the [SCAO] and return the case to the transferring court for a proper order within seven business days of receipt of the transfer order." MCR 2.226(B). Upon receipt of a refusal to accept a transfered case under MCR 2.226(B), the transferring court must "prepare a proper order in accordance with [MCR 2.226(A)] and retransfer the case within seven business days." MCR 2.226(C).

C. Appeals from Probate Court

Final judgments and orders issued by the probate court are generally appealable to the Court of Appeals as of right. MCL 600.308(1). See also Administrative Order No. 2016-4, 500 Mich cxlii (2016) (providing for expedited consideration of probate appeals pending in circuit court and requiring reporting of pending probate appeals in the circuit court in light of 2016 PA 186, which repealed MCL 600.863, which provided that probate appeals be made in the circuit court). Other judgments or interlocutory orders from the probate court as determined by the Michigan Court Rules are appealable to the Court of Appeals only by leave granted. MCL 600.308(2)(c).

2.6 Concurrent Jurisdiction[22]

"A concurrent jurisdiction plan that was adopted, approved by the supreme court, 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 assignments outside of a judge's election district, or retaliation for any action, including failing to vote for a concurrent jurisdiction plan. *Id*. "Subject to approval of the supreme court, before the supreme court

[22] For more information see SCAO's *Concurrent Jurisdiction Planning, Guidelines, and Application* packet (January 2013), and SCAO's concurrent jurisdiction website.

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 supreme court. Subject to approval of the supreme court, the state court administrator shall forward a proposed concurrent jurisdiction plan to the supreme court 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).

"Within each judicial circuit, subject to approval by the supreme court and to the limitations contained in [MCL 600.410, MCL 600.841, and MCL 600.8304], a plan of concurrent jurisdiction shall be adopted by a majority vote of all of the judges of the trial courts in the plan unless a majority of all of the judges of the trial courts in that judicial circuit vote not to have a plan of concurrent jurisdiction. If a majority of all of the judges of the trial courts in a judicial circuit vote not to have a plan of concurrent jurisdiction, the chief judge of the circuit court of that judicial circuit shall report the results of that vote to the state court administrator." MCL 600.401(1).

"A plan of concurrent jurisdiction under [MCL 600.401] may provide for 1 or more of the following:

> (a) The circuit court and 1 or more circuit judges may exercise the power and jurisdiction of the probate court.
>
> (b) The circuit court and 1 or more circuit judges may exercise the power and jurisdiction of the district court.
>
> (c) The probate court and 1 or more probate judges may exercise the power and jurisdiction of the circuit court.
>
> (d) The probate court and 1 or more probate judges may exercise the power and jurisdiction of the district court.
>
> (e) The district court and 1 or more district judges may exercise the power and jurisdiction of the circuit court.
>
> (f) The district court and 1 or more district judges may exercise the power and jurisdiction of the probate court.
>
> (g) If there are multiple district court districts within the judicial circuit, 1 or more district judges may exercise the power and jurisdiction of judge of another district court district within the judicial circuit." MCL 600.401(2).

"A plan of concurrent jurisdiction adopted under this chapter shall not include a delegation of any of the following:

(a) A power of appointment to a public office delegated by constitution or statute to the circuit court or a circuit judge.

(b) A power of appointment to a public office delegated by constitution or statute to the probate court or a probate judge.

(c) A power of appointment to a public office delegated by law to the district court or a district judge, unless that power of appointment is delegated to a court or judge other than the circuit court or a circuit judge." MCL 600.410.

2.7 Court of Claims Subject-Matter Jurisdiction

The Court of Claims' jurisdiction is exclusive, except as provided in MCL 600.6421[23] and MCL 600.6440.[24] MCL 600.6419(1).

"All actions initiated in the court of claims shall be filed in the court of appeals." MCL 600.6419(1).[25]

A. Exclusive Jurisdiction

"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

[23]See Section 2.7(D).

[24]See Section 2.7(E).

[25]"[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).

> 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).

No Jurisdiction. The Court of Claims does not have jurisdiction over any claim for compensation under the worker's disability compensation act (WDCA), MCL 418.101 *et seq.*, or the Compensation of Injured Peace Officers Act, MCL 419.101 *et seq*. MCL 600.6419(3).

Circuit courts retain their jurisdiction over:

- actions brought by the taxpayer under the general sales tax act, MCL 205.51 *et seq.*,
- proceedings to review findings as provided in the Michigan employment security act, MCL 421.1 *et seq.*,
- any other similar tax or employment security proceedings expressly authorized by Michigan statute,
- appeals from the district court and administrative agencies as authorized by law, and
- prerogative and remedial writs consistent with section 13 of article VI of the state constitution of 1963. MCL 600.6419(4)-(6).

B. Verified Claim and Notice

"A claim or notice under [MCL 600.6431(1)[26]] must contain . . . [a] signature and verification by the claimant before an officer authorized to administer oaths." MCL 600.6431(2)(d). "The failure to provide a verified claim or notice of intent is a bar to pursuing a claim in the Court of Claims." *Chisolm v State Police*, ___ Mich App ___, ___ (2023). In *Chisolm*, the Court of Appeals concluded that "plaintiff's notice

[26]"Except as otherwise provided in [MCL 600.6431], a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies." MCL 600.6431(1). A claim or notice for property damage or personal injuries must be filed within 6 months of the event giving rise to the claim. MCL 600.6431(4).

satisfied the requirement contained in [MCL 600.6431(2)(d)] of a verification 'before an officer authorized to administer oaths,' because plaintiff signed and swore to the notice before a notary public." *Chisolm*, ___ Mich App at ___ (noting plaintiff's notice of intent "was signed by plaintiff and his attorney, and was notarized"). "[R]egardless of whether plaintiff's notice of intent is a document under the broad definition of 'document' in MCR 1.109(B), and thus subject to the subrule governing the verification of documents, plaintiff's jurat notification satisfies MCR 1.109(D)(3)(a) as an 'oath or affirmation of the party or of someone having knowledge of the facts stated.'" *Chisolm*, ___ Mich App at ___.

See Section 2.7(C) for additional information on the notice requirements of MCL 600.6431.

C. Notice Requirements

"[A]ll parties with claims against the state, except those exempted in MCL 600.6431 itself, must comply with the notice requirements of MCL 600.6431(1)." *Christie v Wayne State Univ*, ___ Mich ___, ___ (2023). "This includes claims against the state brought in the circuit court." *Id.* at ___ (noting that MCL 600.6431(1)'s notice requirements apply categorically to "a claim" against the state, including those filed in the circuit court, except as otherwise excepted in the statute). Put differently, "any claim against the state, regardless of where it is filed, must comply with MCL 600.6431(1)'s notice requirements, except for claims brought under the [wrongful imprisonment compensation act (WICA), MCL 691.1751 to 691.1757] as exempted in MCL 600.6431(5)." *Christie*, ___ Mich at ___. See also *Elia Cos, LLC v Univ of Mich Regents*, ___ Mich ___, ___ (2023) (holding that defects in complaint cannot be curred after the 1 year notice requirement of MCL 600.6431 has expired[27]).

While a plaintiff's complaint is required to be verified under MCL 600.6434, a plaintiff is "*not* required to file *both* his verified notice of intent and his verified complaint within the time period specified in MCL 600.6431." *Chisolm v State Police*, ___ Mich App ___, ___ (2023) (holding that because plaintiff "complied with MCL 600.6431 by timely filing his [verified] notice of intent, [he] was not required also to file his verified complaint within the time period established by MCL 600.6431"). Although "plaintiff's original complaint was not verified and the amended complaint, though verified, was not filed until after the time limit for complying with MCL 600.6431," "the Court of Claims did not err by holding that plaintiff's amended complaint was not subject to dismissal under MCL 600.6431."

[27]For a claim against the state for property damage or personal injury, there is a six month notice period. MCL 600.6431(4).

Chisolm, ___ Mich App at ___. The Court distinguished *Elia Cos, LLC*, where "the plaintiff did not file a verified notice of intent[,]" "and although the plaintiff filed a complaint within the time period[,] the complaint was not verified." *Chisolm*, ___ Mich App at ___. In contrast, in *Chisolm*, "plaintiff fully complied with MCL 600.6431 by timely filing a verified notice of intent to file a claim. Having done so, plaintiff's complaint was not subject to the time requirements of MCL 600.6431." *Chisolm*, ___ Mich App at ___.

D. Jury Trial Right and Joinder

MCL 600.6421 addresses trial by jury and the joinder and transfer of claims.

"Nothing in [Chapter 64 of the Revised Judicature Act, 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, . . . [nor] 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. Except as otherwise provided by this section, 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 transactions 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. 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." MCL 600.6421(3).

E. Transfer to the Court of Claims

"A notice of transfer to the Court of Claims must be provided before or at the time the defendant files an answer." MCR 2.228(A). If the time to file an answer has passed, and "the court in which [the] civil action is pending has concurrent jurisdiction with the Court of Claims, the defendant must seek leave to file a notice of transfer and the court may grant leave if it 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 2.228(B)(1). "If the court in which [the] civil action is pending does not have subject matter jurisdiction because the case is within the exclusive jurisdiction of the Court of Claims, MCR 2.227 governs." MCR 2.228(B)(2). See Section 2.2(A) for more information on transfers under MCR 2.227.

An order for transfer of jurisdiction must be entered on a SCAO-approved form. MCR 2.226(A). If the order "is not prepared as required under [MCR 2.226(A)], and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the clerk of the receiving court shall refuse to accept the transfer and shall prepare a notice of refusal on a form approved by the [SCAO] and return the case to the transferring court for a proper order within seven business days of receipt of the transfer order." MCR 2.226(B). Upon receipt of a refusal to accept a transfered case under MCR 2.226(B), the transferring court must "prepare a proper order in accordance with [MCR 2.226(A)] and retransfer the case within seven business days." MCR 2.226(C).

F. Remedy in Federal Court Exception

MCL 600.6440 provides:

> "No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof."

G. Res Judicata

"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).

H. Setoff, Recoupment, or Cross Declaration

"Upon the trial of any cause in which any demand is made by the state or any of its departments or officers against the claimant either by way of setoff, recoupment, or cross declaration, the court shall hear and determine each claim or demand, and if the court finds a balance due from the claimant to the state, the court shall render judgment in favor of the state for the balance." MCL 600.6419(2).

I. Judgment

"Writs of execution or garnishment may issue upon the judgment the same as from the circuit court of this state." 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).

J. Caselaw

1. Jurisdiction Over Actions for Mandamus Against State Officials and Departments[28]

"MCL 600.6419, as amended by 2013 PA 164, properly delegates to the Court of Claims jurisdiction over actions for mandamus against state officials and departments"; although MCL 600.6419(1)(a) and MCL 600.4401(1)[29] "clearly conflict," they can be harmonized by reading MCL 600.6419(1)(a) "to expand the original jurisdiction of the Court of Claims to include 'any demand for an extraordinary writ against the state or any of its departments or officers,' such that the Court of Claims now possesses jurisdiction over mandamus claims that had previously been within the jurisdiction of the circuit court pursuant to MCL 600.4401(1)." *O'Connell v Dir of Elections*, 316 Mich App 91, 100, 103-104, 108 (2016) (holding that "the Court of Claims erred by concluding that it lacked subject-matter

[28]See Section 9.9 for additional information on writs of mandamus.

[29]MCL 600.4401 states that "[a]n action for mandamus against a state officer shall be commenced in the court of appeals, or in the circuit court in the county in which venue is proper or in Ingham county, at the option of the party commencing the action."

jurisdiction to hear and decide" the plaintiff judge's mandamus action against the Director of Elections and other state-level defendants). "[T]he circuit court never had exclusive jurisdiction over claims for mandamus against state-level defendants, MCL 600.6419(1) permissibly delegated such jurisdiction to the Court of Claims, and MCL 600.6419(6)[30] did not revoke that delegation of jurisdiction because it was unnecessary to do so." *O'Connell*, 316 Mich App at 104, 106 (holding that the exception under MCL 600.6419(6) did not apply because the circuit court shared concurrent jurisdiction with the Court of Appeals and therefore lacked exclusive jurisdiction over mandamus actions involving state officers).

2. Jurisdiction Over Headlee Amendment Claims

The Court of Claims "has subject-matter jurisdiction over Headlee Amendment claims." *Telford v State of Michigan*, 327 Mich App 195, 197 (2019) (the Court of Claims erred when it transfered the plaintiffs' Headlee Amendment claim to the circuit court pursuant to *City of Riverview v State of Michigan*, 292 Mich App 516 (2011), which holds that a Headlee Amendment action may be filed in circuit court pursuant to MCL 600.308a(1), because "the Legislature intended to repeal MCL 600.308a(1) by implication when it enacted 2013 PA 164," expanding the exclusive jurisdiction of the Court of Claims).

3. Jurisdiction Over Appeals Regarding the Department of Treasury's Seizure of Tobacco Products

There is "an inherent tension between" MCL 600.6419(1)(a), which provides the Court of Claims with exclusive jurisdiction for claims "against the state or any of its departments or officers *notwithstanding another law that confers jurisdiction of the case in the circuit court*" and MCL 205.429(4), which requires an "appeal to the circuit court of the county where the seizure was made[.]"[31] *Prime Time Int'l Distrib, Inc v Dep't of Treasury*, 322 Mich App 46, 55 (2017) (emphasis added). "To remedy this tension, [the Court] look[s] first to the exceptions under the CCA,[32] MCL 600.6419(5), which provides: '[the CCA] does not deprive the circuit court of exclusive jurisdiction over appeals from the

[30] MCL 600.6419(6) provides that Chapter 64 of the Revised Judicature Act "does not deprive the circuit court of exclusive jurisdiction to issue, hear, and determine prerogative and remedial writs consistent with section 13 of article VI of the state constitution of 1963."

[31] MCL 205.429 provides the procedure for judicial review of the Michigan Department of Treasury's actions under the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*.

[32] The Court of Claims Act, MCL 600.6401 *et seq.*

district court and administrative agencies as authorized by law.'" *Prime Time Int'l Distrib*, 322 Mich App at 55-56. Accordingly, where MCL 600.6419(5) applies, the Court of Claims does not have jurisdiction to hear an action against the state. *Prime Time Int'l Distrib*, 322 Mich App at 56. Whether the Court of Claims has jurisdiction in this case "turns on whether MCL 205.429(4) confers exclusive jurisdiction on the circuit court for matters involving appeals from the Department pursuant to the TPTA." *Prime Time Int'l Distrib*, 322 Mich App at 57. Accordingly, the Court of Claims did not err by concluding that it lacked jurisdiction because the TPTA, MCL 205.429(4), confers exclusive jurisdiction to the circuit court; MCL 205.429(4) does not confer concurrent jurisdiction to any other court. *Prime Time Int'l Distrib*, 322 Mich App at 57, 58 (concluding that MCL 600.6419(5) applies and the circuit court has exclusive jurisdiction over the plaintiffs' appeals pursuant to the TPTA).

4. Jurisdiction Over Constitutional Tort Claims

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).

5. Intervention

The Court of Claims properly denied private parties' motions to intervene as defendants under MCR 2.209; the private parties could not intervene in the action because, under MCL 600.6419, "the Court of Claims lacked subject-matter jurisdiction over claims against non-state actors." *Council of Orgs & Others for Ed About Parochiaid v Michigan*, 321 Mich App 456, 465 (2017), citing *Estes v Titus*, 481 Mich 573, 583-584 (2008).

Under MCL 600.6419(1)(a) and MCL 600.6419(7), for the Court of Claims to have jurisdiction over a state officer who is seeking to intervene as a defendant, "the officer must have been acting, or reasonably believed he or she was acting, within the scope of his or her authority at the time of the alleged wrongful conduct, not at the time he or she filed a motion to intervene or become a part of the action." *Council of Orgs & Others for Ed About Parochiaid*, 321 Mich App at 470 (holding that where the plaintiffs asserted that state legislation was unconstitutional, state legislators could not intervene; the Court of Claims lacked jurisdiction over the state legislators because the plaintiffs had raised no claims against them "for allegedly wrongful conduct during which they were acting, or reasonably believed that they were acting, within the scope of their authority while engaged in or discharging a

government function in the course of their duties") (quotation marks, alteration, and citation omitted).[33]

6. Power of Legislature to Expand Court of Claims' Jurisdiction

Neither MCL 600.6419 (conferring jurisdiction to Court of Claims) nor MCL 600.6437 (authorizing the Court of Claims to issue orders against the state and its subunits)[34] preclude the Court of Claims from "exercis[ing] jurisdiction over any other case, if the Legislature were to grant it additional jurisdiction." *River Investment Group, LLC v Casab*, 289 Mich App 353, 358 (2010).

2.8 Michigan Supreme Court and Court of Appeals Subject-Matter Jurisdiction

The Michigan Supreme Court may issue, hear, and determine prerogative and remedial writs. Const 1963, art 6, § 4. It also has appellate jurisdiction as provided in the court rules. *Id*. Further, as it relates directly to trial courts, "[t]he Supreme Court may . . . exercise superintending control over a lower court or tribunal[.]"[35] MCR 7.303(B)(5); see also Const 1963, art 6, § 4. Finally, although the Supreme Court does not have the power to remove a judge, Const 1963, art 6, § 4, it must review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension, MCR 7.303(A). Chapter 2 of the Revised Judicature Act, MCL 600.202 *et seq.*, also addresses the jurisdiction of the Supreme Court.

The Michigan's Court of Appeals jurisdiction is provided by statute and court rule. Const 1963, art 6, § 10. See Chapter 3 of the Revised Judicature Act, MCL 600.301 *et seq.*, and MCR 7.203 for more information on the jurisdiction of the Michigan Court of Appeals.

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[33]Generally, a municipality is not an "arm of the state" under MCL 600.6419(7), when it operates a waterworks system, nor is it an arm of the state when it is operating under Michigan's emergency management laws. *Boler v Governor*, 324 Mich App 614, 619 (2018). Accordingly, the Court of Claims does not have exclusive jurisdiction to hear claims in these situations. *Id*. at 630.

[34]MCL 600.6437 provides: "The court may order entry of judgment against the state or any of its departments, commissions, boards, institutions, arms or agencies based upon facts as stipulated by counsel after taking such proofs in support thereof as may be necessary to satisfy the court as to the accuracy of such facts and upon being satisfied that such judgment is in accordance with applicable law."

[35] See Section 9.10 on superintending control.

2.9 Authority of District Court Magistrate

"A district court magistrate may hear, preside over, and conduct any of the following in civil infraction actions under [the Michigan vehicle code (MVC)], MCL 257.746, the Michigan Regulation and Taxation of Marijuana Act [(MRTMA)], MCL 333.27951 to [MCL 333.27967], or [MCL 600.8719] or [MCL 600.8819] of [the Revised Judicature Act (RJA)], or in civil fine actions under the Michigan Medical Marihuana Act [(MMMA)], MCL 333.26421 to [MCL 333.26430], as applicable:

(a) Admissions.

(b) Admissions with explanation.

(c) Motions to set aside default or withdraw admissions.

(d) Informal hearings." MCL 600.8512(1).

"In exercising the authority conferred by [MCL 600.8512(1)], a district court magistrate may administer oaths, examine witnesses, and make findings of fact and conclusions of law." MCL 600.8512(2).

"If a defendant is determined to be responsible for a civil infraction, or, under the [MMMA], a civil fine, the district court magistrate may impose the civil sanctions authorized by the [MVC], MCL 257.907, the [MRTMA], or [MCL 600.8827] of [the RJA], as applicable." MCL 600.8512(2).

"A district court magistrate may exercise the authority conferred by [MCL 600.8512] only to the extent expressly authorized by the chief judge, presiding judge, or only judge of the district court district." MCL 600.8512(4).

MCL 600.8512a provides that a district court magistrate may "[a]ccept an admission of responsibility, decide a motion to set aside a default or withdraw an admission, or order civil sanctions for a civil infraction and order an appropriate civil sanction permitted by the statute or ordinance defining the act or omission." MCL 600.8512a(a).

2.10 Trial Court's Authority After Appeal

A. District Courts and Agencies

Jurisdiction vests in the circuit court after a claim of appeal is filed or leave to appeal is granted. MCR 7.107. "After a claim of appeal is filed [with the circuit court] or leave to appeal is granted [by the circuit court], jurisdiction vests in the circuit court." *Id*. "The trial court or agency may not set aside or amend the judgment, order, or decision

appealed except by circuit court order or as otherwise provided by law. In all other respects, the authority of the trial court or agency is governed by MCR 7.208(C) through [MCR 7.208](I)."[36] MCR 7.107.

For more information on circuit court appeals, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Chapter 2.

B. Trial Courts (Exclusive of District Court and Agencies)

Filing the entry fee and a claim of appeal from a final judgment in the circuit court transfers jurisdiction to the Court of Appeals in an appeal of right, except as otherwise provided in MCR 3.993(D)(3) and MCR 6.425(G)(1). MCR 7.204(B); MCL 600.308. See also *Michigan State Emp Ass'n v Civil Serv 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)-(J.).

"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." MCR 7.208(A).

See also *Wiand v Wiand*, 205 Mich App 360, 369-370 (1994) (holding that "the trial court properly found that it lacked jurisdiction to grant plaintiff's motion [to amend her complaint and add a claim] under MCR 7.208(A) because a claim of appeal had already been filed from the order of dismissal").

The statutes authorizing a trial court to amend child and spousal support orders after the entry of judgment if circumstances require, MCL 552.17(1) and MCL 552.28, satisfy the "as otherwise provided by law" exception in MCR 7.208(A)(4). *Lemmen v Lemmen*, 481 Mich 164, 167 (2008). The "as otherwise provided by law" exception in MCR 7.208(A)(4) is applicable to custody situations. *Safdar v Aziz*, 501 Mich 213, 219 (2018) (holding the reasoning of *Lemmen*, 481 Mich at 167, extends to custody issues because MCL 722.27(1) of the Child

[36] See Section 2.10(B) for additional information on MCR 7.208(C)-(I).

Custody Act authorizes the trial court to modify or amend its previous orders).

"Except as otherwise provided by rule and until the record is filed in the Court of Appeals, the trial court or tribunal has jurisdiction

> (1) to grant further time to do, properly perform, or correct any act in the trial court or tribunal in connection with the appeal that was omitted or insufficiently done, other than to extend the time for filing a claim of appeal or for paying the entry fee or to allow delayed appeal;
>
> (2) to correct any part of the record to be transmitted to the Court of Appeals, but only after notice to the parties and an opportunity for a hearing on the proposed correction.

After the record is filed in the Court of Appeals, the trial court may correct the record only with leave of the Court of Appeals." MCR 7.208(C).

"The probate court retains continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed." MCR 7.208(D).

"When an appeal is filed while property is being held for conservation or management under the order or judgment of the trial court, that court retains jurisdiction over the property pending the outcome of the appeal, except as the Court of Appeals otherwise orders." MCR 7.208(E).

"A trial court order entered before final judgment concerning custody, control, and management of property; temporary alimony, support or custody of a minor child, or expenses in a domestic relations action; or a preliminary injunction, remains in effect and is enforceable in the trial court, pending interlocutory appeal, except as the trial court or the Court of Appeals may otherwise order." MCR 7.208(F).

"The trial court retains authority over stay and bond matters, except as the Court of Appeals otherwise orders." MCR 7.208(G). Generally, the trial court can still enforce its orders unless there is a stay. See 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).

"Throughout the pendency of an appeal involving an indigent person, the trial court retains authority to appoint, remove, or replace

an attorney except as the Court of Appeals otherwise orders." MCR 7.208(H).

2.11 Federal Court Subject-Matter Jurisdiction

A. Removal

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; the trial court does not have authority to remove a case to federal court. See 28 USC 1441(a); 28 USC 1455(a).

"Promptly after the filing of [a] notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded." 28 USC 1446(d).

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 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.

B. Bankruptcy

"[F]or those matters that merely arise under, arise in, or are otherwise related to a bankruptcy case, the [federal] district court has original jurisdiction, but such jurisdiction is *not* exclusive"; "[r]ather, the federal and state courts have concurrent jurisdiction, and the matters can be heard by either one." *Southfield v Shefa, LLC*, 340 Mich App 391, 410 (2022). "[I]n a dispute involving a hotel whose owner entered and exited federal bankruptcy proceedings, and now the city where the hotel is located seeks [declaratory relief, appointment of receiver, and judicial foreclosure] from that owner for alleged violations of state law," "the circuit court erred in concluding that . . . [it] did not have subject-matter jurisdiction over any of the city's claims." *Id*. at 394, 416.

2.12 Personal Jurisdiction

Personal jurisdiction is defined as a "'court's power to bring a person into its adjudicative process.'" *Foster v Wolkowitz*, 486 Mich 356, 367 n 22 (2010), quoting *Black's Law Dictionary* (8th ed). Jurisdiction over a person is distinct from jurisdiction over a case (subject-matter jurisdiction). *Foster*, 486 Mich at 367. "[A] party may stipulate to, waive, or implicitly consent to *personal* jurisdiction." *People v Lown*, 488 Mich 242, 268 (2011). See also *Lease Acceptance Corp v Adams*, 272 Mich App 209, 229 (2006) (quotation marks and citation omitted) ("[c]hallenges to personal jurisdiction may be waived by either express or implied consent"). 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); MCR 2.116(D)(1).

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[37] — MCL 600.701.

[37] See the Michigan Judicial Institute's *Personal Jurisdiction of Individuals Flowchart*.

- 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. See also *Lease Acceptance Corp v Adams*, 272 Mich App 209 (2006); *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341 (2006). See Section 2.11(A)(1) for more information on forum-selection clauses.

- Corporations[38] – 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. See also *Lease Acceptance Corp*, 272 Mich App at 209; *Turcheck*, 272 Mich App at 341. See Section 2.11(A)(1) for more information on forum-selection clauses.
  - Carrying on "a continuous and systematic part of its general business within the state." MCL 600.711(3); *Electrolines, Inc*, 260 Mich App at 166-167; *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 707-709 (2014).
- Partnerships and limited partnerships[39] – MCL 600.721.
- Partnership associations and unincorporated voluntary associations[40] – MCL 600.731.

1. Forum Selection and Choice of Law Clauses

Generally, parties may create contractual forum selection clauses. *Lease Acceptance Corp v Adams*, 272 Mich App 209, 219 (2006). Subject to certain conditions, Michigan courts will enforce an express forum selection clause where the parties agreed in writing to bring an action in Michigan and "the agreement provides the only basis for the exercise of

[38]See the Michigan Judicial Institute's *Personal Jurisdiction of Corporations Flowchart*.

[39]See the Michigan Judicial Institute's *Personal Jurisdiction of Partnerships or Limited Partnerships Flowchart*.

[40]See the Michigan Judicial Institute's *Personal Jurisdiction of Partnership Associations or Unincorporated Voluntary Associations Flowchart*.

jurisdiction." MCL 600.745(2).[41] The conditions listed in MCL 600.745(2) 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."

Subject to certain exceptions, Michigan courts must stay or dismiss an action that was brought in Michigan where "the parties agreed in writing that an action . . . shall be brought only in another state[.]" MCL 600.745(3). The exceptions listed in MCL 600.745(3) are:

> "(a) The court is required by statute to entertain the action.
>
> (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.
>
> (c) The other state would be a substantially less convenient place for the trial of the action than this state.
>
> (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (e) It would for some other reason be unfair or unreasonable to enforce the agreement."

"[W]hen presented with a contractual forum-selection clause, a court's first step is to determine the threshold issue whether a party is bound by a contract, and, accordingly, any forum selection and choice-of-law provision in the contract." *Barshaw v Allegheny Performance Plastics, LLC*, 334 Mich App 741, 748 (2020)

[41] Similarly, subject to certain conditions, Michigan courts will enforce a contractual choice of law provision. *Chrysler Corp v Skyline Indus Servs Inc*, 448 Mich 113, 126-127 (1995).

(quotation marks and citation omitted). "A contractual forum selection clause, though otherwise valid, may not be enforced against one not bound by the contract." *Id*. (quotation marks and citation omitted).

"[T]he analysis becomes more complicated when . . . a single agreement contains both a forum-selection clause and a choice-of-law provision." *Barshaw*, 334 Mich App at 749 (quotation marks and citation omitted). "Addressing the question of whether a contractual forum-selection clause should be governed by the law of the state where the action was filed or, in the alternative, the law selected by the parties in the choice-of-law provision, . . . this question does not concern the underlying merits of the lawsuit and will only affect *where* the action is litigated. In this respect, dismissing an action under a contractual forum-selection clause is analogous to dismissing an action under the doctrine of forum non conveniens." *Id*. at 751. "Dismissal for *forum non conveniens* reflects a court's assessment of a range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Id*. at 753.

"[T]he question to be answered by a court considering whether to dismiss an action pursuant to a contractual forum-selection clause is similar to the question facing a court considering whether to dismiss an action under the doctrine of forum non conveniens; namely, whether there is a sufficient reason that the action should be litigated in another forum rather than the one in which the plaintiff filed the action. The difference between the two situations is that a dismissal on forum non conveniens grounds is based on concepts related to convenience, the ends of justice, court administration, and other relevant considerations, whereas a dismissal pursuant to a forum-selection clause is based on honoring the contractual agreement reached between the parties[.]" *Barshaw*, 334 Mich App at 753-754 (citations omitted). "[A] forum selection clause can be understood as the embodiment of the parties' negotiation for the most convenient or best forum." *Id*. at 755.

"Because of the similarities between the operation of a forum-selection clause and the doctrine of forum non conveniens in both effect and underlying purpose, . . . analyzing the validity and effect of a forum-selection clause is also a threshold, nonmerits issue that the Michigan court in which the action has been filed may address first before considering other threshold issues." *Barshaw*, 334 Mich App at 755. "[A] forum-selection clause may [generally] be considered separately from any choice-of-law provision that may also be in the contract. In such cases, the Michigan court in which the action has been filed shall

apply Michigan law in determining the effect of the forum-selection clause." *Id*. (indicating that factors not germane to this case may be present that could alter this analysis).

"MCL 600.745(3) plainly indicates that when an action is filed in a Michigan court, the court is required to consider dismissing or staying the action if the parties agreed in writing that any such action was required to be brought *only* in another state. Thus, under the statute, there must be an agreement to litigate *exclusively* in another state before a Michigan court is required to dismiss the action on the basis of a forum-selection clause." *Barshaw*, 334 Mich App at 757-758 (absent exclusivity language, the forum-selection clause is considered permissive). In *Barshaw*, because there was nothing in the forum-selection clause "evidencing an intent by the parties to forgo the personal jurisdiction of all forums other than those within the state of Pennsylvania," the Court could not "infer from the language of the clause that the parties agreed that Pennsylvania would be the sole forum in which they could litigate disputes to the exclusion of all other forums." *Id*. at 760-761 (concluding the trial court "was not required to dismiss [the] case under MCL 600.745(3)" because the forum-selection clause at issue was "permissive under Michigan law," and the clause "provided that Pennsylvania was one potential appropriate forum without excluding the use of other appropriate forums").

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).[42]

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

- Individuals[43] — MCL 600.705, which states, "[A]ny of the following relationships between an individual or his agent and the state . . . enable a court . . . to exercise limited personal jurisdiction over the individual and . . . to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:

  (1) The transaction of any[44] business within the state.

[42] See Section 2.12(C) for a discussion of constitutional limitations on jurisdiction.

[43] See the Michigan Judicial Institute's *Personal Jurisdiction of Individuals Flowchart*.

(2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.[45]

(3) The ownership, use, or possession of real or tangible personal property situated within the state;

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

(5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.[46]

(6) Acting as a director, manager, trustee, or other officer of a corporation incorporated under the laws of, or having its principal place of business within this state.

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

- Corporations[47] – MCL 600.715.
- Partnerships and limited partnerships[48] – MCL 600.725.
- Partnership associations and unincorporated voluntary associations[49] – 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,

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[44] "The word 'any' means just what is says. It includes 'each' and 'every.'" *Sifers v Horen*, 385 Mich 195, 199 n 2 (1971).

[45] "[E]ither the tortious conduct or the injury must occur in Michigan." *WH Froh, Inc v Domanski*, 252 Mich App 220, 229 (2002).

[46] "F.O.B. shipping terms are not dispositive of whether the defendant entered into a contract for materials to be furnished in Michigan." *Starbrite Distrib, Inc v Excelda Mfg Co*, 454 Mich 302, 304 (1997).

[47] See the Michigan Judicial Institute's *Personal Jurisdiction of Corporations Flowchart*.

[48] See the Michigan Judicial Institute's *Personal Jurisdiction of Partnerships or Limited Partnerships Flowchart*.

[49] See the Michigan Judicial Institute's *Personal Jurisdiction of Partnership Associations or Unincorporated Voluntary Associations Flowchart*.

91 (1978). Due process requirements must be met in addition to satisfying the requirements of the Michigan long-arm statutes. See *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 432 (2001). 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 identified a three-part test for determining minimum contacts in *Jeffrey*, 448 Mich 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.[50]

"[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*. "The plaintiff's complaint must be accepted as true unless specifically contradicted by affidavits or other evidence submitted by the parties." *Id*. "[W]hen allegations in the pleadings are contradicted by documentary evidence, the plaintiff . . . must produce admissible evidence of his or her prima facie case establishing jurisdiction." *Id*. "'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).

[50]See the Michigan Judicial Institute's Personal Jurisdiction Flowcharts regarding Individuals, Corporations, Partnerships or Limited Partnerships, and Partnership Associations or Unincorporated Voluntary Associations.

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 437-439. In *Oberlies*, the plaintiff (a Michigan resident) was injured at the defendant's facility (located in Canada). *Id.* at 426. The plaintiff argued that because 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." *Oberlies*, 246 Mich App at 437.

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 v Adams*, 272 Mich App 209, 229 (2006).

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 Fin, Inc*, 272 Mich App 341, 350 (2006).

"Pursuant to the Uniform Interstate Family Support Act's catch-all provision regarding personal jurisdiction, a forum state may exercise personal jurisdiction over petitions for enforcement of out-of-state support claims, . . . if there is any other basis consistent with the constitutions of [Michigan] and the United States for the exercise of personal jurisdiction." *Hilyard v Johnston*, ___ Mich ___, ___ (2023) (cleaned up). Where "the statute includes a catchall provision that only requires a court to consider constitutional due process, the two inquiries collapse into a single inquiry regarding minimum contacts." *Id.* at ___. The *Hilyard* Court concluded that "personal jurisdiction may exist regardless of whether the respondent-father's actions satisfy any provision of MCL 600.705," holding that "the circuit court was obligated under MCL 552.2201(1)(h) to analyze whether due process is satisfied here by determining whether sufficient minimum contacts exist between a nonresident respondent and the state to

support due process requirements of limited personal jurisdiction." *Hilyard*, ___ Mich at ___ (cleaned up).

D. Standard of Review

Whether a court has personal jurisdiction over a party is a question of law that is reviewed de novo. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426 (2001).

2.13 Actions 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 (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.

2.14 Venue

Venue is simply the location of the trial. Determining proper venue ensures 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). "[T]he primary goal is to minimize the costs of litigation . . . by reducing the burdens on the parties, [and] by considering the strains on the system as a whole." *Id*. "Courts evaluate convenience primarily in terms of the interests of the parties and any relevant witnesses." *Id*. "[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." *Id*. at 155-156.

"[V]enue is controlled by statute [(MCL 600.1621)] in Michigan." *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 309 (1999). Because "the Legislature declined to provide that parties may contractually agree to venue in advance, [the Michigan Supreme Court] decline[d] to read into the statute a provision requiring enforcement of such agreements." *Id*. at 311-312. 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, MCL 600.1611, MCL 600.1615, MCL 600.1629, and MCL 600.1641 respectively.

A. Change of Venue 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, a good practice "might be to make orders changing venue effective as of some reasonable time thereafter[.]" *Id*. at 662. Failure to do so results in an immediate loss of jurisdiction. *Id*. at 660 ("unless otherwise explicitly specified, orders are effective when signed by the judge").

The court rules distinguish between motions for change of *proper* venue[51], MCR 2.222, and *improper* venue[52], MCR 2.223.

"[C]ontractual venue provisions are not binding on Michigan courts, . . . [and] such agreements do not constitute a waiver of a party's right to challenge venue, nor do they constitute a consent to a change of venue." *Omne Fin, Inc v Shacks, Inc*, 226 Mich App 397, 407 (1997).

B. Timing

"A motion for change of venue must be filed before or at the time the defendant files an answer." MCR 2.221(A). See also *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 19 (2011) (filing the motion on the same day as answering the complaint satisfied the requirement in MCR 2.221(A)). However, the court cannot deny a late motion if it "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 the defendant fails to object to venue within the time limitations 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). Raising improper venue as an affirmative defense will not satisfy the requirement that a change of venue motion must be filed. *Bursley v Fuksa*, 164 Mich App 772, 779 (1987).

C. 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(A) allows a change of proper venue "for the convenience of parties and witnesses or when an impartial trial cannot be had where the action is pending." "[T]he moving party has the burden of making a persuasive showing of inconvenience justifying a change of venue." *Kohn v Ford Motor Co*, 151 Mich App 300, 305 (1986) (using common sense and logical inferences, the judge properly found that "a far greater number of witnesses would be inconvenienced if trial were held in Wayne County than if the case were to be transferred to Tuscola County"). If venue is proper, the court may not change venue on its own initiative; a motion is required. MCR 2.222(B).

[51]See Section 2.14(C).

[52]See Section 2.14(D).

1. Order for Change of Venue, Case Records, and Required Fees

"The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court" and "order the party that moved for change of venue to pay the applicable statutory filing fee to the receiving court, unless fees have been waived in accordance with MCR 2.002."[53] MCR 2.222(D)(1). The order must be entered on a SCAO-approved form. MCR 2.226(A). If the order "is not prepared as required under [MCR 2.226(A)], and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the clerk of the receiving court shall refuse to accept the transfer and shall prepare a notice of refusal on a form approved by the [SCAO] and return the case to the transferring court for a proper order within seven business days of receipt of the transfer order." MCR 2.226(B). Upon receipt of a refusal to accept a transfered case under MCR 2.226(B), the transferring court must "prepare a proper order in accordance with [MCR 2.226(A)] and retransfer the case within seven business days." MCR 2.226(C).

"The transferring court must serve the order [of transfer] on the parties and send a copy to the receiving court. The clerk of the transferring court must prepare the case records for transfer in accordance with the orders entered under [MCR 2.222(D)(1)] and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method." MCR 2.222(D)(2). "The receiving court must temporarily suspend payment of the filing fee and open a case pending payment of the filing fee as ordered by the transferring court. The receiving court must notify the party that moved for change of venue of the new case number in the receiving court, the amount due, and the due date." MCR 2.222(D)(3).

"If a jury fee has been paid, the clerk of the transferring court must forward it to the clerk of the receiving court as soon as possible after the case records have been transferred." MCR 2.222(E)(2).

2. Proceedings After Transfer

If the court grants the motion to change venue, the moving party must pay the applicable filing fee within 28 days of the date of

[53] "Notwithstanding any other provision of [MCR 2.002], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." MCR 2.002(L). See Section 1.11 for more information on waiver of fees.

the transfer order. MCR 2.222(E)(1). "No further action may be had in the case until payment is made," and the receiving court must order the case transferred back to the transferring court if the fee is not paid within 28 days of the date of the original transfer order. *Id*.

D. Change of Improper Venue

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).

A plaintiff cannot seek a change of venue under MCR 2.223(A) because the rule permits a venue change only "on timely motion of a defendant" or on the court's "own initiative." *Dawley v Hall*, 501 Mich 166, 169-170 (2018) (holding that "by expressly recognizing that the defendant and the court can effect a change in venue, but including no similar provision for the plaintiff, the rule . . . must be read to exclude the plaintiff"). Similarly, MCL 600.1651 allows only the defendant to move for a change of venue and must be read to exclude the plaintiff. *Dawley*, 501 Mich at 170-171 (contrasting MCR 2.222, which permits a court in a proper venue to transfer a case "on motion of *a party*"). A plaintiff can challenge an order transferring venue by filing "a motion for rehearing or reconsideration within 21 days pursuant to MCR 2.119(F)(1),[54] or by filing an application for leave to appeal, MCR 7.205." *Dawley*, 501 Mich at 172.

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). Upon the defendant's timely motion to change venue and a finding that venue is improper, the trial court must transfer the case to a county with proper venue. MCL 600.1651; MCR 2.223(A); *Miller v Allied Signal, Inc*, 235 Mich App 710, 716-717 (1999).

[54] See Section 4.3.

1. Order for Change of Venue, Case Records, and Required Fees

"The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court" and "order the plaintiff to pay the applicable statutory filing fee directly to the receiving court, unless fees have been waived in accordance with MCR 2.002."[55] MCR 2.223(B)(1). The order must be entered on a SCAO-approved form. MCR 2.226(A). If the order "is not prepared as required under [MCR 2.226(A)], and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the clerk of the receiving court shall refuse to accept the transfer and shall prepare a notice of refusal on a form approved by the [SCAO] and return the case to the transferring court for a proper order within seven business days of receipt of the transfer order." MCR 2.226(B). Upon receipt of a refusal to accept a transfered case under MCR 2.226(B), the transferring court must "prepare a proper order in accordance with [MCR 2.226(A)] and retransfer the case within seven business days." MCR 2.226(C). "The court may also order the plaintiff to pay reasonable compensation and attorney fees to the defendant if the case was filed in the wrong court." MCR 2.223(B)(1).

"The transferring court must serve the order [of transfer] on the parties and send a copy to the receiving court. The clerk of the transferring court must prepare the case records for transfer in accordance with the orders entered under [MCR 2.223(B)(1)] and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method." MCR 2.223(B)(2). "The receiving court must temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the transferring court. The receiving court must notify the plaintiff of the new case number in the receiving court, the amount due, and the due date." MCR 2.223(B)(3).

"If a jury fee has been paid, the clerk of the transferring court must forward it to the clerk of the receiving court as soon as possible after the case records have been transferred." MCR 2.223(C)(2).

[55] "Notwithstanding any other provision of [MCR 2.002], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." MCR 2.002(L). See Section 1.11 for more information on waiver of fees.

2. Proceedings After Transfer

The receiving court must dismiss the action if the plaintiff does not pay the applicable filing fee, costs, and expenses as ordered by the transferring court within 28 days of the date of the transfer order. MCR 2.223(C)(1). "No further proceedings may be had in the action until payment has been made." *Id*.

E. Standard of Review

Whether to grant a motion for change of proper venue is reviewed for an abuse of discretion. *Kohn v Ford Motor Co*, 151 Mich App 300, 305 (1986).

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

2.15 Standing and Real Party In Interest Requirements

"'[A]lthough the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts.'" *Maki Estate v Coen*, 318 Mich App 532, 539 n 1 (2017), quoting *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 355 (2013) (alteration in original). "The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits." *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 355. "In contrast, the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another." *Id.*

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 Raps Community Hosp*, 221 Mich App 301, 311 (1997). See also MCL 600.2041 and MCR 2.201(B)(1).

"The real-party-in-interest rule recognizes that litigation should be begun only by a party having an interest that will [ensure] sincere and vigorous advocacy." *Olin v Mercy Health Hackley Campus*, 328 Mich App 337, 345 (2019) (quotation marks and citation omitted). "The rule also protects the defendant by 'requiring that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted' against the defendant.'" *Id*. at 345, quoting *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 356. "[W]hen a minor is negligently injured by another and sues through his or her next friend, the claim still belongs to the minor, and it is the minor who is the real party in interest." *Olin*, 328 Mich App at 346.

MCR 2.201(C) governs an individual's or an entity's capacity to sue or be sued. "[T]he defense that a plaintiff is not the real party in interest is not the same as the legal-capacity-to-sue defense." *Olin*, 328 Mich App at 355 (quotation marks and citations omitted). Where the individual is a minor or incompetent person, MCR 2.201(E) controls. "Nothing in the plain language of MCR 2.201(E) requires the filing of a petition for appointment or the completion of a next friend appointment before suit or simultaneously with the filing of a complaint on behalf of a minor[.]" *Olin*, 328 Mich App at 349. MCR 2.201(E) "repeatedly refers to what 'the court' must do, clearly implying that it is the court assigned to the minor's lawsuit that handles the next friend appointment process." *Olin*, 328 Mich App at 349. As such, "the court rule implicitly assumes the complaint has already been filed, and properly so, even though no next friend has yet been appointed." *Id*. at 349. It is not required "that next-friend appointments occur before commencing suit or before the expiration of the statute of limitations period, even after a complaint has been filed." *Id*. at 356 ("the formal appointment of a next friend is [not] a meaningful date for statute of limitation purposes," and the trial court erred in dismissing plaintiff's medical malpractice action where the next friend was not appointed until after the expiration of the statute of limitations period).[56]

"[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 at 349.

2.16 Res Judicata and Collateral Estoppel

The concepts of res judicata (also known as claim preclusion) and collateral estoppel (also known as issue preclusion) are designed to prevent the relitigation of claims that have already been litigated or that

[56] See Section 9.11 for more information on procedures in medical malpractice actions.

should have been litigated in a prior case. See, generally, *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485 (2004), overruled on other grounds by *Titan Ins Co v Hyten*, 491 Mich 547, 556 n 4 (2012). Although the terms res judicata and collateral estoppel are often conflated, *Topps-Toeller, Inc v Lansing*, 47 Mich App 720, 726 (1973), distinguished the two doctrines:

- Res judicata "bars the reinstitution of the same cause of action by the same parties in a subsequent suit." *Topps-Toeller, Inc*, 47 Mich App 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." *Topps-Toeller, Inc*, 47 Mich App at 727.

The above "two principles fulfill the judicial policy of providing the parties with a *final* decision upon litigated questions." *Topps-Toeller, Inc*, 47 Mich App at 727.

A. Res Judicata

1. Prerequisites

"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 Mich Nat'l Bank*, 172 Mich App 456, 464 (1988) (internal citations omitted).

"'The transactional test provides that the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.'" *Adair v Michigan (Adair III)*, 317 Mich App 355, 366 (2016), quoting *Adair v Michigan (Adair II)*, 470 Mich 105, 124

(2004) (additional citation and quotation 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*, 498 Mich 934 (2015), quoting *Adair II*, 470 Mich at 125 (additional citation and quotation omitted).

"To be accorded the conclusive effect of res judicata, the judgment must ordinarily be a firm and stable one, the last word of the rendering court." *In re Bibi Guardianship*, 315 Mich App 323, 333 (2016) (explaining that orders granting temporary relief and interlocutory orders generally do not carry preclusive effect under res judicata) (quotation marks, alterations, and citation 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).

2. Burden of Proof

The burden of proving the application of res judicata is on the party asserting it. *Baraga Co v State Tax Comm*, 466 Mich 264, 269 (2002).

3. Timing

The defense of 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).

4. Res Judicata Asserted by Plaintiff

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 498 Mich 934 (2015).[57] Although "[p]arties

[57]For more information on the precedential value of an opinion with negative subsequent history, see our note.

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).

5. Federal Case as Basis for Res Judicata

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." *Id*. at 422.

6. Application of Res Judicata

a. Consent Judgment

The doctrine of res judicata applies to consent judgments. *In re Bibi Guardianship*, 315 Mich App 323, 333 (2016). However, the consent judgment must be "a final decision for purposes of res judicata." *Id*. Accordingly, res judicata did not bar a guardianship petition where a prior foreign consent judgment "was clearly not intended to be the last word of the [foreign] court with regard to the wards," but rather was merely "an agreement between the parties regarding a temporary placement . . . [pending] 'further Order of the Court.'" *Id.* at 334. Furthermore, where "[m]ore than a year passed between the entry of the consent judgment and the probate court's decision, during which there were intervening changes of both fact and law," and "the proper venue for a guardianship or custody [action] changed from [the foreign jurisdiction] to Michigan," the probate court erred in applying res judicata, which resulted in an "abdicat[ion of] its statutory authority to decide the issue on the merits[.]" *Id.* at 334, 335 (citations omitted).

b. Involuntary Dismissal

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). See also *Adair v Michigan (Adair III)*, 317 Mich App 355, 365 (2016) (holding that "[a]n involuntary dismissal pursuant to MCR 2.504 operates as an adjudication on the merits," and "in the absence of any language in the order of dismissal limiting the scope of the merits decided," the first prerequisite to applying res judicata – that the prior action be decided on the merits – is satisfied by an involuntary dismissal).

> **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. Workers' Compensation

"The doctrine of res judicata applies to workers' compensation awards[.]" *Banks v LAB Lansing Body Assembly*, 271 Mich App 227, 229-230 (2006). "However, a claimant may later raise a different claim or modify an existing award if the employee's physical condition worsens." *Id*. at 230.

d. The Headlee Amendment

The doctrine of res judicata applies to matters involving the enforcement of the Headlee Amendment, Const 1963, art 9, §§ 25-34. *Adair v Michigan (Adair III)*, 317 Mich App 355, 364 n 3 (2016) ("the ratifiers of the Headlee Amendment 'would have thought, as with all litigation, there would be the traditional rules that would preclude relitigation of similar issues by similar parties' and that an application of the doctrine was essential to making the amendment 'workable,' and to preventing the Amendment from becoming a 'Frankensteinian monster'"), quoting *Adair v Michigan (Adair II)*, 470 Mich 105, 120-121, 126-127 (2004).

e. Landlord-Tenant Summary Proceedings

"The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory." MCL 600.5750. Accordingly, the application of res judicata in the context of a judgment of possession is limited to claims that were actually litigated. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 576-577 (2001). "Interpreting this provision, our Supreme Court has concluded that, 'the Legislature took these cases outside the realm of the normal rules concerning merger and bar in order that attorneys would not be obliged to fasten all other pending claims to the swiftly moving summary proceedings.'" *King v Munro*, 329 Mich App 594, 602 (2019), quoting *Sewell*, 463 Mich at 574 (concluding that "because plaintiff was not required to bring her negligence claim in the summary-eviction proceedings and the district court did not otherwise resolve the claim, res judicata [did] not bar plaintiff from bringing a negligence claim in the circuit court").

f. Personal Protection Order

Res judicata did not bar a petitioner's second request for a PPO where the petitioner accused the respondent of some of the same stalking behaviors she identified in her first request for a PPO. See *PF v JF*, 336 Mich App 118, 120-121 (2021). In *PF*, the petitioner sought the first PPO based on five incidents, and the trial court denied the request. *Id*. at 120. After the court denied the request, a sixth incident occurred, and it "drove petitioner to again seek the assistance of a [different] court in an effort to obtain a PPO against respondent. And the sixth incident could not be viewed in isolation or a vacuum; rather, the pattern of conduct between and involving the parties, including the first five incidents, had to be examined in its entirety. The earlier incidents could give explanation or context to the sixth incident by providing insight on intent, continuity of purpose, the reasonableness of beliefs, and states of mind or feelings relative to terror, fright, intimidation, threats, harassment, and molestation." *Id*. at 129-130 (the Court recognized that the incidents raised in the first request overlapped with all but one incident raised in the second request, but noted that if "res judicata precluded consideration of the first five incidents in relation to whether a PPO should be issued predicated on stalking activity," the Court "would effectively be subverting the intent of the Legislature in enacting MCL 600.2950" and

"the common-law doctrine of res judicata cannot be employed to undermine our Legislature's intent"). "A circuit court needs to have the ability to examine and consider the totality of the circumstances when ruling on a PPO petition. The past history of the parties is a necessary consideration when evaluating whether a PPO should be issued." *PF*, 336 Mich App at 130-131.

g. Assignments

Because "both res judicata and collateral estoppel apply only when the parties in the subsequent action were parties or privies of parties to the original action," "a judgment entered after [an] assignment does not bind the assignee [when] the assignee is not in privity with the assignor with respect to that judgment." *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co*, ___ Mich ___, ___ (2022). In *Mecosta*, the insured "was injured in a car crash and received medical treatment from plaintiffs[.]" *Id.* at ___. "As compensation for this treatment," the insured assigned plaintiffs "his right to seek no-fault personal protection insurance (PIP) benefits from the insurer responsible for making those payments." *Id.* at ___. "After the assignment," the insured "filed suit seeking PIP benefits for separate services he received arising from the crash." *Id*. at ___. "In that lawsuit, to which [the *Mecosta* plaintiffs] were not party, the trial court held that [the insured] had not properly insured the vehicle and was therefore not entitled to any benefits." *Id.* at ___.

The Michigan Supreme Court held that "the doctrines of res judicata and collateral estoppel [were] inapplicable" "because plaintiffs were neither parties to the earlier suit nor privies with respect to the subsequently entered judgment[.]" *Mecosta Co Med Ctr*, ___ Mich at ___. The *Mecosta* Court noted that "the mere succession of rights to the same property or interest does not, by itself, give rise to privity with regard to subsequent actions by and against the assignor." *Id*. at ___. The Court observed that "the assignee succeeds to those rights subject to any earlier adjudication involving the assignor that defined those rights." *Id.* at ___. Accordingly, the Court opined that "[w]hen the litigation involving the assignor occurs after the assignment, the rights could not yet have been affected by the litigation at the time they were transferred to the assignee." *Id.* at ___.

"The fact that the prior judgment involved rescission does not alter the analysis under *Mecosta*." *C-Spine Orthopedics,*

> *PLLC v Progressive Mich Ins Co*, ___ Mich App ___, ___ (2023). Accordingly, "[t]he fact that the court in [the injured party's] case granted the equitable remedy of rescission does not affect [assignee] C-Spine's rights, because C-Spine was not involved in that case. It had no opportunity to argue against rescission in that litigation. A contrary position would allow an assignor to cut off an assignee's rights without the latter having any notice or opportunity to be heard." *Id*. at ___. "Rescission does not change this." *Id*. at ___.

B. Collateral Estoppel

1. Prerequisites

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) (alteration in original).

"In the subsequent action, the ultimate issue to be concluded must be the same as that involved in the first action. The issues must be identical, and not merely similar." *King v Munro*, 329 Mich App 594, 600 (2019) (quotation marks and citation omitted).

2. Mutuality of Estoppel

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 v State Farm Ins Co*, 469 Mich 679, 684 (2004). "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, or purchase." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 529-530 (2014).

Estoppel is mutual if the party asserting estoppel would have been bound by the earlier adjudication if it had gone against them. *Monat*, 469 Mich at 684-685. 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." *Id*. at 691-692.

3. Crossover Estoppel

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. *Id.* 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*, 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. *Id.* at 50-51. 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). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook Vol. 1*, Chapter 9, for additional information on civil-to-criminal cross-over estoppel.

4. On Remand

"[C]ollateral estoppel may arise within the confines of a single cause of action." *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, ___ Mich App ___, ___ (2023). "[W]hen a case is remanded for a new trial, the trial court may consider and grant a motion for summary disposition if the requirements for granting such a motion are satisfied." *Id*. at ___. Additionally,

"when a case is remanded, the lower court is free to consider and decide any matters left open by the appellate court's mandate." *Id*. at ___ (cleaned up).

5. Application of Collateral Estoppel

"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 v Mich Nat'l Bank*, 172 Mich 456, 463 (1988), citing *Cogan v Cogan*, 149 Mich App 375, 379 (1986).

a. Consent Judgment

Older Court of Appeals cases have concluded that collateral estoppel does not apply to consent judgments because "'[n]othing is adjudicated between two parties to a consent judgment.'" *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 102-103 (1985), quoting *American Mut Liability Ins Co v Mich Mut Liability Co*, 64 Mich App 315, 327 (1975). But a more recent opinion, *In re Bibi Guardianship*, 315 Mich App 323, 332 (2016), states that "collateral estoppel does not apply to consent judgments where factual issues are neither tried nor conceded." (Quotation marks and citation omitted.) Where "the factual issues involved in [a] prior [foreign child protective] proceeding were [not] actually tried or conceded by entry of [a] consent judgment . . . [that] was merely an agreement between the parties regarding a temporary placement for the wards," and collateral estoppel did not bar a Michigan guardianship proceeding. *Id.* at 332.

b. Dismissal/Affirmative Defense

Collateral estoppel does not apply to an issue raised as an affirmative defense in a prior action that was dismissed upon stipulation of the parties where the issue "was not one of the essential questions actually litigated in the prior case and . . . was not resolved by the judgment." *King v Munro*, 329 Mich App 594, 599 (2019) (the issue "was not mentioned at the hearing to dismiss the case and [was] not mentioned in the order"; additionally, "the dismissal [did] not hinge on the [issue]").

c. Arbitration Proceeding

"[T]he trial court did not err when it denied [the plaintiff's] motion to vacate [an] arbitration award on the basis of collateral estoppel." *Radwan v Ameriprise Ins Co*, 327 Mich App 159, 173 (2019). Where the issue of the plaintiff's "injury was actually tried and incorporated into [a] stipulated order of dismissal" during the plaintiff's third-party action, a question of fact essential to the plaintiff's claim for first-party benefits had been litigated and determined by a valid and final judgment. *Id*. at 171. "[T]he stipulated order of dismissal, which incorporated the jury's verdict [that the plaintiff had not suffered an injury, was] sufficient to satisfy the first requirement for collateral estoppel." *Id*. at 168 ("even if the stipulated order of dismissal was a consent judgment, collateral estoppel applies in this case"[58]). Additionally, although the plaintiff "made the tactical decision to relinquish her opportunity to appeal [the jury's verdict] in consideration for [the defendant's] agreement to forgo case evaluation sanctions" that decision did not prevent her from receiving "a full and fair opportunity to litigate the issue of her injuries." *Id*. at 173. Lastly, mutuality was not required because "'collateral estoppel [was] being asserted defensively against [the plaintiff] who [had] already had a full and fair opportunity to litigate the issue[.]'" *Id*. at 166, quoting *Monat v State Farm Ins Co*, 469 Mich 679, 680-681, 695 (2004).[59]

d. Administrative Proceeding

"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, 731-732 (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).

[58]See Section Section 2.15(B)(4)(a) for additional discussion of collateral estoppel and consent judgments.

[59]See Section 2.15(B)(2) for additional discussion of mutuality.

e. Assignments

Because "both res judicata and collateral estoppel apply only when the parties in the subsequent action were parties or privies of parties to the original action," "a judgment entered after [an] assignment does not bind the assignee [when] the assignee is not in privity with the assignor with respect to that judgment[.]" *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co*, ___ Mich ___, ___ (2022). In *Mecosta*, the insured "was injured in a car crash and received medical treatment from plaintiffs[.]" *Id.* at ___. "As compensation for this treatment," the insured assigned plaintiffs "his right to seek no-fault personal protection insurance (PIP) benefits from the insurer responsible for making those payments." *Id.* at ___. "After the assignment," the insured "filed suit seeking PIP benefits for separate services he received arising from the crash." *Id.* at ___. "In that lawsuit, to which [the *Mecosta* plaintiffs] were not party, the trial court held that [the insured] had not properly insured the vehicle and was therefore not entitled to any benefits." *Id.* at ___.

The Michigan Supreme Court held that "the doctrines of res judicata and collateral estoppel [were] inapplicable" "because plaintiffs were neither parties to the earlier suit nor privies with respect to the subsequently entered judgment." *Mecosta Co Med Ctr*, ___ Mich at ___. The *Mecosta* Court noted that "the mere succession of rights to the same property or interest does not, by itself, give rise to privity with regard to subsequent actions by and against the assignor." *Id.* at ___. The Court observed that "the assignee succeeds to those rights subject to any earlier adjudication involving the assignor that defined those rights." *Id.* at ___. Accordingly, the Court opined that "[w]hen the litigation involving the assignor occurs after the assignment, the rights could not yet have been affected by the litigation at the time they were transferred to the assignee." *Id.* at ___.

"The fact that the prior judgment involved rescission does not alter the analysis under *Mecosta*." *C-Spine Orthopedics, PLLC v Progressive Mich Ins Co*, ___ Mich App ___, ___ (2023). Accordingly, "[t]he fact that the court in [the injured party's] case granted the equitable remedy of rescission does not affect [assignee] C-Spine's rights, because C-Spine was not involved in that case. It had no opportunity to argue against rescission in that litigation. A contrary position would allow an assignor to cut off an assignee's rights without the latter having any notice or

opportunity to be heard." *Id*. at ___. "Rescission does not change this." *Id*. at ___.

f. Government Employee Advice

"Not everything a government worker tells you binds the government." *Meier v Pub Sch Employees' Retirement Sys*, ___ Mich App ___, ___ (2022). The United States Supreme Court has "rejected an estoppel-based argument that erroneous oral and written advice given by a Government employee to a benefits claimant bound the federal government to provide benefits to the claimant." *Id*. at ___ (quotation marks and citation omitted). The Michigan Supreme Court "similarly has taken an extraordinarily narrow view of estoppel against the government, ruling that, although it is unfortunate that plaintiff received incorrect guidance, such guidance cannot alter the law of this state." *Id*. at ___ (cleaned up). "There cannot be as many laws as there are public servants who dispense guidance or advice on the meaning of the law. Rather, such guidance or advice must always be understood as subordinate to the law actually enacted by the elected representatives of the people." *Id*. at ___ (quotation marks and citation omitted). Accordingly, a statute "must be faithfully applied" "even if plaintiff received advice from [a government] employee that contradicted the language of the [act]." *Id*. at ___.

C. Standard of Review

The application of res judicata or collateral estoppel is a question of law that is reviewed de novo. *In re Bibi Guardianship*, 315 Mich App 323, 328 (2016).

2.17 Mootness

"Michigan Courts exist to decide actual cases and controversies[.]" *Bailey v Antrim Co*, 341 Mich App 411, 419 (2022) (quotation marks and citation omitted). Accordingly, courts "generally [do] not decide moot issues[.]" *Barrow v Wayne Co Bd of Canvassers*, 341 Mich App 473, 482 (2022). However, a court may "review moot issues if they are publicly significant, likely to recur, and yet likely to evade judicial review." *Duckett v Solky*, 341 Mich App 706, 732 (2022) (quotation marks and citation omitted).

"An issue is rendered moot when an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a

judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Duckett v Solky*, 341 Mich App 706, 731-732 (2022) (quotation marks and citation omitted). "[O]nce [a] circuit court [becomes] aware of [a] mootness issue, it [is] obligated to address it." *Equity Funding, Inc v Village of Milford*, ___ Mich App ___, ___ (2022). Indeed, "[a] court must address mootness when it arises, whether that is in a reply brief or sua sponte." *Id*. at ___. "Where a court considers an issue sua sponte, due process can be satisfied by affording a party an opportunity for rehearing." *Id*. at ___ (quotation marks and citation omitted).

Chapter 3: Pleadings and Process

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3.1 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).

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).

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

MCR 2.111(A)-(B) governs the format of pleadings, in general, while MCR 2.111(C) governs the content of responsive pleadings.[1] Pleadings are also subject to the requirements of MCR 1.109(D)(3) (addressing document verification requirements) and MCR 1.109(E) (addressing document signature requirements). See MCR 2.111(A). At least one attorney of record, or a party if not represented by an attorney, must sign any pleading. MCR 1.109(E)(2). "If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party." MCR 1.109(E)(3). "An electronic signature is acceptable in accordance with [MCR 1.109(E)(4)]." MCR 1.109(E)(4). "The following form is acceptable: /s/ John L. Smith." MCR 1.109(E)(4)(a).

A pleading or other document filed by an unrepresented individual who is incarcerated in prison or jail "must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline. Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp)

[1] MCR 2.112 governs the pleading of special matters.

showing that the document was timely deposited and that postage was prepaid."

Committee Tip:

Courts may receive pleadings filed by an in pro per party (often submitted in letter format). Filings should be reviewed by court staff to determine whether the "pleading" was properly served or is ex parte communication. See Section 1.3(A) for more information on ex parte communication. Additionally, the court may dismiss a matter, MCR 2.504(B), or enter a default, MCR 2.603, if the filing fails to comply with MCR 2.111(C). See Section 4.10(E) regarding involuntary dismissal as a sanction and Section 4.11 regarding defaults. However, courts should recall that dismissal is a drastic action. To facilitate justice, all available options should be considered to devise a sanction that is just and proper (i.e., granting a period in which the party may file an amended pleading in an attempt to cure any defects).

B. Electronic Filing[2]

"Electronic filing [(e-filing)] and electronic service of documents is governed by [MCR 1.109(G)] and the policies and standards of the State Court Administrative Office [(SCAO)]." MCR 1.109(D)(7). Courts must implement e-filing and electronic service capabilities in accordance with MCR 1.109, and comply with standards established by SCAO. MCR 1.109(G)(2). "Confidential and nonpublic information or documents and sealed documents that are electronically filed or electronically served must be filed or served in compliance with these standards to ensure secure transmission of the information." *Id*.

Courts must:

- accept e-filings and allow electronic service of documents;
- comply with the e-filing guidelines and plans approved by SCAO; and

[2]See the MiFile webpage for more information on Michigan's e-filing system.

- maintain electronic documents in accordance with the standards established by SCAO. MCR 1.109(G)(3)(a)(*i*)-(*iii*).

"[C]ourts that seek permission to mandate that all litigants e-File [must] first submit an e-Filing Access Plan for approval by the State Court Administrative Office." Administrative Order No. 2019-2, 504 Mich xviii (2019). "Each plan must conform to the model promulgated by the State Court Administrator and ensure access to at least one computer workstation per county." *Id*. "The State Court Administrative Office may revoke approval of an e-Filing Access Plan due to litigant grievances." *Id*.

Courts must accommodate the filing and serving of materials that cannot be done so electronically. MCR 1.109(G)(3)(c). "The clerk of the court shall convert to electronic format certain documents filed on paper in accordance with the electronic filing implementation plans established by [SCAO]." MCR 1.109(G)(3)(d). "A court may electronically send any notice, order, opinion, or other document issued by the court in that case by means of the electronic-filing system." MCR 1.109(G)(3)(e). MCR 1.109(G)(3)(e) does not "eliminate any responsibility of a party, under these rules, to serve documents that have been issued by the court." *Id*. Attorneys must electronically file documents for required case types in courts that have implemented electronic filing, unless the attorney is exempt from e-filing under MCR 1.109(G)(3)(h) because of a disability. MCR 1.109(G)(3)(f). "All other filers are required to electronically file documents only in courts that have been granted approval to mandate electronic filing by [SCAO.]" *Id*. See Section 3.1(B)(1)(c) for information on exemptions from e-filing mandates.

"There is only one official court record, regardless whether original or suitable-duplicate and regardless of the medium." MCR 8.119(D)(4). "Documents electronically filed with the court or generated electronically by the court are original records and are the official court record. A paper printout of any electronically filed or generated document is a copy and is a nonrecord for purposes of records retention and disposal." *Id*.

1. Electronic Filing Process

a. General Provisions

Authorized users must electronically provide specified case information,[3] including e-mail addresses for achieving e-service.[4] MCR 1.109(G)(5)(a)(*i*). The authorized user is responsible for ensuring that a filing has been received by the e-filing system, and must

immediately notify the clerk of the court if it is discovered that the version of the document available for viewing through the e-filing system does not depict the document as submitted (and must resubmit the document if necessary). MCR 1.109(G)(5)(a)(*ii*). The authorized user may file a motion with the court pursuant to MCR 1.109(G)(7) if a controversy arises between the clerk of the court and the authorized user.[5] MCR 1.109(G)(5)(a)(*ii*).

If the court rejects a submitted document pursuant to MCR 8.119(C), the clerk must notify the authorized user of the rejection and the reason for the rejection. MCR 1.109(G)(5)(a)(*iii*). The rejection must be recorded in an e-filing transaction (from the court to the authorized user), but the rejected document does not become part of the official court record. *Id*.

b. Timing

"A document submitted electronically is deemed filed with the court when the transmission to the electronic-filing system is completed and the required filing fees have been paid or waived."[6] MCR 1.109(G)(5)(b). "If a document is submitted with a request to waive the filing fees, no fees will be charged at the time of filing and the document is deemed filed on the date the document was submitted to the court." *Id*. "A transmission is completed when the transaction is recorded as prescribed in [MCR 1.109(G)(5)(c)]." MCR 1.109(G)(5)(b). The filing date is the date the document was submitted, regardless of the date the clerk of the court accepts the filing. *Id*. A document submitted at or before 11:59 p.m. of a business day is deemed filed on that business day. *Id*. "Any document submitted on a Saturday, Sunday, legal holiday, or other day on which the court is closed pursuant to court order is deemed filed on the next business day." *Id*.

c. Exemptions from Mandatory E-Filing

"Where electronic filing is mandated, a party may file paper documents with that court and be served with

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[3] Specified case information must be proved in the form and manner established by SCAO and other applicable rules. At a minimum, it must "include the name, an address for service, an e-mail address, and a telephone number of every party[.]" MCR 1.109(D)(2).

[4] See Section 3.1(B)(2) for additional information on electronic service process.

[5] See Section 3.1(B)(3) for additional information on transmission failures.

[6] See Section 3.1(B)(4) for additional information on fees.

paper documents according to [MCR 1.109(G)(6)(a)(*ii*)] if the party can demonstrate good cause for an exemption." MCR 1.109(G)(3)(g). "For purposes of [MCR 1.109], a court shall consider the following factors in determining whether the party has demonstrated good cause:

> (*i*) Whether the person has a lack of reliable access to an electronic device that includes access to the Internet;
>
> (*ii*) Whether the person must travel an unreasonable distance to access a public computer or has limited access to transportation and is unable to access the e-Filing system from home;
>
> (*iii*) Whether the person has the technical ability to use and understand email and electronic filing software;
>
> (*iv*) Whether access from a home computer system or the ability to gain access at a public computer terminal present a safety issue for the person;
>
> (*v*) Any other relevant factor raised by a person." MCR 1.109(G)(3)(g).

"Upon request, the following persons are exempt from electronic filing without the need to demonstrate good cause:

> (*i*) a person who has a disability as defined under the Americans with Disabilities Act that prevents or limits the person's ability to use the electronic filing system;
>
> (*ii*) a person who has limited English proficiency that prevents or limits the person's ability to use the electronic filing system; and
>
> (*iii*) a party who is confined by governmental authority, including but not limited to an individual who is incarcerated in a jail or prison facility, detained in a juvenile facility, or committed to a medical or mental health facility." MCR 1.109(G)(3)(h).

An exemption request must be filed (in paper) on a SCAO approved form, verified under MCR 1.109(D)(3), and no

fee may be charged for the request. MCR 1.109(G)(3)(i)(*i*). "The request . . . must specify the reasons that prevent the individual from filing electronically" and may be supported with documents. *Id*. "If the individual filed paper documents at the same time as the request for exemption under [MCR 1.109(G)(3)(i)], the clerk shall process the documents for filing. If the documents meet the filing requirements of [MCR 1.109(D)], they will be considered filed on the day they were submitted." MCR 1.109(G)(3)(j).

A request for exemption from e-filing under MCR 1.109(G)(3)(h) must "be approved by the clerk of the court on a form approved by [SCAO]." MCR 1.109(G)(3)(i)(*ii*). If the clerk is unable to grant an exemption, the clerk must immediately submit the request for judicial review. *Id*. A judge is required to review requests made under MCR 1.109(G)(3)(g) and MCR 1.109(G)(3)(h)(*i*), and any requests not granted by the clerk. MCR 1.109(G)(3)(i)(*ii*). A court must "issue an order granting or denying the request within two business days of the date the request was filed." *Id.* The clerk "must hand deliver or promptly mail the clerk approval granted or order entered under [MCR 1.109(G)(3)(i) to the individual. MCR 1.109(G)(3)(k). The request, any supporting documentation, and the clerk approval or order must be placed in the case file. *Id.* "If there is no case file, the documents must be maintained in a group file." *Id*. "If the request was made under [MCR 1.109(G)(3)(h)(*i*)], both the Request for Exemption from Use of MiFILE and the Request for Reasonable Accomodations [sic], along with any supporting documentation and the clerk approval or order shall be maintained confidentially." MCR 1.109(G)(3)(k).

"An exemption granted under [MCR 1.109] is valid only for the court in which it was filed and for the life of the case unless the individual exempted from filing electronically registers with the electronic-filing system." MCR 1.109(G)(3)(*l*). An individual who waives exemption (by registering with the electronic-filing system) "becomes subject to the rules of electronic filing and the requirements of the electronic-filing system. An individual who waives an exemption . . . may file another request for exemption." *Id*.

2. Electronic-Service Process[7]

Service of process of case initiating documents must be made in accordance with the rules and laws applicable to the particular case type. MCR 1.109(G)(6)(a)(*i*).

Generally, service of process of all other documents e-filed must be performed through the e-filing system. MCR 1.109(G)(6)(a)(*ii*). However, service must be made by any other method required by Michigan Court Rules if a party has been exempted from electronic filing or has not registered with the e-filing system. *Id*. "Delivery of documents through the electronic-filing system in conformity with [the Michigan Court Rules] is valid and effective personal service and is proof of service under Michigan Court Rules." MCR 1.109(G)(6)(a)(*iii*). "Except for service of process of initiating documents and as otherwise directed by the court or court rule, service may be performed simultaneously with filing." MCR 1.109(G)(6)(a)(*iv*). "When a court rule permits service by mail, service may be accomplished electronically under [MCR 1.109(G)(6)]." MCR 1.109(G)(6)(a)(*v*).

Parties and attorneys are required to file with the court and serve on other parties or attorneys a written notice of a change in contact information, which includes name, physical address, mailing address, phone number, and email address (when required). MCR 1.109(D)(11)(a). The written notice of changed contact information must be served in accordance with MCR 2.107(C) or MCR 1.109(G)(6)(a). MCR 1.109(D)(11)(a). The clerk of the court must update the case caption with the modified contact information; however, the case title shall not be modified as a result of a change of name. MCR 1.109(D)(11)(b). The court and parties to the case must send or serve subsequent documents to the new mailing address as required by MCR 2.107(C) or the new email address as required by MCR 1.109(G)(6)(a). MCR 1.109(D)(11)(c).

"A document served electronically through the electronic-filing system in conformity with all applicable requirements of this rule is considered served when the transmission to the recipient's e-mail address is completed. A transmission is completed when the transaction is recorded as prescribed in [MCR 1.109(G)(6)(c)]." MCR 1.109(G)(6)(b).

[7] See Section 3.4 for additional information on service.

3. Transmission Failures

"In the event the electronic-filing system fails to transmit a document submitted for filing, the authorized user may file a motion requesting that the court enter an order permitting the document to be deemed filed on the date it was first attempted to be sent electronically." MCR 1.109(G)(7)(a). "The authorized user must prove to the court's satisfaction that:

> (*i*) the filing was attempted at the time asserted by the authorized user;
>
> (*ii*) the electronic-filing system failed to transmit the electronic document; and
>
> (*iii*) the transmission failure was not caused, in whole or in part, by any action or inaction of the authorized user. A transmission failure caused by a problem with the filer's telephone line, ISP, hardware, or software shall be attributed to the filer." MCR 1.109(G)(7)(a)(*i*)-(*iii*).

"Electronic service by the electronic-filing system is complete upon transmission as defined in [MCR 1.109(G)(6)(b)] unless the person or entity making service learns that the attempted service did not reach the intended recipient." MCR 1.109(G)(7)(d). "If the transmission is undeliverable, the person or entity responsible for serving the document must immediately serve by regular mail under MCR 2.107(C)(3) or by delivery under MCR 2.107(C)(1) or [MCR 2.107(C)(2)] the document and a copy of the notice indicating that the transmission was undeliverable"; "[t]he person or entity must also include a copy of the notice when filing proof of service with the court under [MCR 1.109(G)]." MCR 1.109(G)(7)(d)(*i*). "A recipient who is served with a notice under [MCR 1.109(G)(7)(d)(*i*)] should ensure the electronic filing system reflects their current email address." MCR 1.109(G)(7)(d)(*ii*).

If the e-filing system fails to transmit a document selected for service and that document is deemed necessary to ensure due process rights are protected, the State Court Administrator must "provide notice to the affected persons in either of the following ways:

> (*i*) file, as a nonparty, a notice of defective service in each affected case and, as deemed appropriate, serve the notice, or

> (*ii*) send notice of a system-wide transmission failure to each affected system user." MCR 1.109(G)(7)(e).

"If notice is provided under [MCR 1.109(G)(7)(e)], the clerk of the court where the affected case is filed must enter the event in the case history in accordance with MCR 8.119(D)(1)(a)." MCR 1.109(G)(7)(f). A fee must "not be assessed on a motion filed claiming that rights in the case were adversely affected by transmission failure of a document selected for service." MCR 1.109(G)(7)(g).

4. Fees

"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 also collect an electronic filing system fee, subject to [MCL 600.1993[8]], as follows:

> (a) For civil actions filed in the supreme court, court of appeals, circuit court, probate court, and court of claims, $25.00.
>
> (b) Except as proved 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).[9]

"Except for an automated payment service fee collected under [MCL 600.1986(5)], and except as provided in [MCL 600.1987(2)[10]], 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).

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[8] MCL 600.1993 provides that "[a] clerk shall not collect an electronic filing system fee under [MCL 600.1986(1)] after February 28, 2031."

[9] SCAO published a memorandum on February 29, 2016, to assist trial courts in determining when an electronic filing system fee must be assessed.

[10] MCL 600.1987(2) provides that "[i]f, pursuant to a supreme court 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, 2017."

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 supreme court." MCL 600.1992.

a. Collection of Electronic Filing System Fee

"Subject to [MCL 600.1991[11]], 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).[12]

"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.

b. 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).

"If a document is submitted with a request to waive the filing fees, no fees will be charged at the time of filing and the document is deemed filed on the date the document was submitted to the court." MCR 1.109(G)(5)(b).

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

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[11] MCL 600.1991 permits courts to apply to the Supreme Court for access to and use of the e-filing system. MCL 600.1991(1). "If the supreme court accepts a court under [MCL 600.1991(1)], the state court administrative office 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).

[12] SCAO published a memorandum on February 29, 2016, to assist trial courts in determining when an e-filing system fee must be assessed

c. 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 [SCAO]. 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).

C. Appearance

Filing an appearance entitles a party or attorney to be served with all documents as provided by MCR 2.107(A). MCR 2.117(A)(2); see also MCR 2.117(B)(1). 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)(4); *Plunkett & Cooney, PC v Capitol Bancorp, Ltd*, 212 Mich App 325, 329 (1995).

1. Limited Appearance[13]

An attorney may appear on behalf of a party "for limited purposes during the course of an action, including, but not limited to, depositions, hearings, discovery, and motion practice, if the following conditions are satisfied:

> (*i*) The attorney files and serves a notice of limited appearance with the court before or during the relevant action or proceeding, and all parties of record are served with the limited entry of appearance; and
>
> (*ii*) The notice of limited appearance identifies the limitation of the scope by date, time period, and/or subject matter." MCR 2.117(B)(2)(c). See also MRPC 1.2(b).

"An attorney who has filed a notice of limited appearance must restrict activities in accordance with the notice or any amended

[13]See the Michigan Judicial Institute's *Stages of Limited Scope Representation* table.

limited appearance. Should an attorney's representation exceed the scope of the limited appearance, opposing counsel (by motion), or the court (by order to show cause), may set a hearing to establish the actual scope of representation." MCR 2.117(B)(2)(d).

2. Duration of Appearance[14]

Generally, 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). However, in some circumstances, the attorney may withdraw from the action or be substituted earlier in the case. See MCR 2.117(C)(2); MCR 2.117(C)(4). Regarding withdrawal, generally, "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).

However, an attorney who filed a notice of limited appearance may withdraw by filing a notice of withdrawal from the limited appearance with the court and serving it on all parties of record. MCR 2.117(C)(4). If the party has signed the withdrawal, it is effective immediately upon filing and service. *Id*. If the party has not signed the withdrawal, it is effective 14 days after filing and service, unless the self-represented party "files and serves a written objection to the withdrawal on the grounds that the attorney did not complete the agreed upon services. *Id*.

After a limited appearance ends or an order is entered removing an attorney from the case, that attorney must no longer be served case-related documents. MCR 2.117(E).

3. Nonappearance of Attorney Assisting in Document Preparation

"An attorney who assists in the preparation of pleadings or other documents without signing them, as authorized in MRPC 1.2(b), has not filed an appearance and shall not be deemed to have done so." MCR 2.117(D). See also MRPC 1.2(b)(2) (indicating that the party must designate as "self-represented"). Note that any document prepared by an attorney who has not signed it must include the statement: "'This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b).'" MRPC 1.2(b)(1). MCR 2.117(D) "shall not be construed to prevent the court from investigating

[14]See the Michigan Judicial Institute's *Stages of Limited Scope Representation* table.

issues concerning the preparation of such a document." *Id.* Although the attorney may rely on the client's representation of facts when preparing the document, there are limitations as outlined in MRPC 1.2(b)(2).

4. Inferred Appearance

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).

5. Appearance by Out-of-State Attorney

MCR 8.126 addresses the temporary appearance of attorneys from other jurisdictions. The out-of-state attorney must be eligible to practice in at least one jurisdiction and cannot be disbarred or suspended in any jurisdiction. MCR 8.126(A).

Except where an attorney is representing an Indian tribe intervening in a child custody proceeding, each out-of-state attorney is limited to appearing in five cases in a 365-day period. MCR 8.126(A); MCR 8.126(B)(1). The out-of-state attorney "may be permitted to appear and practice in a specific case in a court, before an administrative tribunal or agency, or in a specific arbitration proceeding 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*)-(*iv*) contain the requirements for the motion and affidavit that must be filed. Both documents, along with a fee, must be submitted to the State Bar of Michigan, and "the State Bar of Michigan must notify the court, administrative tribunal or agency, or arbitrator 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, or arbitrator has discretion whether to grant the request. MCR 8.126(A)(1)(c). If permission to appear is granted, "the Michigan attorney shall submit an electronic copy of the order or writing to the State Bar of Michigan within seven days." *Id.*

"An applicant is not required to associate with local counsel, limited to the number of appearances to practice, or required to pay the fee to the State Bar of Michigan, if the applicant establishes to the satisfaction of the court in which the attorney seeks to appear that:

(1) the applicant appears for the limited purpose of participating in a child custody proceeding as defined by MCL 712B.3(b) in a Michigan court pursuant to the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq.*; and

(2) the applicant represents an Indian tribe as defined by MCL 712B.3; and

(3) the applicant presents an affidavit from the Indian child's tribe asserting the tribe's intent to intervene and participate in the state court proceeding, and averring the child's membership or eligibility for membership under tribal law; and

(4) the applicant presents an affidavit that verifies:

(a) the jurisdictions in which the attorney is or has been licensed or has sought licensure;

(b) the jurisdiction where the attorney is presently eligible to practice;

(c) that the attorney is not disbarred, or suspended in any jurisdiction, is not the subject of any pending disciplinary action, and that the attorney is licensed and is in good standing in all jurisdictions where licensed; and

(d) that he or she is familiar with the Michigan Rules of Professional Conduct, Michigan Court Rules, and the Michigan Rules of Evidence.

(5) If the court in which the attorney seeks to appear is satisfied that the out of state attorney has met the requirements in this subrule, the court shall enter an order authorizing the out of state attorney's temporary admission." MCR 8.126(B).

D. 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 caselaw 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."[15] 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).

"[U]nder [Administrative Order No. 2020-3] and MCR 1.108(1), any day falling during the [COVID-19] state of emergency does not count toward determining the last day of a statutory limitations period." *Carter v DTN Mgt Co*, ___ Mich App ___, ___ (2023). "[T]he Supreme Court did not exclude only deadlines that fell during the state of emergency. Rather, it more broadly excluded *any day* within the state of emergency '*for purposes of determining the deadline* applicable to the commencement of *all* civil and probate case types under MCR 1.108(1).'" *Carter*, ___ Mich App at ___, quoting Administrative Order No. 2020-18.

E. 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. Form of Responsive Pleading

A responsive pleading must respond to each allegation on which the adverse party relies. 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." MCR 2.111(C).

"Allegations in a pleading that requires a responsive pleading, other than allegations of the amount of damage or the nature of the relief demanded, are admitted if not denied in the responsive pleading." MCR 2.111(E)(1). "Allegations in a pleading that does not require a responsive pleading are taken as denied." MCR

[15] See Section 1.11 on waiver of fees. See also Section 3.1(B)(4) on electronic filing fees.

2.111(E)(2). "A pleading of no contest, provided for in [MCR 2.111(C)(2)], permits the action to proceed without proof of the claim or part of the claim to which the pleading is directed." MCR 2.111(E)(3). "Pleading no contest has the effect of an admission only for purposes of the pending action." *Id*.

2. Affirmative Defense[16]

"An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff." *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). Once evidence supporting the affirmative defense has been introduced, the burden shifts to the plaintiff to provide clear and decisive evidence negating the defense. *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684, 707 (2019), rev'd in part on other grounds 507 Mich 272 (2021)[17] (trial court improperly placed the burden of proof on the plaintiff to prove defendant's affirmative defense).

a. Timing

"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 Of America v Juno Lighting, Inc*, 247 Mich App 236, 241 (2001), citing MCR 2.111(F)(3) and *Chmielewski v Xermac, Inc*, 216 Mich App 707, 712 (1996), aff'd 457 Mich 593 (1998); see also MCR 2.111(F)(2)(a). "[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*, 312 Mich App 734, 757 (2015), citing MCR 2.110(A) (holding that the defendant failed to adequately preserve its

[16]See Section 3.1(E)(2)(a) regarding the timing of filing an affirmative defense.

[17]For more information on the precedential value of an opinion with negative subsequent history, see our note.

affirmative defense where the defense was raised in response to the plaintiff's motion for leave to amend the complaint). See Section 3.7(E) for additional discussion.

b. Amendment

"[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 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) (citation omitted), overruled in part on other grounds 498 Mich 68, 74 (2015).[18] "[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." *Tyra*, 302 Mich App at 213, citing MCR 2.118(A)(2).

If a defense is based on a written instrument, a copy of the instrument must be attached to the pleading and labeled according to standards established by the State Court Administrative Office, subject to exceptions listed in the court rule. MCR 2.113(C)(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. "[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.

[18]For more information on the precedential value of an opinion with negative subsequent history, see our note.

3. Time for Filing and Serving Responsive Pleadings[19]

If personally served with complaint 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 served with complaint 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 served with complaint 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 party. 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 MCR 2.108(A)(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).

F. 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

[19]See the Michigan Judicial Institute's *Filing and Serving Responsive Pleadings Table*.

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 [MCL 600.5801 *et. seq.*] 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); *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." *Id*.

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,[20] 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 Indus, Inc v Mooney Process Equip Co*, 175 Mich App 213, 216 (1988).

G. Service of Pleadings and Other Documents

"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 document 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 documents." 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 documents after entry of final judgment or final order and after the time for an appeal of right has passed,[21] and in instances where the court orders service on the party. MCR 2.107(B)(1).

Except under MCR 1.109(G)(6)(a), all documents served to a party or a party's attorney must be served via delivery or first-class mail. MCR 2.107(C).[22] "Except as provided by MCR 1.109(G)(6)(a)(*ii*), the parties may agree to alternative electronic service among themselves by filing a stipulation in that case," which may include email, text message, or an email or text message alert to log into a secure website to view notices and court papers. MCR 2.107(C)(4)(a). "Some or all of the parties may also agree to alternative electronic service of notices and court documents in a particular case by a court or a friend of the court by filing an agreement with the court or friend of the court respectively." *Id*. "This rule does not require the court or the friend of the court to create functionality it does not have nor accommodate more than one standard for alternative electronic service." MCR 2.107(C)(4)(k).

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[20] See Section 2.16 for additional discussion of collateral estoppel and res judicata.

[21] 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).

[22] "Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]." MCR 2.107(G).

"Except as otherwise provided in MCR 2.104, [MCR] 2.105, or [MCR] 2.106, proof of service of documents required or permitted to be served must be by written acknowledgment of service, or a written statement by the individual who served the documents verified under MCR 1.109(D[])(3). The proof of service may be included at the end of the document as filed. Proof of service must be filed promptly and at least at or before a hearing to which the document relates." MCR 2.107(D).

H. Filing Documents Under Seal

"Except for documents filed pursuant to a protective order issued under MCR 2.302(C), a party seeking to file a document under seal must comply with [MCR 1.109(D)(8)]." MCR 1.109(G)(5)(d). Under MCR 1.109(D)(8), "[p]ublic documents may not be filed under seal except when the court has previously entered an order in the case under MCR 2.302(C). However, a document may be made nonpublic temporarily before an order is entered as follows:

> (a) A filer may request that a public document be made nonpublic temporarily when filing a motion to seal a document under MCR 8.119(I). As part of the filing, the filer shall provide a proposed order granting the motion to seal and shall identify each document that is to be sealed under the order. The filer shall bear the burden of establishing good cause for sealing the document.
>
> (b) Pending the court's order, the filer shall serve on all the parties:
>
> > (*i*) copies of the motion to seal and the request to make each document nonpublic temporarily,
> >
> > (*ii*) each document to be sealed, and
> >
> > (*iii*) the proposed order.
>
> (c) The clerk of the court shall ensure that the documents identified in the motion are made nonpublic pending entry of the order.
>
> (d) Before entering an order sealing a document under this rule, the court shall comply with MCR 8.119(I). On entry of the order on the motion, the clerk shall seal only those documents stated in the court's order and shall remove the nonpublic status of any of the documents that were not stated in the order."[23] MCR 1.109(D)(8).

[23] See Section 1.2 for additional information on sealing records pursuant to MCR 8.119(I).

I. 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,* 292 Mich App at 382-383.

J. Standard of Review

"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 of America v Juno Lighting, Inc*, 247 Mich App 236, 241 (2001).

3.2 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 who are subject to the court's jurisdiction 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 or be joined as a co-party if the joiner asserts a right (or, in the case of a defendant, has a right asserted against him or her) 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 at any time, on just terms. 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 actions "seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under [MCL 600.2957] by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault." MCL 600.2957(1). "In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action." *Id*.

1. Notice of Nonparty Fault

In a personal injury, property damage, or wrongful death action, the trier of fact may not assess the fault of a nonparty unless notice has been given as provided in MCR 2.112(K)(3). MCR 2.112(K)(2). 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 proved 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 provision to save [the plaintiffs'] otherwise untimely claims against [the nonparty]").

2. Response to Notice of Nonparty Fault

Once a party has been served with 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, "[u]pon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. 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 MCL 600.2957(2) and MCR 2.112(K) in regard to the period of limitations 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) (noting that "MCR 2.112(K) contains no language regarding periods of limitations"). "MCL 600.2957(2) and MCR 2.112(K) do not irreconcilably conflict" because "the court rule addresses the conduct of the parties, whereas the statute is directed at the conduct of the court." *Stenzel v Best Buy Co, Inc*, 503 Mich 199, 202, 203 (2019) (quotation marks, alteration, and citation omitted). "As a result, a plaintiff may elect to amend the complaint without filing a motion for leave to amend. If the plaintiff so elects the court shall grant the amendment. Alternatively, if a plaintiff wishes to file a motion to add a nonparty, the plaintiff is permitted to do so under MCL 600.2957(2)." *Stenzel*, 503 Mich at 203 (quotation marks, alterations, and citations omitted). The Michigan Supreme Court "promulgated MCR 2.112(K)(4) to implement MCL 600.2957, not to supplant it." *Stenzel*, 503 Mich at 203 (quotation marks and citation omitted). Therefore, "a party may amend a pleading upon receipt of notice of nonparty fault pursuant to MCR 2.112(K) without filing a motion for leave to amend, and the amended pleading relates back to the original action pursuant to MCL 600.2957(2)." *Stenzel*, 503 Mich at 202.

3. Liability of Nonparty

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).

4. Relation-Back Provision

MCL 600.2957(2) "envisions application of the relation-back rule only in a single lawsuit." *St Clair v XPO Logistics Inc*, ___ Mich App ___, ___ (2022). "The second sentence of MCL 600.2957(2) dictates that 'any amendment of a pleading to add a cause of action against an identified nonparty at fault relates back to the date of the filing of the original action for purposes of assessing whether the applicable period of limitations has expired.'" *St Clair*, ___ Mich App at ___ (noting "plaintiff's argument that

MCL 600.2957(2) applies between separate lawsuits is not supported by the text of the statute"). In *St Clair*, the plaintiff initially brought suit in federal court within the three-year statute of limitations for negligence actions, and defendant was identified as a nonparty at fault in that action. *Id*. at ___. However, the federal suit was dismissed for lack of jurisdiction, and plaintiff's subsequent state court suit fell outside of the limitations period. *Id*. at ___. The Court of Appeals held that "the relation-back provision of MCL 600.2957(2) is not applicable between separate lawsuits such that it renders plaintiff's state-court complaint against [defendant] timely." *St Clair*, ___ Mich App at ___. Accordingly, "the circuit court properly construed the relation-back provision as applying to a single suit" and "did not err by dismissing it under MCR 2.116(C)(7)" because plaintiff's complaint was untimely. *St Clair*, ___ Mich App at ___.

D. Standard of Review

A trial court's decision regarding joinder is reviewed for an abuse of discretion. *Mason Co v Dep't of Community Health*, 293 Mich App 462, 489 (2011).

3.3 Summons

A. First Summons

The clerk issues a summons when a complaint is filed. MCR 2.102(A). The summons must be served as provided in MCR 2.103 and MCR 2.105. MCR 2.102(A). The form of the summons is prescribed in MCR 2.102(B). Generally, the summons expires 91 days after the date it is issued. MCR 2.102(D). However, that timeframe may be extended under certain circumstances. See Section 3.3(C) for more information.

B. Duplicate Summons

"A duplicate summons may be issued from time to time and is as valid as the original summons." MCR 2.102(A). "Duplicate summonses issued under [MCR 2.102(A)] do not extend the life of the original summons." MCR 2.102(D).

C. Second Summons

A request to issue a second summons must be made before the original summons expires; similarly, the court's order granting a second summons must be entered before the original summons expires. See MCR 2.102(D); *Moriarity v Shields*, 260 Mich App 566, 575

(2004) (holding that a clerk's *issuance* of the second summons after the expiration of the original summons was still valid where the court order granting the second summons was entered within the effective period of the original summons).

Upon "a showing of due diligence by the plaintiff in attempting to serve the original summons," the court may "order a second summons to issue for a definite period not exceeding 1 year from the date the summons is issued." MCR 2.102(D). "[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 v Beemer*, 224 Mich App 457, 464 (1997) (rejecting the plaintiff's claim that "diligent efforts to determine whether a case has merit constitutes good cause for delayed service" because this determination "should precede the filing of the complaint"). Regarding efforts to try to serve process, "due diligence requires efforts that are more than a mere gesture." *Ickes v Korte*, 331 Mich App 436, 443 (2020) (quotation marks and citation omitted). "[D]ue diligence means undertaking reasonable, good-faith measures under the circumstances, not necessarily everything possible." *Id*. n 3 (due diligence "does not require the commission of acts that are illegal, professionally unethical, or otherwise impermissible under any applicable rules or regulations"). The trial court did not abuse its discretion in determining that the plaintiff failed to demonstrate due diligence where the record showed that the "plaintiff made no effort to serve defendant until about three weeks before the original summons was set to expire," the plaintiff "did not avail himself of the multiple methods reasonably available to him to locate defendant," and "an interrogatory answer in [simultaneous] litigation contained defendant's current address." *Id*. at 443.

If an extension (up to one year) is granted for the second summons, it "expires at the end of the extended period." MCR 2.102(D). The issuance of a third summons is not permitted under MCR 2.102(D). *Hyslop v Wojjusik*, 252 Mich App 500, 506-507 (2002).

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.

D. Dismissal

Service of a valid summons is a necessary part of service of process. *Holliday v Townley*, 189 Mich App 424, 425-426 (1991). 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).[24] 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. *Id*. The clerk is responsible for entering the order dismissing the action and for providing notice of the entry as provided in MCR 2.107; failure to enter the order or provide proper notice "does not continue an action deemed dismissed" or "affect the dismissal." MCR 2.102(E)(2)-(3).

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). If setting aside based on a motion, the following conditions must be met: 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); the moving party must establish that proof of service was in fact made within the time provided in MCR 2.102(D) or that the defendant submitted to the court's jurisdiction, MCR 2.102(F)(1); and the moving party must establish that "proof of service of process was filed or the failure to file is excused for good cause shown[.]" MCR 2.102(F)(2).[25]

3.4 Service of Process

"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).

A. Who May Serve Process

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). However, certain types of cases require a specific person to serve process. See MCR 2.108(B)-(D).

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[24] See Section 4.10 for additional discussion of dismissals, including dismissal for lack of progress.

[25] See Section 3.4 on service of process.

"[A] process server 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).

B. Proof of Service

A party must show proof of service. MCR 2.104. "Delivery of documents through the electronic-filing system in conformity with [the Michigan Court Rules] . . . is proof of [personal] service under Michigan Court Rules."[26] MCR 1.109(G)(6)(a)(*iii*). Otherwise, 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) a written statement of the facts of service, verified under MCR 1.109(D)(3). The statement shall include 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 another description of the location." MCR 2.104(A)(1)-(3).

MCL 600.1910(1) provides that "[p]roof of service of process may be made by 1 of the following methods:

[26] See Section 3.1(B)(2) for more information on electronic-service process.

> (a) Written acknowledgment of the receipt of a summons and a copy of the complaint, dated and signed by the person authorized under this act to receive them.
>
> (b) A certificate, stating the facts of service, if service is made in this state by any of the following:
>
> > (i) A sheriff.
> >
> > (ii) A deputy sheriff, medical examiner, court officer, or constable, or a deputy of any of these officers, if the officers held office in a county in which the court issuing the process is held.
>
> (c) If service is made by any other individual, a written statement of the facts of service, verified by the following statement: 'I declare under the penalty of perjury that this proof of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.'."

The validity of the service is not affected by a party's failure to file the proof of service. MCR 2.104(B); MCL 600.1910(2).

C. Manner of Service[27]

The manner of service depends on the entity of defendant. MCR 2.105. The requirements for valid service are set forth as follows[28]:

- individuals (resident or non resident), MCR 2.105(A);
- individuals (nonresident, minor, defendant for whom a guardian or conservator has been appointed and is acting, individual doing business under an assumed name) and substituted service, MCR 2.105(B);
- partnerships and limited partnerships, MCR 2.105(C);
- private corporations (domestic and foreign), MCR 2.105(D);
- partnership associations and unincorporated voluntary associations, MCR 2.105(E);

[27] See the Michigan Judicial Institute's *Service of Process Table*.

[28] "If a rule uses the term registered mail, that term includes the term 'certified mail', and the term 'registered mail, return receipt requested' includes the term 'certified mail, return receipt requested.' However, if certified mail is used, the receipt of mailing must have been postmarked by the post office." MCR 2.105(L)(1). "If a rule uses the term 'certified mail', a postmarked receipt of mailing is not required. Registered mail may be used when a rule requires certified mail." MCR 2.105(L)(2).

- service on an insurer, MCR 2.105(F);
- certain corporations, unincorporated board, or public body, MCR 2.105(G);
- limited liability company, MCR 2.105(H); and
- agent authorized by appointment or by law, MCR 2.105(I)(1).

Generally. A plaintiff may serve process on a resident or nonresident individual by transmitting a document in the e-filing system, MCR 1.109(G), or 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*, 293 Mich App at 557 (the plaintiff violated MCR 2.105(A)(2) by failing to attempt service by certified mail without restricting delivery to the defendant).

"Delivery of documents through the electronic-filing system in conformity with [the Michigan Court Rules] is valid and effective personal service . . . ."[29] MCR 1.109(G)(6)(a)(*iii*).

Substituted Service. MCR 2.105(J) 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(J).

The motion must meet all procedural requirements set forth in MCR 2.105(J)(2). The court may direct a hearing on the motion, but it is not required. MCR 2.105(J)(2). Substituted "[s]ervice of process may not be made . . . before entry of the court's order permitting it." MCR 2.105(J)(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 MCR 2.106(E) on how to accomplish 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).

[29] See Section 3.1(B)(2) for more information on electronic service process.

D. Exemptions from Service and Privileged Persons

Civil process cannot be served:

- "[O]n an elector entitled to vote at an election during the day that election is held. However, if sufficient cause is shown by affidavit to the satisfaction of a judge, that judge may issue a restraining order or authorize the issuance and service or execution of a writ[.]" MCL 600.1831(1).

- "[O]n a person attending a worship meeting of a religious organization that has tax exempt status . . ., on property where the organization normally conducts its worship, or going to or coming from such a meeting within 500 feet of that property. A judge may order service or execution of process notwithstanding this subsection if, to the judge's satisfaction, sufficient cause is shown by affidavit." MCL 600.1831(2).

The following persons are privileged from civil process:

- "All persons going to, attending, or returning from, any court proceedings in any action in which their presence is needed . . . if service could not have been made on them had they not gone to, attended, or returned from the proceedings." MCL 600.1835(1).

- "Any person brought into this state by or after waiver of extradition based on a criminal charge . . . in civil actions arising out of the same facts as the criminal proceedings which he or she is returned to answer until he or she has been convicted in the criminal proceeding, or, if acquitted, until he or she has a reasonable opportunity to return to the state from which he or she came." MCL 600.1835(2) (only applicable to "service of personal process").

- "A member of the legislature . . . on a day on which there is a scheduled meeting of the house of which he or she is a member . . . [unless] such process is executed by certified mail, return receipt requested." MCL 600.1835(3).

E. Defects in Service of Process or Proof of Service

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(K)(3); *In re Gosnell*, 234 Mich App 326, 344 (1999).

A party may challenge the sufficiency of the service or process in a summary disposition[30] motion. See 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 Rap 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 dismissal. MCR 2.105(K)(3); *Hill v Frawley*, 155 Mich App 611, 613 (1986). 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), or MCR 2.116(C)(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. A general appearance does not waive a challenge to the sufficiency of service of process under MCR 2.116(C)(3). *Al-Shimmari*, 477 Mich at 293.

"At any time on terms that are just, a court may allow process or proof of service of process to be amended, unless it clearly appears that to do so would materially prejudice the substantive rights of the party against whom the process issued." MCR 2.102(C). See also MCL 600.1905(3), which contains substantially similar language. "An amendment relates back to the date of the original issuance or service of process unless the court determines that relation back would unfairly prejudice the party against whom the process issued." MCR 2.102(C).

[30] See Section 4.2 on summary disposition.

3.5 Motion for More Definite Statement[31]

A. Generally

A party may file a motion for a more definite statement as a remedy to a deficient pleading. MCR 2.115(A). Pursuant to MCR 2.115(A), "[i]f 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." See also *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).[32] "Failing 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." *Tyra*, 302 Mich App at 216.

Committee Tip:

MCR 2.115(A) does not provide courts the authority to order a more definite statement sua sponte. Due to a lack of authority on this issue, it is unclear how appellate courts would treat a trial court's decision to sua sponte order a party to file a more definite statement.

B. Timing

A motion for a more definite statement must be filed before the responsive pleading. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90 (1995). See also MCR 2.115(A); MCR 2.108(B) (motions that raise a

[31]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(9) and MCR 2.408(C)(6) to motions to correct, strike, or amend pleadings. See Section 1.15 for more information on videoconferencing.

[32]For more information on the precedential value of an opinion with negative subsequent history, see our note.

defense or an objection to a pleading must be filed and served within the time for filing a responsive pleading; 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).[33]

If a motion for a more definitive statement "made before filing a responsive pleading is denied, the moving party must serve and file a responsive pleading within 21 days after notice of the denial," unless a different time is set by the court. MCR 2.108(C)(1). If the moving party files an application for leave to appeal within 21 days after notice of the denial, the time to serve and file a responsive pleading "is extended until 21 days after the denial of the application unless the appellate court orders otherwise." *Id*.

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, LLC*, 277 Mich App 622, 625 (2008).

3.6 Motion to Strike[34]

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). A response to a motion for summary disposition "cannot be struck" under MCR 2.115(B) because "MCR 2.110(A) defines 'pleading' as a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of the above, or a reply to an answer." *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 717 (2019) (finding, however, that "although the form" of defendants' request to strike was improper, "there was arguable legal merit to defendants' claim that the trial court should only consider the issue before it," and "the trial court did not abuse its discretion by denying sanctions on this basis").

[33]A motion for more definite statement may be deemed presented for filing on the date it is deposited into the institution's outgoing mail if the appellant is pro se, is incarcerated in prison or jail, and meets the other requirements of MCR 1.112.

[34]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(9) and MCR 2.408(C)(6) to motions to correct, strike, or amend pleadings. See Section 1.15 for more information on videoconferencing.

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). While 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, "the time limit imposed under MCR 2.108(B) should not be interpreted to control motions under MCR 2.115(B)." *Belle Isle*, 256 Mich App at 471.[35]

C. Standard of Review

A trial court's decision regarding a motion to strike a pleading, is reviewed for an abuse of discretion. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469 (2003).

3.7 Amendment of Pleadings[36]

A. Amendments of Right[37]

Under MCL 600.2301, the court is authorized "to amend any process, pleading or proceeding."[38] 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

[35]A motion to strike may be deemed presented for filing on the date it is deposited into the institution's outgoing mail if the appellant is pro se, is incarcerated in prison or jail, and meets the other requirements of MCR 1.112.

[36]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(9) and MCR 2.408(C)(6) to motions to correct, strike, or amend pleadings. See Section 1.15 for more information on videoconferencing

[37]For a discussion of amendments adding a nonparty at fault see Section 3.2(C).

[38]See the Michigan Judicial Institute's *Amendment of Process or Pleadings Flowchart* describing amendment of pleadings under MCL 600.2301.

2.118(A)(2). In *Fyke & Sons v Gunter Co*, 390 Mich 649 (1973), the Michigan Supreme Court discussed the "freely given" language in 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*, 290 Mich at 656, quoting *United States v Hougham*, 364 US 310, 316 (1960).

Generally, a motion to amend should be granted. *Weymers v Khera*, 454 Mich 639, 658-660 (1997). The motion should be denied only for particularized reasons, such as (1) undue delay if the delay was in bad faith or the opposing party suffered actual prejudice, (2) bad faith, (3) dilatory motive, (4) repeated failure to cure deficiencies, (5) undue prejudice, or (6) futility. *Id*. at 658-660, citing *Fyke*, 390 Mich at 656, 663-664. "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 v Flint*, 311 Mich App 76, 95 (2015) (citations omitted).

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*, 311 Mich App at 95. "The amendment of a pleading is properly deemed futile when, regardless of the substantive merits of the proposed amended pleading, the amendment is legally insufficient on its face." *Kostadinovski Harrington*, 321 Mich App 736, 743-744 (2017).

"Delay, alone, does not warrant denial of a motion to amend." *Weymers*, 454 Mich at 659, citing *Fyke,* 390 Mich at 663-664. See also *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 321 (1993), where the Court stated that "there must always be some delay associated with an amendment of a pleading." Leave to amend should be granted unless the delay occurred as a result of bad faith or created actual prejudice. *Weymers*, 454 Mich at 659, citing *Fyke,* 390 Mich at 663-664. The proper remedy for inexcusable delay is to impose sanctions under MCR 2.118(A)(3). *Stanke,* 200 Mich App 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); *Weymers*, 454 Mich at 659.

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 in writing or a clear statement of plaintiff's claim").

D. Amendment After Motion for Summary Disposition Filed

Generally, the process for amending a pleading is governed by MCR 2.118.[39] However, if a motion is based on MCR 2.116(C)(8), MCR 2.116(C)(9), or MCR 2.116(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). "When a party makes an oral request to amend the complaint under MCR 2.116(I)(5), that party must also offer a proposed amendment in writing." *Grayling Twp v Berry*, 329 Mich App 133, 151-152 (2019). "If a plaintiff fails to do so, the plaintiff has failed to comply with [the writing requirement in MCR 2.118(A)(4)] and the trial court does not abuse its discretion in denying the request to amend." *Grayling Twp*, 329 Mich App at 152. See Section 3.7(C) for more information on submitting amendments in writing.

Where a party does not seek leave of the court or obtain the opposing party's consent to amend his or her pleading, "MCR 2.116(I)(5) [does] not require the court to sua sponte offer [the party] an opportunity to amend." *Kloian v Schwartz*, 272 Mich App 232, 242 (2006) (finding no plain error in these circumstances).[40]

[39] See Section 3.7(B) for more information on amendment of pleadings by consent or leave of court under MCR 2.118.

[40] See Section 4.2(D)(2) for more information.

E. Amendments to Conform to Evidence

MCR 2.118(C)(1) "is liberal and permissive[.] . . . The only requirement is that the party seeking amendment move to have the court amend the pleadings[.]" *Zdrojewski v Murphy*, 254 Mich App 50, 61 (2002). "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). "The court may grant an adjournment to enable the objecting party to meet the evidence." 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." MCR 2.118(D).[41] "MCR 2.118(D) does not place limits on the nature of the amendment. It provides for all types of amendments provided that the substance relates to the same conduct as the original pleading." *Legion-London v Surgical Institute of Mich Ambulatory Surgery Ctr, LLC*, 331 Mich App 364, 369 (2020). "Indeed, '[i]t does not matter whether the proposed amendment introduces new facts, a different cause of action, or a new theory, so long as the amendment springs from the same transactional setting as that pleaded originally.'" *Id*. quoting *Kostadinovski v Harrington*, 321 Mich App 736, 744 (2017).

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.[42] The relation-back rule does not apply to a contractual limitations period. *Ulrich v Farm Bureau Ins*, 288 Mich App 310, 322

[41] "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). For more information on medical malpractice actions, see Section 9.11.

[42] A medical malpractice action begins when "a timely served complaint is filed." *Ottgen v Katranji*, ___ Mich ___, ___ (2023) ("the normal tolling rules apply to medical malpractice actions, and tolling occurs upon the filing of a timely served complaint").

(2010) (concluding that a claim for uninsured motorist benefits is governed by the insurance policy, a contract; 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").

"'When placed in context against a backdrop providing that leave to amend pleadings must be freely granted, MCR 2.118(A)(2), the principle to be gleaned from [relevant caselaw] is the necessity for a broadly focused inquiry regarding whether the allegations in the original and amended pleadings stem from the same general 'conduct, transaction, or occurrence.' The temporal setting of the allegations is not, in and of itself, the determinative or paramount factor in resolving the propriety of an amendment of the pleadings, and undue focus on temporal differences clouds the requisite broader analysis.'" *Kostadinovski*, 321 Mich App at 744, quoting *Doyle v Hutzel Hosp*, 241 Mich App 206, 218-219 (2000).

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*, 477 Mich 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, 670-671 (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. *Id*. 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. 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 stand as a response to the amended pleading. MCR 2.118(B).

H. Standard of Review

A trial court's decision whether to allow an amendment to a pleading is reviewed for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53 (2004).

3.8 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. *Id*.[43]

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).

[43]A pleading or other document may be deemed presented for filing on the date it is deposited into the institution's outgoing mail if the appellant is pro se, is incarcerated in prison or jail, and meets the other requirements of MCR 1.112.

3.9 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 Transp, 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 Roseville*, 396 Mich 185, 188 (1976). "Laches or unreasonable delay by the intervenors is a proper reason to deny intervention."[44] *Id*.

[44]See Section 9.6(D) for additional discussion of the doctrine of laches.

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).[45]

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 v Eaton Rapids Community Hosp*, 221 Mich App 301, 309-312 (1997); 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 v L F Transp, Inc*, 277 Mich App 500, 507 (2008).

[45] A pleading or other document may be deemed presented for filing on the date it is deposited into the institution's outgoing mail if the appellant is pro se, is incarcerated in prison or jail, and meets the other requirements of MCR 1.112.

Chapter 4: Pretrial Procedures

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4.1 Motions[1]

A. Form[2]

Unless made during a hearing or trial, a motion must be in writing, state with particularity the grounds and authority on which it is based, state the relief or order sought, and be signed by the attorney or party as set out in MCR 1.109(D)(3) and MCR 1.109(E). MCR 2.119(A)(1). If a contested motion is filed after a proposed order is rejected under MCR 2.119(D), the party must attach a copy of the rejected order and an affidavit. MCR 2.119(A)(4).

"A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C)[3] regarding citation of unpublished Court of Appeals opinions." MCR 2.119(A)(2). However, a trial court need not deny a motion if it is filed without a brief, if the motion itself contains citations to legal authority supporting its proposition. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 625-626 (2008). Except where electronic filing has been implemented, a copy of the motion and brief, as well as any response, must be provided to the judge. MCR 2.119(A)(2)(d).

The combined length of a motion and brief may not exceed 20 pages double spaced (exclusive of exhibits and attachments) without permission of the court. MCR 2.119(A)(2)(a). Permission to file a motion and brief in excess of the 20-page limit should be requested sufficiently in advance of the hearing on the motion to allow the opposing party adequate opportunity for analysis and response. See *People v Leonard*, 224 Mich App 569, 578-579 (1997) (finding an abuse of discretion where the trial court allowed the defendant to file an excessive-length brief during the hearing because the prosecution was deprived of an opportunity to analyze and respond to the brief).

"Except as permitted by the court or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed." MCR 2.119(A)(2)(b).

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[1] "When an appellate court orders a new trial, that includes all phases of trial, including all pretrial matters such as motions for summary disposition." *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, ___ Mich App ___, ___ (2023).

[2] Many jurisdictions have local court rules governing the form of motions.

[3] MCR 7.215(C)(1) provides that an unpublished opinion is not precedentially binding under the rule of stare decisis and requires a party who cites an unpublished opinion to explain why it was cited and how it is relevant to the issues presented, and also provide a copy of the opinion to the court and to opposing parties.

The motion and notice of the hearing may be combined into one document. MCR 2.119(A)(3).

B. Affidavit (If Required)

"Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit." MCR 1.109(D)(3). However, if an affidavit is filed, it "must be verified by oath or affirmation." MCR 1.109(D)(1)(f). "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 an opposing party. *Id*.

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

> "(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. Filing and Serving Motions and Responses

"Unless the court sets a different time, a motion must be filed at least 7 days before the hearing, and any response to a motion required or

permitted by these rules must be filed at least 3 days before the hearing." MCR 2.119(C)(4). Generally, filing is complete upon delivery to the court clerk. See MCR 1.109(C).

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

> (a) at least 9 days before the time set for hearing if by first-class mail; or
>
> (b) at least 7 days before the time set for hearing if delivered or electronically served pursuant to MCR 2.107(C)(1), MCR 2.107(C)(2),[4] or MCR 1.109(G)(6)(a). 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 by first-class mail; or
>
> (b) at least 3 days before the hearing if delivered or electronically served pursuant to MCR 2.107(C)(1), MCR 2.107(C)(2),[5] or MCR 1.109(G)(6)(a). 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. Filings by Incarcerated Individuals

A pleading or other document filed by an unrepresented individual who is incarcerated in prison or jail "must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline. Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has

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[4]"Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]." MCR 2.107(G).

[5]"Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]." MCR 2.107(G).

been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." MCR 1.112.

E. 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). The order is considered rejected if the opposing party does not take either action within 7 days of being served. *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 if the court requires a hearing on the motion. MCR 2.119(D)(4).

F. Contested Motions

Contested motions should be noticed for hearing by the moving party at the time designated by the court for the hearing of motions. MCR 2.119(E)(1). The court may 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 governed by MCR 2.119(E)(4). The moving party must appear unless excused by the court. MCR 2.119(E)(4)(b). The nonmoving party must either appear at the hearing, or file a response containing a concise statement of opposition to the motion supported by legal authority. MCR 2.119(E)(4)(a)(*i*)-(*ii*).

"If a party violates the provisions of [MCR 2.119(E)(4)(a) or MCR 2.119(E)(4)(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).

G. 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. *Id*. Matters not decided within 56 days of submission must be identified on the quarterly "Report as to Matters Undecided." MCR 8.107(B).

H. Entry of Order

Except as otherwise provided in MCR 2.602 and MCR 2.603, "all judgments and orders must be in writing, signed by the court, and dated with the date they are signed." MCR 2.602(A)(1). The date the judgment or order is signed is the date of entry. MCR 2.602(A)(2). "Where electronic filing is implemented, judgments and orders must be issued under the seal of the court." MCR 2.602(A)(4).

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)(3). "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, 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, as long as 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.") If objections are received, the court must schedule a hearing for all objections within 14 days after receiving the first objection, or as soon thereafter as is

practicable. *Id*. The party filing the objection must serve notice of the hearing as provided in MCR 2.602(B)(3)(c). MCR 2.602(B)(3)(d).

- "A party may prepare a proposed judgment or order and notice it for settlement before the court." MCR 2.602(B)(4). A motion fee may not be charged.

A party objecting to the entry of a proposed judgment under MCR 2.602(B)(3) is not required to provide a transcript of the prior proceeding. *Jones v Jones*, 320 Mich App 248, 261 (2017) (holding that the trial court erred by rejecting the defendant's objections to the proposed judgment based on the lack of a transcript and noting that "given the compressed timing requirements under [MCR 2.602], it is doubtful that timely obtaining a copy of a transcript would be possible in most circumstances").

I. 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).

"The decision whether to hold an evidentiary hearing under MCR 2.119(E)(2) is reviewed for an abuse of discretion." *Williams v Williams*, 214 Mich App 391, 399 (1995).

4.2 Summary Disposition[6]

Although summary disposition is typically ordered in response to a motion, MCR 2.116 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), citing MCR 2.116(I)(1). See Section 4.2(E) for more information on ordering summary disposition sua sponte.

"When an appellate court orders a new trial, that includes all phases of trial, including all pretrial matters such as motions for summary disposition." *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, ___ Mich App ___, ___ (2023).

[6]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(10) to motions pursuant to MCR 2.116. See Section 1.15 for more information on videoconferencing.

A. Timing

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)]," this court rule does not "[deprive] the trial court of discretion to set a 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*), allowing courts 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. Under MCR 2.401(B)(2)(a)(*ii*), "trial courts may issue scheduling orders to establish times for events including filing of motions." *Cleveland v Hath*, ___ Mich App ___, ___ (2024) (cleaned up).

A defendant may raise an affirmative defense in a motion for summary disposition. "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 Of America v Juno Lighting, Inc*, 247 Mich App 236, 241 (2001), citing MCR 2.111(F)(3) and *Chmielewski v Xermac, Inc*, 216 Mich App 707, 712 (1996); see also MCR 2.111(F)(2)(a). For additional information on affirmative defenses, see Section 3.1(E)(2).

1. Motions Based on (C)(1), (C)(2), and (C)(3)

Motions based on MCR 2.116(C)(1) (lack of jurisdiction over person or property), MCR 2.116(C)(2) (insufficient process), and MCR 2.116(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). However, 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 v Detroit Med Ctr*, 477 Mich 280, 293 (2007).

2. Motions Based on (C)(4) or Governmental Immunity

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), MCR 2.116(C)(6) (another action exists between same parties on the same claim), or MCR 2.116(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), MCR 2.116(C)(9) (failure to state a valid defense), or MCR 2.116(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).[7] It is at the court's discretion whether to consider a motion filed after such period. *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." *Id*. at 537-538. "Mere speculation that additional discovery might produce evidentiary support is not sufficient." *Caron v Cranbrook Ed Comm*, 298 Mich App 629, 646 (2012) (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).[8]

5. Filing, Service, and Hearing Deadlines

Unless MCR 2.116(G) specifically provides otherwise, MCR 2.119 governs summary disposition motions. See MCR 2.119(G)(1).

The motion, brief, and any affidavits must be filed and served 21 days before the hearing, unless the court orders otherwise. MCR 2.116(G)(1)(a)(*i*).

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[7]Defendants are not required to wait until a plaintiff "first move[s] to certify [a] class under MCR 3.501(B)(1)" before moving "for summary disposition of . . . class action claims under MCR 2.116(C)(8)[.]" *Rodriguez v Hirshberg Acceptance Corp*, 341 Mich App 349, 363 (2022).

[8]See Section 4.2(D)(2) regarding amendment of pleadings following the denial of a motion based on MCR 2.116(C)(8)-(10).

A response to the motion, brief, and any affidavits must be filed and served at least 7 days before the hearing, unless the court sets a different time. MCR 2.116(G)(1)(a)(*ii*).

The moving party may file a reply brief in support of the motion; reply briefs must be confined to rebuttal of arguments in the nonmoving party's response brief and cannot exceed five pages. MCR 2.116(G)(1)(a)(*iii*). A reply brief must be filed and served at least four days before the hearing. *Id.* "[N]o additional or supplemental briefs may be filed without leave of the court." MCR 2.116(G)(1)(a)(*iv*).

"[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[9]

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). Accordingly, in *Black v Cook*, ___ Mich App ___, ___ (2023), the Court of Appeals held that "[d]espite [defendant's] failure to specify the subrule under which she sought summary disposition, because the substance of her motion and accompanying brief indicated that the motion sought dismissal for failure to state a claim against defendants upon which relief could be granted, the trial court could consider, address, and decide the motion as if specifically brought under MCR 2.116(C)(8)."

"The parties . . . may submit an agreed-upon stipulation of facts to the court." MCR 2.116(A)(1).

Committee Tip:

Trial courts should specify the subrule of MCR 2.116(C) relied on when granting or denying a motion for summary disposition. This will assist the appellate court in determining which standard to apply and what evidence to consider.

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[9]See also the Michigan Judicial Institute's *Summary Disposition Table*.

1. (C)(1): Lack of Jurisdiction Over Person or Property[10]

Summary disposition may be granted where "[t]he court lacks jurisdiction over the person or property." MCR 2.116(C)(1). A motion for summary disposition based on the lack of personal jurisdiction is resolved based on the pleadings and the evidence, including affidavits.[11] *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 Corp*, 272 Mich App at 218.

2. (C)(2): Insufficient Process

Summary disposition may be granted where "[t]he process issued in the action was insufficient." MCR 2.116(C)(2). "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).[12] See also MCR 2.116(G)(5).

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. *Hill v Frawley*, 155 Mich App 611, 613 (1986), citing MCR 2.105(K)(3).[13] "[MCR 2.105(K)(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). Dismissal is warranted only where there is a complete failure of service of process. *Id*. at 425-426.[14]

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[10]See Section 2.12 and the Michigan Judicial Institute's Personal Jurisdiction Flowcharts regarding *Individuals*, *Corporations*, *Partnerships or Limited Partnerships*, and *Partnership Associations or Unincorporated Voluntary Associations*.

[11]"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).

[12]"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).

[13]Formerly MCR 2.105(J)(3). See ADM File No. 2020-20, effective May 1, 2021.

If a party submits any affidavits with the pleadings, depositions, admissions, or other documentary evidence, the trial court must consider these documents when ruling on a motion pursuant to MCR 2.116(C)(3).[15] MCR 2.116(G)(5).

The court may order an immediate trial for summary motions based on MCR 2.116(C)(3). MCR 2.116(I)(3). A jury trial is not required to determine whether service of process was sufficient. *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 288-289 (2007). The court may decide whether to hold a jury trial or a bench trial on MCR 2.116(C)(3) motions. *Al-Shimmari*, 477 Mich at 289-290.

4. (C)(4): Lack of Subject Matter Jurisdiction

Summary disposition may be granted where "[t]he court lacks jurisdiction of the subject matter." MCR 2.116(C)(4). "Whether subject-matter jurisdiction exists is a question of law for the court." *Dep't of Natural 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).[16, 17]

In an appeal regarding a motion for summary disposition under 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). Accordingly, "when deciding a motion for summary disposition under MCR 2.116(C)(4), which requires a court to consider evidence in the record, a circuit court must go beyond the pleadings to determine whether the amount in controversy could not exceed $25,000." *Rodriguez v Hirshberg Acceptance Corp*, 341 Mich App 349, 365 (2022).

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*

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[14] See Section 3.4 on service of process.

[15] "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).

[16] See Section 2.2 on subject matter jurisdiction.

[17] "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).

Common Sense in Gov't v Attorney General, 243 Mich App 43, 50 (2000).

5. (C)(5): Lack of Legal Capacity to Sue

Summary disposition may be granted where "[t]he party asserting the claim lacks the legal capacity to sue." MCR 2.116(C)(5). In deciding this motion, the trial court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence.[18] MCR 2.116(G)(5); *Wortelboer v Benzie Co*, 212 Mich App 208, 213 (1995).

Committee Tip:

Standing and capacity to sue are distinct concepts. However, a motion challenging standing might be properly considered under MCR 2.116(C)(5). See Miller v Chapman Contracting, 477 Mich 102, 104 (2007); UAW v Central Mich Univ Trustees, 295 Mich App 486, 493-497 (2012). Real-party-in-interest is another distinct concept. However, a motion based on a real-party-in-interest defense should be considered under MCR 2.116(C)(8) or MCR 2.116(C)(10). See *Leite v Dow Chem Co*, 439 Mich 920 (1992). See Section 2.15 for more information on standing and real-party-in-interest.

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6. (C)(6): Another Action Exists Between the Same Parties Involving the Same Claim

"Summary disposition is appropriate when '[a]nother action has been initiated between the same parties involving the same claim.'" *Dairyland Ins Co v Mews*, ___ Mich App ___, ___ (2023), quoting MCR 2.116(C)(6). See also *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. *Id*.[19] Summary disposition "cannot be granted under MCR 2.116(C)(6) unless there is another action

[18] "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).

[19] See Section 2.16 regarding res judicata and collateral estoppel.

between the same parties involving the same claims currently initiated and pending at the time of the decision regarding the motion for summary disposition." *Dairyland*, ___ Mich App at ___ (quotation marks and citation omitted). "[T]he term 'same parties' in the court rule does not require complete identity as to all parties in each lawsuit; rather, it only requires the moving party and the opposing party to be the same." *Id*. at ___. Put differently, "the 'same parties' language of MCR 2.116(C)(6) requires that relevant parties, i.e., the moving and opposing party, be the exact same in both actions." *Dairyland*, ___ Mich App at ___. The Court of Appeals rejected plaintiff's argument that a defendant "was a 'party' for purposes of MCR 2.116(C)(6) merely" because it "had an interest that would be affected by the [circuit court] case and participated in discovery." *Dairyland*, ___ Mich App at ___. The Court further held that the "fact that [defendant] was central to [plaintiff's] request for declaratory relief in the [circuit court] case, participated extensively in discovery, and would be affected by the outcome, does not make it a 'party' to the original action" under MCR 2.116(C)(6). *Dairyland*, ___ Mich App at ___.

The court must consider any affidavits, pleadings, depositions, admissions, or other documentary evidence when ruling on a motion pursuant to MCR 2.116(C)(6). MCR 2.116(G)(5).[20]

Summary disposition may occur even where the other action initiated between the parties was not filed in Michigan. *Valeo Switches*, 272 Mich App at 319. However, the Court of Appeals noted "that it might be appropriate, when dismissing a case under MCR 2.116(C)(6), to do so *without prejudice* in the event that the foreign court's jurisdiction is disputed, an issue such as forum non conveniens arises, or the case is dismissed on grounds other than its merits." *Valeo Switches*, 272 Mich App at 319 (emphasis added).

Before dismissing claims under MCR 2.116(C)(6), the trial court must specifically identify which claims are being dismissed and which claims are already pending in another action. *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 326-327 (2017) (noting that the dismissal was proper "on its face" where there was an action pending in a Nebraska court that involved the same claims and parties, but remanding for additional fact-finding because it was not clear from the record whether the trial court considered all of the plaintiffs' claims). On remand, the Court required the trial

[20] "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).

court to order the parties "to make a record of what claims are then pending in the Nebraska action (or on appeal in Nebraska) and to subsequently address—on an individual basis—the issue of whether summary disposition of each claim involved in this action is appropriate under MCR 2.116(C)(6)." *Planet Bingo, LLC*, 319 Mich App at 326.

Further, "'if there is another action pending and the party opposing the motion under MCR 2.116(C)(6) raises a question regarding whether that suit can and will continue, a stay of the second action pending resolution of the issue in the first action should be granted.'" *Planet Bingo, LLC*, 319 Mich App at 327, quoting *Fast Air, Inc v Knight*, 235 Mich App 541, 549 (1999) (punctuation omitted).

7. (C)(7): Claim Is Barred by One of Several Grounds Listed in the Subrule

Summary disposition may be granted where "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." MCR 2.116(C)(7).

A party is not required to submit any material in support of a motion under MCR 2.116(C)(7); the motion can be evaluated on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.* "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence."[21] *Maiden*, 461 Mich at 119.

"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 (Yono I)*, 495 Mich 982, 982-983 (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

[21] "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).

summary disposition], the burden shifts to the nonmoving party to present evidence that establishes a question of fact." *Yono v Dep't of Transp (On Remand) (Yono II)*, 306 Mich App 671, 679-680 (2014), rev'd on other grounds, 499 Mich 636 (2016).[22] "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." *Yono II*, 306 Mich App at 680, citing *Dextrom v Wexford Co*, 287 Mich App 406, 431 (2010).

See Section 9.6(H) for information regarding a defense of immunity granted by law as asserted against a claim for quantum meruit.

8. (C)(8): Failure to State a Claim on Which Relief Can Be Granted

Summary disposition may be granted where "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). When deciding a motion on this ground, a court may consider only the parties' pleadings. MCR 2.116(G)(5). "[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the non-moving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163 (1992). "A mere statement of a pleader's conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action." *Varela v Spanski*, 329 Mich App 58, 79 (2019) (plaintiff failed to plead facts in support of his claim but instead made conclusory statements and conclusions of law). 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.

Note that (C)(8) motions are distinct from (C)(10) motions: (C)(8) motions denounce a claim's legal sufficiency and require the court to consider evidence only from the pleadings, while (C)(10) motions denounce a claim's factual sufficiency and allow the court to consider evidence beyond the pleadings. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019). Courts should be careful to analyze the summary disposition motion under the correct standard. See *id*. "While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot." *Id*. at 162 ("the Court of Appeals erroneously conducted what amounted to analysis under MCR 2.116(C)(10) in deciding a motion under

[22]For more information on the precedential value of an opinion with negative subsequent history, see our note.

MCR 2.116(C)(8) by requiring evidentiary support for plaintiff's allegations rather than accepting them as true").

The trial court did not consider evidence outside the pleadings where the partnership agreement in dispute was attached to the defendants' reply brief, and the plaintiff's complaint raised a reasonable inference that plaintiff failed to attach the agreement to the complaint because the defendants had destroyed the document. *Varela*, 329 Mich App at 69 (noting that MCR 2.113(C)(1)(b) and MCR 2.113(C)(2) excuse such failure). "Therefore, the partnership agreement was part of the pleadings, and although the trial court articulated the wrong standard [(MCR 2.116(C)(10))], it did not actually consider evidence outside the pleadings in deciding defendants' motion for summary disposition. *Varela*, 329 Mich App at 69-70.

9. (C)(9): Failure to State a Valid Defense

Summary disposition may be granted where "[t]he opposing party has failed to state a valid defense to the claim asserted against him or her." MCR 2.116(C)(9). This motion tests the legal sufficiency of a pleaded defense to determine whether the defense is "'so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery.'" *Vayda v Lake Co*, 321 Mich App 686, 693 (2017), quoting *Abela v Gen Motors Corp*, 257 Mich App 513, 518 (2003). When deciding a motion on this ground, "the trial court may only consider the pleadings, which include complaints, answers, and replies, but not the motion for summary disposition itself." *Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 321 Mich App 574, 579 (2017); MCR 2.116(G)(5). Summary disposition is inappropriate on this ground when a material allegation of the complaint is categorically denied and the nonmoving party has stated a legally cognizable defense. *Dimondale v Grable*, 240 Mich App 553, 564-565 (2000).

10. (C)(10): No Genuine Issue as to Any Material Fact Exists

Summary disposition may be granted where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). This motion tests the factual sufficiency of the complaint[23] 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). The moving party bears the initial burden of supporting its position. *Smith v Globe Life Ins Co*, 460 Mich 446,

455 (1999). "Affidavits, depositions, 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). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may *not* rely on mere allegations or denials in pleadings, but *must* go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Smith*, 460 Mich at 455 (citations omitted; emphasis added).

"A party's own testimony, standing alone, can be sufficient to establish a genuine question of fact." *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 476 (2020). "A conflict in the evidence may generally only be removed from the trier of fact's consideration if it is based on testimony that is essentially impossible or is irreconcilably contradicted by unassailable and objective record evidence." *Id*. The "court cannot make findings of fact" "[i]n its review of the evidence." *Doster v Covenant Medical Center, Inc.*, ___ Mich ___, ___ (2022). Accordingly, "when a witness's credibility is at issue, summary disposition is inappropriate." *Taylor Estate v Univ Physician Group*, 329 Mich App 268, 284 (2019).

"[S]peculation isn't enough to give rise to a genuine issue of material fact." *Doster*, ___ Mich at ___. 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*, 460 Mich at 455 n 2. 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.*

[23] Note that (C)(10) motions are distinct from (C)(8) motions: (C)(8) motions denounce a claim's legal sufficiency and require the court to consider evidence only from the pleadings, while (C)(10) motions denounce a claim's factual sufficiency and allow the court to consider evidence beyond the pleadings. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019). Courts should be careful to analyze the summary disposition motion under the correct standard. See *id*.

Material Considered. In evaluating a motion for summary disposition on this ground, 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).

Party Responsible for Presenting Material. In a motion for summary disposition under MCR 2.116(C)(10), "[t]he moving party may . . . satisfy its burden . . . by submitting affirmative evidence that negates an essential element of the nonmoving party's claim, *or* by demonstrating to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7 (2016) (quotation marks and citation omitted). Accordingly, the moving party is "not required to go beyond showing the insufficiency of [the nonmoving party's] evidence." *Id.* at 3, 9 (holding that "in order to obtain summary disposition under MCR 2.116(C)(10), defendant was not required to present proof that it lacked notice of the hazardous condition, but needed only to show that plaintiff presented insufficient proof to establish the notice element of her claim").

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). If the adverse party fails to respond, and if appropriate, the court must grant the summary disposition motion. MCR 2.116(G)(4).

Where "the opposing party fails to present any evidence" in response to a motion for summary disposition under MCR 2.116(C)(10), "the motion is properly granted because no genuine issue of material fact exists." *Cleveland v Hath*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). In *Cleveland*, ___ Mich App at ___, the "plaintiff assert[ed] that he should not have lost the case as a sanction for missing the deadline in the scheduling order for filing a response to defendants' summary disposition motions." "[T]he failure to file a timely brief in response to a dispositive motion is not, by itself, grounds for dismissal as a sanction"; however, "if a motion for summary disposition under MCR 2.116(C)(10) challenges the existence of any genuine issue of material fact and the opposing party fails to timely present evidence in response, then the motion may be properly granted on the merits." *Cleveland*, ___ Mich App at ___. "Here, the trial court not only established

deadlines for motion practice, but also cautioned the parties in . . . its scheduling order: 'If you do not submit a timely brief, the Court will assume that there is no legal or factual support for your position.'" *Id*. at ___. "That language seems consistent with the well-settled proposition that 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"—"the trial court's scheduling order appears compatible with that standard because the scheduling order . . . obligates the party opposing a summary disposition motion to present evidence and arguments to fend off a motion for relief under MCR 2.116(C)(10)." *Cleveland*, ___ Mich App at ___ (cleaned up). "[D]efendants' motions shifted the burden to plaintiff to present evidence to establish a genuine issue of material fact," and "[b]y neglecting to submit timely responses to the motions, plaintiff failed to carry that burden, so the trial court properly awarded relief to defendants under MCR 2.116(C)(10)." *Cleveland*, ___ Mich App at ___.

Affidavit Contradicting Earlier Deposition Testimony. "[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 Prod Corp*, 223 Mich App 141, 155 (1997).

Self-Conflicting Testimony. "[A] party may provide an affidavit to explain, clarify, or expand upon deposition testimony, especially where the deposition testimony was not unequivocal." *Bakeman v Citizens Ins Co*, ___ Mich App ___, ___ (2022) (adopting a case-by-case approach when analyzing arguably inconsistent deposition testimony). "[W]here a deponent's testimony is inherently self-contradictory, a court may not, at the summary disposition stage of proceedings, blindly assume that one statement is true and the other is false. In the absence of an objective basis for concluding that one or the other of the statements *must* have been the true statement, doing so constitutes an impermissible credibility assessment." *Id*. at ___.

Expert Affidavit. 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").

Contractual Interpretation. 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).

Motive or Intent. "Michigan does not apply a rule precluding summary disposition whenever a claim or defense involves an individual's motive or intent." *Franks v Franks*, 330 Mich App 69, 86 (2019). "To the extent that [Michigan Court of Appeals's] decisions seem to apply an absolute exception to the application of summary disposition premised on the mere possibility that a jury might disbelieve an essential witness, . . . the application of that rule is limited to those situations where the moving party relies on subjective matters that are exclusively within the knowledge of its own witness and those in which the witness would have the motivation to testify to a version of events that are favorable to the moving party." *Id*. at 90-91 (where "plaintiffs present[] evidence that if left unrebutted . . . establishe[s] that defendants [acted] . . . with the requisite intent, . . . the trial court could properly grant summary disposition on liability if defendants [do] not establish a question of fact on the issue of intent").

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, 174 (1979), where the defendant was unable to present an affidavit on the facts because "the specific evidential facts concerning the nature of plaintiff's injuries and treatment [stemming from an automobile accident] were within the personal knowledge of only the plaintiff and [her doctor]." (Citation 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*, 93 Mich App 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. Possible Dispositions

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);
- postpone hearing and decision on the matters until trial, MCR 2.116(I)(4); or
- where the grounds are based on MCR 2.116(C)(8), MCR 2.116(C)(9), or MCR 2.116(C)(10), and justification exists, an opportunity to amend the pleadings, MCR 2.116(I)(5).

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 [MCR 2.116(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. *Id.* at 505.

2. Amendment of Pleadings

If a summary disposition motion is based on MCR 2.116(C)(8), MCR 2.116(C)(9), or MCR 2.116(C)(10), the court must give the parties an opportunity to amend their pleadings as provided in

MCR 2.118,[24] unless evidence before the court shows that an amendment would be unjustified. MCR 2.116(I)(5). Where a party does not seek leave of the court or obtain the opposing party's consent to amend his or her pleading, "MCR 2.116(I)(5) [does] not require the court to sua sponte offer [the party] an opportunity to amend." *Kloian v Schwartz*, 272 Mich App 232, 242 (2006) (finding no plain error in these circumstances).

"[A]n amendment is not justified if it would be futile." *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 138 (2003). "[L]eave to amend should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility." *Bennett v Russell*, 322 Mich App 638, 647 (2018) (quotation marks and citation omitted).

A trial court's decision whether to grant leave to amend a pleading is reviewed for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53 (2004). "[A] court must specify its reasons for denying the motion [to amend the pleading]; a failure to do so requires reversal, unless amendment would be futile."*Noyd v Claxton, Morgan, Flockhart & Vanliere*, 186 Mich App 333, 340 (1990).

E. Ordering Summary Disposition Sua Sponte

MCR 2.116 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), citing MCR 2.116(I), which states:

> "(1) 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.
>
> (2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

However, 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). See also *Lamkin v Hamburg Twp Bd of Trustees*, 318 Mich App 546, 549-551 (2017). In a civil proceeding, notice and a meaningful opportunity to be heard meet basic due process requirements. *Al-Maliki*, 286 Mich App at 485. "Where a court

[24] See Section 3.7 on amendment of pleadings.

considers an issue sua sponte, 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 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." *Al-Maliki*, 286 Mich App at 486.

F. Filing Multiple Summary Disposition Motions

"A party may file more than one motion under [MCR 2.116], subject to the provisions of [MCR 2.116(F)]."[25]"MCR 2.116(E)(3). "The denial of a motion for summary disposition does not preclude such a motion on the same ground from being granted later in the same case." *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 521-522 (2016) (holding that the trial court had authority to revisit and reverse its previous denials of summary disposition and reconsideration after the defendant raised the same issue again in another motion for summary disposition).

G. Prejudicial Value

In deciding whether an order granting a motion for summary disposition "should be with or without prejudice, the trial court should consider whether the doctrine of res judicata would bar subsequent actions involving the same claim." *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co*, 223 Mich App 559, 562 (1997).[26] "Where a trial court dismisses a case on the merits, the plaintiff should not be allowed to refile the same suit against the same defendant and dismissal should therefore be with prejudice." *Id*. at 563.

"[S]ummary disposition under [MCR 2.116(C)(8)] is necessarily a decision on the merits. To grant such a motion 'without prejudice' is . . . equally incongruous. . . . Logically, then, a grant of summary disposition under [MCR 2.116(C)(8)] should always be with prejudice." *ABB Paint Finishing, Inc*, 223 Mich App at 563. However, "[t]his conclusion does not . . . preclude a plaintiff from requesting leave to amend its complaint [as permitted by MCR 2.116(I)(5)], before the court rules on a motion under [MCR 2.116(C)(8)]." *ABB Paint Finishing, Inc*, 223 Mich App at 563.

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[25]MCR 2.116(F) provides: "A party or an attorney found by the court to have filed a motion or an affidavit in violation of the provisions of MCR 1.109(D)(3) and [MCR 1.109(E)] may, in addition to the imposition of other penalties prescribed by that rule, be found guilty of contempt."

[26]See Section 2.16 for a discussion of res judicata.

H. Standard of Review

A trial court's decision whether to grant summary disposition is reviewed de novo. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558 (2007).

4.3 Reconsideration or Rehearing

A. Requirements

Unless a more specific court rule provides otherwise,[27] a motion for reconsideration or rehearing must be filed and served no later than 21 days after entry of order disposing of the motion. 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 a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3).

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 2.405(D)(6)(*iii*); and MCR 2.625(F)(2). See also Section 6.5(J)(2).

B. Decision

"The purpose of MCR 2.119(F) 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) (at the time this case was decided, the time requirement was seven days) (citation omitted).

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, the decision whether to grant a motion for reconsideration is within the court's discretion. See *id*. Accordingly, MCR 2.119(F)(3) "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

[27] See, e.g., MCR 2.604(A) or MCR 2.612.

mistakes." *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754 (2014).

No abuse of discretion was found where the trial court denied a plaintiff's motion for reconsideration that rested "on a legal theory and facts which could have been pled or argued prior to the trial court's original order" because the motion did not "demonstrate a 'palpable error by which the court and the parties ha[d] been misled.'" *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733 (1987), quoting 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, 964 (2013), quoting *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883).

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). The court also has discretion to limit its reconsideration to the issue it believes warrants further consideration. *Id*.

4.4 Revisiting a Judgment In Actions Involving Multiple Claims or Multiple Parties

MCR 2.604(A) allows courts to revise orders before entry of a final judgment in a case:

> "Except as provided in [MCR 2.604(B), addressing receiverships and similar actions[28]], an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. Such an order or other form of decision is not appealable as of right before entry of final judgment. A party may file an application for leave to appeal from such an order."

[28] MCR 2.604(B) provides: "In receivership and similar actions, the court may direct that an order entered before adjudication of all of the claims and rights and liabilities of all the parties constitutes a final order on an express determination that there is no just reason for delay."

"As a general matter, courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court." *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 521 (2016) (quotation and citation omitted).[29] In *Bank of America, NA*, the trial court initially denied the defendant's motion for summary disposition and ultimately revisited its decision after the defendant filed another motion for summary disposition raising the same issue. *Id.* The plaintiff challenged the trial court's authority to alter its stance on the issue because it already denied the defendant's first motion for summary disposition and motion for reconsideration. *Id.* The Court of Appeals, citing MCR 2.604(A), held that "although the trial court exhibited a lack of awareness that it had previously denied [the defendant's] motion for reconsideration of the order denying [the defendant's] first motion for summary disposition, the trial court nonetheless had authority to revisit its previous determination regarding the applicability of the full credit bid rule. A final judgment had not yet been entered, and [the defendant] had filed another motion for summary disposition again raising the issue . . . as permitted by [MCR 2.116(E)(3)]."[30] *Bank of America, NA*, 316 Mich App at 522.

4.5 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). 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.'" *Id.* at 331-332, quoting *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 270 (1990). MCR 2.109 does not "prohibit[] a court from imposing bond on its own initiative." *Zapalski v Benton*, 178 Mich App 398, 404-405 (1989) (the trial court did not abuse its discretion in sua sponte ordering plaintiff to file security regarding certain claims that rested upon tenuous legal theories).

[29] For a discussion of reconsideration or rehearing, see Section 4.3.

[30] See Section 4.2(F) for a discussion of filing multiple motions for summary disposition pursuant to MCR 2.116(E)(3).

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 v Harmony Hills Recreation, Inc*, 186 Mich App 265, 269 (1990). 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 circumstance in which security for costs may not be ordered. For example, if the party's pleading states a legitimate claim, and shows by affidavit that he or she is financially unable to furnish a security bond, financial inability is a basis for proceeding without security. MCR 2.109(B)(1). This does not necessarily require a party to be indigent. *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 272 (1990). 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 321, 333 (1997). 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.

E. Objection to Sufficiency of Security

"MCR 3.604(E) and [MCR 3.604(F)] govern objections to the surety." MCR 2.109(A). "In an appeal to the circuit court from a lower court or tribunal, an objection to the surety is heard in the circuit court." MCR 3.604(F)(3).

Within seven days of receiving a copy of the bond, the moving party may "serve on the officer taking the bond and the party giving the bond a notice that the party objects to the sufficiency of the surety."

MCR 3.604(E). The notice "must be filed as a motion for hearing on objections to the bond." MCR 3.604(F). Failure to provide notice of an objection waives all objections. MCR 3.604(E).

"On demand of the objecting party, the surety must appear at the hearing of the motion and be subject to examination as to the surety's pecuniary responsibility or the validity of the execution of the bond." MCR 3.604(F)(1). "After the hearing, the court may approve or reject the bond as filed or require an amended, substitute, or additional bond, as the circumstances warrant." MCR 3.604(F)(2). See also MCR 2.109(C).

F. Modification of Order

"The court may order new or additional security at any time on just terms, (1) if the party of the surety moves out of Michigan, or (2) if the original amount of the bond proves insufficient. A person who becomes a new or additional surety is liable for all costs from the commencement of the action, as if he or she had been the original surety." MCR 2.109(C).

G. 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 321, 332 (1997).

H. 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 321, 331 (1997).

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.

4.6 Separate or Joint Trial

A. Court's Discretion

MCR 2.505 allows the court to decide 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 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.

B. Standard of Review

A trial court's decision regarding consolidation is reviewed for an abuse of discretion. *Bordeaux v Celotex Corp*, 203 Mich App 158, 163-164 (1993).

4.7 Substitution or Withdrawal of Attorney

A. Order Required

"Unless otherwise stated in [MCR 2.117], 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, 386-387 (2006).

"An attorney who has filed a notice of limited appearance[31] pursuant to MCR 2.117(B)(2)(c) and MRPC 1.2(b) may withdraw by filing a notice of withdrawal from limited appearance with the court, served on all parties of record, stating that the attorney's limited representation has concluded and the attorney has taken all actions necessitated by the limited representation, and providing to the court a current service address and telephone number for the self-

[31] See Section 3.1(C)(1) and the Michigan Judicial Institute's *Stages of Limited Scope Representation* table.

represented litigant." MCR 2.117(C)(4). The notice of withdrawal from limited appearance is effective immediately upon filing and service if it is signed by the client; it is effective 14 days after filing and service if it is not signed by the client, "unless the self-represented client files and serves a written objection to the withdrawal on the grounds that the attorney did not complete the agreed upon services." *Id*.

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*, 234 Mich App 421, 431 (1999).

4.8 Adjournments[32]

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 the 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).

[32]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(4) and MCR 2.408(C)(4) to adjournments. See Section 1.15 for more information on videoconferencing.

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." *Zerillo v Dyksterhouse*, 191 Mich App 228, 230 (1991). 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 written statement verified under MCR 1.109(D)(3). MCR 2.503(D)(2).

An adjournment (at least 28 days) must be ordered where an attorney in the case has died, become physically or mentally unable to continue in the case, been disbarred, been suspended, been placed on inactive status, or resigned from active membership in the bar. MCR 2.503(F).

"[T]o establish good cause in the context of a motion for an adjournment a party must show a legally sufficient or substantial reason." *Ypsilanti Twp v Dahabra*, 338 Mich App 287, 292 (2021) (quotation marks and citation omitted). In *Dahabra*, 338 Mich App at 292, defendant was "an impoverished individual who thereby might have some difficulty expeditiously obtaining counsel for a civil defense," which was "a legally sufficient, substantial reason to seek an adjournment." Additionally, "the existence of [defendant's] ongoing criminal case [(relating to the same conduct as defendant's civil nuisance abatement case)] tended to support the necessity of an adjournment." *Id*. at 294. "While a trial court need not in every instance delay a civil abatement suit until after the criminal trial on the same facts is completed, the decision to proceed with or delay a civil abatement suit must be tested against the equity and necessity

for proceeding with the civil action under the circumstances of a given case." *Id*. at 295 (cleaned up). In light of the circumstances presented in *Dahabra*, there was "no valid reason for the trial court to have outrightly ignored defendant's request for an adjournment in order to obtain counsel," and "[t]he trial court's decision simply did not promote the cause of justice[.]" *Id*. at 295-296 (concluding that the trial court's "failure to consider defendant's request for an adjournment constituted an abuse of discretion").

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).

4.9 Stay of Proceedings

A. 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).

B. Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act (SCRA) governs the granting of stays to members of the military who are unable to appear at civil court proceedings. 50 USC 3931–50 USC 3938a; 50 USC Appx 501-596. "[T]he SCRA is always to be liberally construed[.]" *Johnson v Johnson*, 329 Mich App 110, 119 (2019) (quotation marks and citation omitted).

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 must 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 3931(d); 50 USC Appx 521(d).

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 3932(b)(1)-(2); 50 USC Appx 522(b)(1)-(2).

"[A]lthough [50 USC 3932(b)(2)(B)] expressly state[s] that [the letter or communication] must be 'from' the servicemember's commanding officer . . ., nothing in the statutory language precludes the servicemember's commanding officer from making those statements in a letter authored by the servicemember [that is] adopted by the servicemember's commanding officer." *Johnson*, 329 Mich App at 123-124 (the trial court properly denied a servicemember's request for a stay where the servicemember "offered no explanation for why or how her duties materially affected her ability to appear for the . . . proceedings," and "failed to state 'a date when the servicemember [would] be available to appear'").

"A service member who is granted a stay of a civil action or proceeding under subsection (b) may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear." 50 USC 3932(d)(1); 50 USC Appx 522(d). However, "[u]nlike the stay under [50 USC 3932(b)], an additional stay under [50 USC 3932(d)] is not mandatory[.]" *Johnson*, 329 Mich App at 121 n 6. "If the court refuses to grant an additional stay of proceedings . . ., the court shall appoint counsel to represent the servicemember in the action or proceeding." 50 USC 3932(d)(2); 50 USC Appx 522(d)(2).

4.10 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);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); or
- Failure to timely file a motion for substitution "within 91 days after filing and service of a statement of the fact of the death [of a party]," "unless the party seeking substitution shows that there would be no prejudice to any other party from allowing later substitution." MCR 2.202(A)(1)(b).

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 service of process 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).[33]

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. *Id*.

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

[33] See Section 3.3 on summons and Section 3.4 on service of process.

- 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*, 244 Mich App 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

1. 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.[34] See *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417 (2007).

2. With Court Order

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

"A motion for voluntary dismissal should not be granted when the defendant would be legally prejudiced by the decision." *Newman v Real Time Resolutions, Inc*, ___ Mich App ___, ___

[34] See Section 2.16 on res judicata.

(2022). "An order of dismissal without prejudice should place the defendants in no worse of a position than they were in before the case began." *Id*. at ___. If a plaintiff moves for voluntary dismissal but does not have "a valid claim they could bring after dismissal," dismissal with prejudice is warranted. *Id*. at ___ (noting that "[i]f the trial would have dismissed this matter without prejudice, defendants would be legally prejudiced by potentially having to defend another lawsuit filed by plaintiff over this same issue, even though he legally cannot succeed").

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.

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).

Dismissal is a drastic sanction. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506 (1995). "Severe sanctions such as default or dismissal are predicated on a flagrant or wonton refusal to facilitate discovery that typically involves repeated violations of a court order." *Swain v Morse*, 332 Mich App 510, 518 (2020). 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*, 211 Mich App 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 wilful or accidental;
>
> (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);
>
> (3) the prejudice to the defendant;

> (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice;
>
> (5) whether there exists a history of plaintiff's engaging in deliberate delay;
>
> (6) the degree of compliance by the plaintiff with other provisions of the court's order;
>
> (7) an attempt by the plaintiff 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." *Id*. 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 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.

The "trial court abused its discretion by dismissing [plaintiff's] complaint against [defendant] as a discovery violation" upon the trial court's finding "that plaintiff 'lied under oath' at her deposition." *Swain*, 332 Mich App at 517, 518. "*Maldonado* concerned serious misconduct that went to the ability of the court to assure a fair trial." *Id*. at 523. "In contrast, untruthful deposition testimony does not threaten the integrity of the judicial *system*. A witness can be impeached at trial, and the jury can consider whether a witness was lying in making its credibility determination." *Id*. at 523-524. "[R]ather than protecting the judicial process, permitting judges to dismiss cases for false deposition testimony would be a fundamental change and could itself undermine the integrity of the judicial system that has always relied on the fact-finder for credibility determinations." *Id*. at 524, 527 ("the fact that there is some ambiguity and equivocation in plaintiff's answers counsels against dismissal, and it also demonstrates why courts should be hesitant to impose sanctions

based upon a finding that the deponent intentionally made false statements").

A trial court's "findings that plaintiffs deliberately delayed progress when progress was solely under their control strongly supported dismissal with prejudice." *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg LLC*, ___ Mich App ___, ___ (2023). A trial court's "finding that the delay was part of a pattern of gamesmanship also supported dismissal with prejudice." *Id*. at ___. In *Tolas*, the Court of Appeals concluded that the trial court's findings and determinations were sufficient to allow the trial court to dismiss the case under its inherent authority to punish misconduct." *Id*. at ___ (holding "[o]n this record, we cannot conclude that the trial court abused its discretion when it dismissed the case with prejudice").

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) (holding that "[u]nder the plain language of MCR 2.504(B)(3), the dismissal of the . . . untimely complaint [pursuant to MCR 2.116(C)(7)] was an adjudication on the merits"); *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 523-524 (2016) (holding that MCR 2.504(B)(3) governed the effect of a dismissal under MCR 2.313(B)(2)(c) for failure to provide or permit discovery; because the court did not provide otherwise in the dismissal order, dismissal of the claims constituted an adjudication on the merits).

F. Failure to Timely File a Motion for Substitution

"Unless a motion for substitution is made within 91 days after filing and service of a statement of the fact of the death, the action must be dismissed as to the deceased party, unless the party seeking substitution shows that there would be no prejudice to any other party from allowing later substitution." MCR 2.202(A)(1)(b).

MCR 2.202(A)(1)(b) "requires dismissal unless there is a showing of no prejudice." *Bradley v Progressive Marathon Ins Co*, ___ Mich App ___, ___ (2022). However, "MCR 2.202(A)(1)(b) does not require that the trial court refuse to dismiss the case if the plaintiff has showed no prejudice." *Bradley*, ___ Mich App at ___. "Instead, when the plaintiff

has showed no prejudice, the trial court retains the discretion to either dismiss or retain the case." *Id*. at ___.

G. 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*, 311 Mich App 420, 427 (2015) ("[u]nder [MCR 2.504(B)(2)], 'a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences'"), quoting *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*, 311 Mich App 276, 289 (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).

H. 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).

I. Standard of Review

Questions of law pertinent to an involuntary dismissal motion based on MCR 2.504(B)(2) are reviewed de novo. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639 (1995). The trial court's factual findings are reviewed for clear error. *Williamstown Twp v Hudson*, 311 Mich App 276, 289 (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. *McKelvie v Mount Clemens*, 193 Mich App 81, 86 (1992).

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

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 Tip:

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).[35]

4.11 Default and Default Judgments

There is a distinction between entry of default and entry of default judgment: "the former operates as an admission by the defaulting party of issues of liability, but leaves the issues of damages unresolved until entry of judgment. The latter reduces the default to a judgment for money damages." *Dollar Rent-A-Car Sys v Nodel Constr*, 172 Mich App 738, 743 (1988) (citations omitted). "A defaulted party retains the right to challenge the amount of damages, but the defaulted party may no longer challenge liability." *Lakeside Retreats, LLC v Camp No Counselors, LLL*, 340 Mich App 79, 89 (2022).

A. Default

1. Purpose of Default

"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

[35]See Section 4.11 on default and default judgments and Section 4.12 on setting aside judgments.

plaintiff in the establishment of his claim." *Mason v Marsa*, 141 Mich App 38, 41 (1985).

A party may be found in default for either failing to plead or answer, or for improper conduct such as discovery abuses (in which case, default is used as a sanction).[36] *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87 (2000).

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, the clerk must enter the default of that party if that fact is:
>
> (a) known to the clerk of the court, or
>
> (b) verified in the manner prescribed by MCR 1.109(D)(3) and filed with the court in a request for the default."

"[A] party must not be defaulted [under MCR 2.603(A)(1)] 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) (defendant failed to "otherwise defend" himself by filing a motion for an evidentiary hearing and stay of the proceedings and was therefore properly defaulted). See also *Marposs Corp v Autocam 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). Note that both *Huntington Nat'l Bank* and *Marposs* were decided before verification under MCR 1.109(D)(3) was required. See ADM File No 2002-37, effective May 1, 2019.

Notice of entry of the default must be sent to the defaulted party and all parties who have appeared. MCR 2.603(A)(2). If the defaulted party has not appeared, notice of entry of the default 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). The party seeking a default must send the notice and file proof of service and a copy of the notice with the court. MCR 2.603(A)(2)(b).

[36] See Section 4.10(E) for a discussion of entering a default as a sanction.

3. Effect of Entry of Default

Entry of a default does impact:

- The defaulted party's right to challenge liability. *Lakeside Retreats LLC v Camp No Counselors LLC*, 340 Mich App 79, 89 (2022). The defaulted party's right to assert 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 v Boerman*, 242 Mich App 75, 87-88 (2000).

- The right to participate in the adjudication of the property division after a default is entered in an equitable action, such as a divorce. *Draggoo v Draggoo*, 223 Mich App 415, 427 (1997).

Entry of a default does not impact:

- The defaulted party's right to challenge the amount of damages. *Lakeside Retreats*, 340 Mich App at 89 (2022). "[T]herefore, a party is . . . entitled to notice in advance of a default judgment for purposes of challenging the amount of damages." *Id*. at ___.The defaulted party's right to a jury trial on the issue of damages. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 554 (2001). If the defaulted party 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.[37] *Marshall Lasser, PC v George*, 252 Mich App 104, 106 (2002).

- A party's right to contest its vicarious liability (where that party's sole source of liability is vicarious) once a default has been entered against a coparty. *Rogers v J B Hunt Transp, Inc*, 466 Mich 645, 655 (2002).

[37] See Section 7.19 for a discussion of waiver of jury trial.

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;[38]
- the judgment seeks relief different in kind 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)(a)(*i*)-(*iii*).

"The purpose of the notice requirement is to apprise the default[ed] party of the possibility of entry of judgment so that he may have an opportunity to participate in any hearing necessary to ascertain the amount of damages or other form of remedy to be granted." *Dollar-Rent-A-Car Sys v Nodel Constr*, 172 Mich App 738, 743 (1988). See Section 4.11(B)(2) for more information about the hearing on damages.

"The notice . . . must be served at least 7 days before entry of the requested default judgment." MCR 2.603(B)(1)(b). This seven-day notice period also applies "to any hearing or trial necessitated by the request for judgment when that hearing occurs on a date preceding the actual entry of the default judgment." *Dollar-Rent-A-Car Sys*, 172 Mich App at 743-744. Notice must be pursuant o MCR 2.107 if the defaulted party has appeared. MCR 2.603(B)(1)(c). If the defaulted party has not appeared, notice may be by personal service, ordinary first-class mail at the defaulted party's last known address or the place of service, or as the court directs. *Id*.

A pleading's caption must identify the document. MCR 1.109(D)(1)(b)(*iv*). Where the pleading's caption does not identify "that the pleading contain[s] or [is] intended to be notice of 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 1.109(D)(1)(b)(*iv*)]."[39] *Brooks Williamson and Assoc, Inc v Mayflower Constr Co*, 308 Mich App 18, 28 (2014) (rejecting the claim that timely notice was

[38]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).

[39]Formerly MCR 2.113(C)(1)(d). See ADM File No. 2002-37, effective September 1, 2018.

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 1.109(D)(1)(b)(*iv*)] 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 and preserves the fair opportunity for a defendant to contest damages where the defendant might otherwise not dispute liability").

2. Hearings on Damages

"[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. 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).

3. Entry of Default Judgment

By clerk. The clerk may enter the default judgment for the amount requested if the amount that the plaintiff is seeking is made by written request, verified under MCR 1.109(D)(3), and if:

- 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 amount of damages is less than or equal to the amount stated in the complaint. MCR 2.603(B)(2).

By court. The court may enter default judgments in all other cases. MCR 2.603(B)(3). The party seeking the default judgment must file a motion requesting the court to enter a default judgment. *Id*. However, the court cannot enter a default judgment "against a minor or incompetent person unless the person is represented by a conservator, guardian ad litem, or other representative." MCR 2.603(B)(3)(a).

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 Section 4.11(B)(2) for information on conducting a hearing on damages in order to enter or effectuate a default judgment.

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).

Notice. Once a default judgment is entered, the party who sought the default must promptly serve the default judgment on all parties. MCR 2.603(B)(4). "Proof of service must be filed with the court." *Id.*

4. Entry of Default Judgment as a Sanction

When a party fails to obey an order to provide or permit discovery, MCR 2.313(B)(2)(c) authorizes a trial court to enter a default judgment against the disobedient party. However, the court "should carefully consider the circumstances of the case to determine whether a drastic sanction such as the entry of a default judgment is appropriate." *In re Hall Trust*, ___ Mich App ___, ___ (2023) (quotation marks and citation omitted). "The record should reflect that the trial court gave careful consideration to all of the factors involved and considered all of its options in determining the sanction that was just and proper in the context of the case before it. Ultimately, the court's chosen discovery sanction must be proportionate and just." *Id.* at ___ (cleaned up).

"Before imposing the sanction of a default judgment, a trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to parties seeking the sanction, and whether willfulness has been shown." *In re Hall Trust*, ___ Mich App at ___ (cleaned up; holding that "[e]ach of those considerations supports the default-judgment sanction imposed" "based upon the persistent, willful, egregious discovery violations committed").

4.12 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). See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 234 n 7 (1999).

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

Unless MCR 2.612 provides otherwise, a motion to set aside default or default judgment brought pursuant to MCR 2.603 must be filed before the default judgment is entered or within 21 days of entry of the default judgment if the defaulted party was personally served. MCR 2.603(D)(2)(a)-(b).[40]

Except when grounded on lack of jurisdiction (or under certain circumstances involving multiple defendants[41]), 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.
>
> (2) A statement of facts showing a meritorious defense, verified in the manner prescribed by MCR 1.109(D)(3), is filed. MCR 2.603(D)(1).

Generally, the court "[should] not set aside a default that has been *properly* entered." *Village of Edmore v Crystal Automation Sys, Inc*, 322 Mich App 244, 255 (2017).

The "good cause" and "meritorious defense" elements of a motion to set aside a default must be considered separately; it is improper to blur the two elements. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229-234 (1999).[42]

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[40] MCR 2.603(D)(2) is silent regarding the timing of a motion to set aside a default or default judgment if the defaulted party was not personally served.

[41] "[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).

[42] "However, "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 a manifest injustice." *Alken-Ziegler, Inc*, 461 Mich at 233-234. See Section 4.12(B)(2) for a discussion of meritorious defense.

1. Good Cause

Good cause sufficient to set aside a default "can be shown by: (1) a substantial procedural defect or irregularity or (2) a reasonable excuse for the failure to comply with the requirements that created the default." *Tindle v Legend Health, PLLC*, ___ Mich App ___, ___ (2023) (quotation marks and citation omitted). While "the good cause and meritorious defense elements of MCR 2.603(D)(1) . . . are separate requirements," and "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 a manifest injustice." *Shawl v Spence Bros, Inc*, 280 Mich App 213, 233-235 (2008) (cleaned up). Trial courts must consider the totality of the circumstances when determining whether a party has shown good cause in support of a motion to aside a default judgment, including the following factors:

> "(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 the judgment;
>
> (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*, 280 Mich App at 237-238.

This list is not intended to be exhaustive. *Shawl*, 280 Mich App at 239. Trial courts 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*.

The following cases discuss whether good cause to set aside a default or default judgment exists:

- *Tindle*, **___ Mich App at ___:** Because a medical assistant generally lacks "authority to make decisions on behalf of an office of an entity," the "plaintiff did not properly serve defendants" despite mailing "a copy of the summons and complaint to [defendant's] principal office as required by [MCR 2.105]." *Tindle* ___ Mich App at ___, fn 2 (noting that "the failure to serve process is itself sufficient to warrant setting aside a default judgment").

- *Village of Edmore v Crystal Automation Sys, Inc*, **322 Mich App 244, 257 (2017)**: Failing to file a timely answer where the party "otherwise defended" the action under MCR 2.603(A)(1) by "vigorously opposing plaintiff's motions for injunctive relief and partial summary disposition."

- *Brooks Williamson and Assoc, Inc v Mayflower Constr Co*, **308 Mich App 18, 26 (2014):** "[S]ervice [of process] on [a court-appointed receiver is] sufficient under [MCR 2.105(I)[43]], 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[.]"

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

2. Verified Statement of Facts Showing Meritorious Defense

MCR 2.603(D)(1) requires defendants to execute a verified statement showing a meritorious defense "in the manner prescribed by MCR 1.109(D)(3)[.]" The purpose of a verified statement showing a meritorious defense "is to inform the trial court whether the defaulted defendant has a meritorious defense to the action." *Tindle v Legend Health, PLLC*, ___ Mich App ___, ___ (2023) (citation omitted). Accordingly, the statement of facts must be verified by someone with "personal knowledge of the facts, state admissible facts with particularity, and show that the [person] can testify competently to the facts" contained in the verified statement. *Id.* at ___ (citation omitted). The defaulted

[43]Formerly MCR 2.105(H). See ADM File No. 2020-20, effective May 1, 2021.

party must file a verified statement of facts showing a meritorious defense before a default may be set aside, even if good cause exists. See *Shawl v Spence Bros, Inc*, 280 Mich App 213, 232 (2008);[44] MCR 2.603(D)(1).

A statement filed in support of a motion to set aside a default or default judgment may be verified by:

> "(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or
>
> (b) except as to an affidavit, including the following signed and dated declaration: 'I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief.'" MCR 1.109(D)(3).

Trial courts must consider the totality of the circumstances when determining whether a party has presented a meritorious defense for the purposes of MCR 2.603(D). *Shawl*, 280 Mich App at 236-237. Trial courts should consider whether the verified statement 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*, 280 Mich App at 238.

This list is not intended to be exhaustive. *Shawl*, 280 Mich App at 239. Trial courts 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.*

"[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)[45]], 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

[44] *Shawl* was decided prior to the issuance of ADM File No. 2002-37, effective May 1, 2019, which amended MCR 2.603 to require the filing of a verified statement rather than an affidavit to establish a meritorious defense.

[45] See Section 4.11(B)(1) for notice requirements when seeking entry of a default judgment.

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).

The following cases discuss whether a meritorious defense exists:

- *Tindle*, **___ Mich App at ___:** Affidavit to support a meritorious defense lacked any particular facts about one corporate entity's proffered defense. While the statement hinted the corporation may have a valid defense, the affidavit failed to state factual support for the meritorious defense with particularity. *Id*. at ___ (failure to mention corporation's standing within the sales agreement or reference entity's defense was detrimental to burden under MCR 2.603(D)(1)).

- *Huntington Nat'l Bank v Ristich*, **292 Mich App 376, 393-394 (2011)**[46]**:** 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.

- *ISB Sale Co v Dave's Cakes*, **258 Mich App 520, 532-533 (2003)**[47]**:** A meritorious defense existed where the affidavits supported the defendant's claim that long-arm jurisdiction could not be acquired.[48]

- *Lindsley v Burke*, **189 Mich App 700, 702-703 (1991):** A meritorious defense existed where the plaintiff's complaint was insufficient as a matter of lawby failing to state a claim for relief.

- *Hunley v Phillips*, **164 Mich App 517, 523 (1987)**[49]**:** A meritorious defense existed where the affidavits demonstrated that the defendant was not liable to the plaintiff, and the complaint failed to state a claim for relief in avoidance of governmental immunity.

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[46]*Huntington Nt'l Bank* was decided prior to the issuance of ADM File No. 2002-37, effective May 1, 2019, which amended MCR 2.603 to require the filing of a verified statement rather than an affidavit to establish a meritorious defense.

[47]*ISB Sale Co* was decided prior to the issuance of ADM File No. 2002-37, effective May 1, 2019, which amended MCR 2.603 to require the filing of a verified statement rather than an affidavit to establish a meritorious defense.

[48]See Section 2.12 and the Michigan Judicial Institute's Personal Jurisdiction Flowcharts regarding *Individuals*, *Corporations*, *Partnerships or Limited Partnerships*, and *Partnership Associations or Unincorporated Voluntary Associations*.

[49]*Hunley* was decided prior to the issuance of ADM File No. 2002-37, effective May 1, 2019, which amended MCR 2.603 to require the filing of a verified statement rather than an affidavit to establish a meritorious defense.

3. Costs

"An order setting aside [a] default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D)." MCR 2.603(D)(4). The order may also impose other conditions, including reasonable attorney fees, as prerequisites to setting aside a default. *Id*.

C. Setting Aside Final Judgment Under Michigan Court Rule 2.612

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

1. Defendant Not Personally Notified

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."

A default judgment constitutes a final judgment. *Lawrence M Clarke, Inc v Richco Const, Inc*, 489 Mich 265, 280 (2011).

Personal jurisdiction.[50] 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 272, 275. In *Clarke*, 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

[50]See Section 2.12 and the Michigan Judicial Institute's Personal Jurisdiction Flowcharts regarding *Individuals*, *Corporations*, *Partnerships or Limited Partnerships*, and *Partnership Associations or Unincorporated Voluntary Associations*.

under MCR 2.612(B)[.]" *Lawrence M Clark, Inc*, 389 Mich at 275-276.

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,* 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[51] 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. *Lawrence M Clarke, Inc,* 489 Mich at 277-278.

Reasons justifying relief. A defendant may show that he or she has a "'reason justifying relief from the judgment'" as required 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,* 489 Mich 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

"The procedure for obtaining any relief from a judgment shall be by motion as prescribed in [the Michigan Court Rules] or by an independent action." MCR 2.612(C)(4).

[51] 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.

Pursuant to MCR 2.612(C)(1), 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."

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. MCR 2.612(C)(2).

Relief under MCR 2.612 may be appropriate even if a case is closed. See *Peterson v Oakwood Healthcare, Inc*, 336 Mich App 333, 347 (2021). In *Peterson*, "[t]he trial court's reliance on the fact that the case was closed [to deny relief was] highly dubious. Following that premise to its logical end, no party could ever obtain relief from judgment under MCR 2.612(C) once a case was closed," and that "premise is patently wrong." *Peterson*, 336 Mich App at 347-348 (concluding, however, that the trial court's rejection of plaintiff's argument that it could obtain relief from the final order based on a subsequently issued decision of the Court of Appeals was correct). "MCR 2.612 does not mention any such extra requirements and instead simply states that a party can seek relief '[o]n motion and on just terms,' MCR 2.612(C)(1), and that [a] motion [under MCR 2.612(C)(1)(d)-(f)] must be made within a reasonable time, MCR 2.612(C)(2)." *Peterson*, 336 Mich App at 347 (alteration in original). "Additionally, . . . the vehicle to 'reopen' a case is MCR 2.612(C) itself." *Peterson*, 336 Mich App at 347.

"If a circuit court order grants relief to a party as described under [MCL 600.309a(2)], an opposing party may file an appeal of right from that order to the court of appeals. Action in the circuit court must be stayed while the matter is on appeal." MCL 600.309a(3). In addition, the court[52] must "take appropriate steps toward ensuring, consistent with the appellate court rules, a timely processing of the appeal." MCL 600.309a(4). MCL 600.309a "applies only if a party seeks relief from a circuit court judgment entered in a civil action based on a jury verdict on any of the following grounds:

> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence.
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party.
>
> (d) That the judgment is void.
>
> (e) Another reason that justifies relief from the operation of the judgment." MCL 600.309a(2).

MCL 600.309a "does not apply to an action to which [MCL 600.6098] applies," and "applies only to an action, case, or proceeding commenced after" September 10, 2021. MCL 600.309a(5)-(6).

a. MCR 2.612(C)(1)(a)

A party may request relief from a final judgment, order, or proceeding on the basis of mistake, inadvertence, surprise, or excusable neglect. MCR 2.612(C)(1)(a). However, the "mistake, inadvertence, surprise, or excusable neglect" language should not be used "to bypass the analysis under MCR 2.603(D)(1)[.]" *Tindle v Legend Health, PLLC*, ___ Mich App ___, ___ (2023). "MCR 2.603(D)(1) establishes a rigorous analysis for the manner in which a default judgment could be set aside. Setting aside a judgment for merely being surprised about a hearing the next day, especially without arguing there was any issue with the notice of entry of default judgment, does not capture the essence of MCR 2.603(D)(1)." *Tindle*, ___ Mich App at ___. "Labeling improper service as such would swallow the analysis under 2.603(D)(1)[.]" *Tindle*, ___ Mich App at ___

[52] It is unclear whether the Legislature is referring to the lower court or the Court of Appeals.

(observing that defendants did "not present any extraordinary circumstance that would justify labeling the effect of the improper service as a 'surprise'").

b. MCR 2.612(C)(1)(b)

"Under MCR 2.612(C)(1)(b), newly discovered evidence is not sufficient to grant relief from a judgment unless it could not have been discovered through due diligence in time to move for a new trial under MCR 2.611(B)." *Int'l Outdoor, Inc v SS Mitx, LLC*, ___ Mich App ___, ___ (2023). "A party seeking relief from judgment based on newly discovered evidence must establish that (1) the evidence, not simply its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the newly discovered evidence is likely to change the result, and (4) the party moving for relief from judgment was not able to produce the evidence with reasonable diligence." *Id*. at ___.

c. MCR 2.612(C)(1)(c)

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). "MCR 2.612(C)(1)(c) does not impose a due diligence requirement on the party seeking relief from judgment on the basis of fraud, misrepresentation, or the misconduct of an adverse party." *Int'l Outdoor*, ___ Mich App at ___.

"An evidentiary hearing is necessary where fraud [on the court] 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) (quotation marks and citation omitted). "[I]t is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations." *Id*.

d. MCR 2.612(C)(1)(e)

There is a distinction between a trial court's judgment being reversed or vacated and being overruled by subsequent caselaw. *Kidder v Ptacin*, 284 Mich App 166, 170 (2009). "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. . . . However, an appellate court's pronouncement that a rule of law no longer applies does not change the result of an effective judgment." *Id*. In a previous appeal in *Kidder*, the Court of Appeals, based on a case that was later reversed, ordered that summary disposition be granted in favor of the defendants. *Id*. at 169. When the case[53] on which the Court based its decision was reversed, the *Kidder* plaintiff did not appeal the trial court's decision to order summary disposition; instead she moved under MCR 2.612(C)(1)(e) to reinstate her case at the trial court. *Kidder*, 284 Mich App at 169. Because "MCR 2.612 envisions a court relieving a party from its own judgment, not the judgment of a higher authority" and the original *Kidder* decision to grant summary disposition to the defendants constituted the law of the case, the trial court erred in granting the plaintiff's motion under MCR 2.612(C)(1)(e). *Kidder*, 284 Mich App at 170.

e. MCR 2.612(C)(1)(f)

"Generally, relief is granted under MCR 2.116(C)(1)(f) when the reason for setting aside the judgment is not included in [MCR 2.612(C)(1)(a)-MCR 2.612(C)(1)(e)], and when the judgment was obtained by the improper conduct of the party in whose favor the judgment was entered." *Int'l Outdoor*, ___ Mich App at ___. 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, 62 (2010) (noting that "extraordinary circumstances warranting relief from a judgment [under MCR 2.612(C)(1)(f)] generally arise when the judgment was obtained by the improper conduct of a party.") In addition, "the competing concerns of finality and fairness counsel a cautious, balanced approach" to setting aside a judgment under MCR 2.612(C)(1)(f). *Rose*, 289 Mich App at 58.

Subsequently Issued Appellate Decision. "[R]elief from judgment under MCR 2.612(C)(1)(f) is inappropriate where a party has not sought appellate review of a trial court's final order and the basis for relief from judgment is a subsequent appellate decision in a different case."

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

Peterson v Oakwood Healthcare, Inc, 336 Mich App 333, 348 (2021) (quotation marks and citation omitted) ("the trial court's rejection of the [plaintiff's] position that it could obtain relief from the final order based on a subsequently issued decision of [the Court of Appeals was] correct").

Judgment of Divorce. 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. *Rose*, 289 Mich App 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 "detrimentally affect 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.

Caselaw Retroactively Reversed. Once a case is closed, a party cannot be granted relief under MCR 2.612(C)(1)(f) based upon a retroactive change or clarification in the law. *King v McPherson Hosp*, 290 Mich App 299, 304 (2010). In *King*, it was undisputed that the case was closed, and that the case[54] on which the court relied was later reversed and given partial retroactive effect. *Id*. at 307-308. The Court of Appeals concluded that the plaintiff

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

could not be granted relief under MCR 2.612(C)(1)(f) because binding precedent[55] prohibited such relief and denying the requested relief did not constitute an extraordinary circumstance as required by MCR 2.612(C)(1)(f). *King*, 290 Mich App at 308.

Error in Jurisdiction. "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).

Attorney's Negligence. 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. *Id*. at 300-301.

3. Independent Action

"[MCR 2.612(C)] 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." MCR 2.612(C)(3). However, "[r]elief may not be sought or obtained by the writs of coram nobis, coram vobis, audita querela, bills of review, or bills in the nature of a bill of review." MCR 2.612(C)(4).

"The express language of MCR 2.612(C)(3) states that the provisions in MCR 2.612(C)(1) and [MCR 2.612](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

[55] See *Reynoldsville Casket Co v Hyde*, 514 US 749 (1995); *People v Maxson*, 482 Mich 385 (2008); *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653 (2001); and *Gillespie v Bd of Tenant Affairs of the Detroit Housing Comm*, 145 Mich App 424 (1985).

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 v Kiefer*, 212 Mich App 176, 182 (1995).

D. Standard of Review

1. Decisions Under MCR 2.603

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).

2. Decisions Under MCR 2.612

The ruling on a motion for relief from judgment pursuant to MCR 2.612(B) is reviewed for an abuse of discretion. *Bullington v Corbell*, 293 Mich App 549, 554-555 (2011). A motion brought pursuant to MCR 2.612(C) is also reviewed for an abuse of discretion. *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 203 (1989). 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. *Id*.

"Where a party has alleged that a fraud has been committed on the court [pursuant to MCR 2.612(C)(1)(c)], it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations." *Kiefer v Kiefer*, 212 Mich App 176, 179 (1995).

Chapter 5: Discovery

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5.1 Discovery in General

A. Availability, Scope, and Time for Completion

"The court may control the scope, order, and amount of discovery, consistent with [the Michigan Court Rules]." MCR 2.301(C).

Availability. "In a case where initial disclosures are required, a party may seek discovery only after the party serves its initial disclosures under MCR 2.302(A) Otherwise, a party may seek discovery after commencement of the action when authorized by [the Michigan Court Rules], by stipulation, or by court order." MCR 2.301(A)(1). See Section 5.2 for more information on initial disclosures. Notwithstanding, discovery is not permitted in a district court action prior to entry of a judgment[1] unless the parties stipulate or the court grants leave. MCR 2.301(A)(2). "A motion for discovery may not be filed unless the discovery sought has previously been requested and refused." *Id*. Discovery is not permitted in small claims or civil infraction matters. MCR 2.301(A)(3).

Scope. Michigan follows the open, broad discovery policy, permitting liberal discovery. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616 (1998). However, "Michigan's commitment to open and far-reaching discovery does not encompass fishing expeditions." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419-420 (2011) (quotation marks, alteration, and citation omitted). "MCR 2.302(B)(1) clearly obligates the trial court to balance the burden of the proposed discovery against the value of the proposed discovery." *Micheli v Mich Auto Ins Placement Facility*, 340 Mich App 360, 374 (2022). "Parties may obtain discovery regarding any non-privileged[2] matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable." MCR 2.302(B)(1). The Michigan Court Rules do not impose a requirement of good cause for the discovery of relevant, nonprivileged documents or things. See *Ostoin v Waterford Twp Police Dep't*, 189 Mich App 334, 340 (1991). "However, a trial court should also protect the interests of the party opposing discovery so as not to

[1] See Section 8.1()regarding post judgment discovery proceedings.

[2] See Section 5.10 regarding privileged materials.

subject that party to excessive, abusive, or irrelevant discovery requests." *Cabrera v Ekema*, 265 Mich App 402, 407 (2005).

Where a producing party shows that ESI is not reasonably accessible because of undue burden or cost, the party does not have to produce the information. MCR 2.302(B)(6). However, if the requesting party files a motion to compel, or the producing party files a motion for a protective order, the court may order the producing party to provide the information despite a showing of undue burden or cost "if the requesting party shows good cause, considering proportionality under [MCR 2.302(B)(1)] and the limitations of [MCR 2.302(C)]." MCR 2.302(B)(6). "The court may specify conditions for the discovery, including allocation of the expense, and may limit the frequency or extent of discovery of ESI (whether or not the ESI is from a source that is reasonably accessible)." *Id*.

Completion. For actions pending before a circuit or probate court, the time to complete discovery is set by an order entered pursuant to MCR 2.401(B). MCR 2.301(B)(1). For actions where discovery is granted by leave or stipulation, the order or stipulation must set a time for completion of discovery. MCR 2.301(B)(2). "A time set by stipulation may not delay the scheduling of the action for trial." *Id*.

"As may be reasonable under the circumstances, or by leave of the court, motions with regard to discovery may be brought after the date for completion of discovery." MCR 2.301(B)(4). See Section 5.11 for information on discovery motions.

B. Constitutionality of Discovery Orders

"To the extent that a discovery order entered by a trial court in a civil lawsuit constitutes a search by a government agent within the meaning of the Fourth Amendment, the search would be reasonable if entered by a neutral judge in accord with 'closely circumscribed' rules that provide safeguards equivalent to probable cause." *Martin v Martin*, 331 Mich App 224, 245 (2020). In Michigan, "the court rules provide adequate protections to ensure that properly made discovery orders are reasonably consistent with the Fourth Amendment" because: (1) "the discovery must be relevant to the subject matter and must not be privileged" under MCR 2.302(B)(1); (2) the party or person from whom discovery is sought may seek a protective order under MCR 2.302(C); (3) trial courts have the authority "to provide significant protections against unreasonable discovery requests" under MCR 2.302(C); (4) "improper discovery requests may be subject to sanction" under MCR 2.302(G); and (5) "a party aggrieved by a trial court's decision to order discovery may appeal" under MCR 7.203(B)(1). *Martin*, 331 Mich App at 246-247

(2020) (finding that a discovery order granting the defendant's motion to compel the plaintiff's cell phone for a forensic review was reasonable because "[u]nder the totality of the circumstances, the protections afforded to [the plaintiff] exceeded those applicable when police officers make a warrant request," and "the court [had] already formulated a protection plan in case any privileged communications [found] their way into the forensic report").

C. Supplementing Disclosures and Responses

"A party that has made a disclosure under MCR 2.302(A)–or that has responded to an interrogatory, request for production, or request for admission–must supplement or correct its disclosure or response:

> (*i*) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing or
>
> (*ii*) as ordered by the court." MCR 2.302(E)(1)(a).

"A duty to supplement disclosures or responses may be imposed by order of the court, agreement of the parties, or at any time before trial through requests for supplementation." MCR 2.302(E)(1)(b). Failure to provide properly supplemented disclosures or responses, 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 or oppose designated claims or defenses, or to prohibit that party from introducing specific matters into evidence). MCR 2.302(E)(2). "[D]eposition testimony is not subject to the duty to supplement discovery responses under MCR 2.302(E)" because "a deposition is *not* a response to a request for discovery." *Swain v Morse*, 332 Mich App 510, 520 (2020). See Section 5.2(D) for information on failure to provide disclosures.

D. 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 v Consumers Power Co*, 227 Mich App 614, 616-618 (1998) (upholding a trial court's decision to allow the plaintiff to submit interrogatories to nonparty expert witnesses in lieu of expending

time and money traveling across the country questioning each witness individually).

The purpose of discovery is to simplify and clarify issues. *Domako v Rowe*, 438 Mich 347, 360 (1991). "Restricting parties to formal methods of discovery [does] not aid in the search for truth[.]" *Id.* In *Domako,* 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, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action[.]" *Domako,* 438 Mich 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.

E. Discovery Planning Conference

"Upon court order or written request by another party, the parties must confer among themselves and prepare a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared are jointly responsible for arranging the conference and for attempting in good faith to agree on a proposed discovery plan." MCR 2.401(C)(1). The proposed discovery plan must address all disclosure and discovery matters, including those set forth in MCR 2.401(B), and identify proposed deadlines for the completion of disclosures and discovery. MCR 2.401(C)(2).[3] The plan is submitted to the court by stipulation or motion and should note any disagreements between the parties. MCR 2.401(C)(3). The court reviews the plan and enters a scheduling order. See MCR 2.401(B)(2); MCR 2.401(C)(2). Once the court has entered a scheduling order, a party seeking to change a deadline must show good cause. MCR 2.401(C)(2).

"The court may enter an order governing disclosure, discovery, and any other case management matter the court deems appropriate." MCR 2.401(C)(3). The court may also enter an appropriate sanction, including payment of attorney fees and costs, if a party or their attorney fails to make a good faith effort to participate in developing and submitting a proposed discovery plan. MCR 2.401(C)(4).

[3]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(2) and MCR 2.408(C)(2) to early scheduling conferences under MCR 2.401(B). See Section 1.15 for more information on videoconferencing.

F. ESI Conference, Plan, and Order[4]

Conference.[5] "Where a case is reasonably likely to include the discovery of ESI, parties may agree to an ESI Conference, the judge may order the parties to hold an ESI Conference, or a party may file a motion requesting an ESI Conference. At the ESI Conference, the parties must consider the matters set forth in MCR 2.401(J)(1).

"Attorneys who participate in an ESI Conference or who appear at a conference addressing ESI issues must be sufficiently versed in matters relating to their clients' technological systems to competently address ESI issues; counsel may bring a client representative or outside expert to assist in such discussions." MCR 2.401(J)(3).

ESI discovery plan. Within 14 days of an ESI Conference, the parties must file an ESI discovery plan and statement concerning the issues upon which the parties cannot agree. MCR 2.401(J)(2). The plaintiff's attorney must submit the ESI discovery plan to the court unless the parties agree otherwise. *Id*. "The ESI discovery plan may include:

> (a) a statement of the issues in the case and a brief factual outline;
>
> (b) a schedule of discovery including discovery of ESI;
>
> (c) a defined scope of preservation of information and appropriate conditions for terminating the duty to preserve prior to the final resolution of the case;
>
> (d) the forms in which ESI will be produced; and
>
> (e) the sources of any ESI that are not reasonably accessible because of undue burden or cost." MCR 2.401(J)(2).

ESI order. "The court may enter an order governing the discovery of ESI pursuant to the parties' ESI discovery plan, upon motion of a party, by stipulation of the parties, or on its own." MCR 2.401(J)(4).

G. Final Pretrial Conference and Order

"The court may hold a final pretrial conference to facilitate preparation of the action for trial and to formulate a trial plan."

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[4]See Section 5.11(A)(2) for information on the failure to preserve ESI.

[5]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(1) and MCR 2.408(C)(1) to civil pretrials. See Section 1.15 for more information on videoconferencing.

MCR 2.401(H)(2).[6] A final pretrial conference can be combined with a settlement conference. *Id*. Each unrepresented party and the lead attorney who will conduct trial on behalf of a represented party must attend the conference. *Id*. At the conference, the parties may discuss the following items, which may be memorialized in a joint final pretrial order either before or after the conference, as ordered by the court:

> "(a) scheduling motions in limine;
>
> (b) a concise statement of plaintiff's claims, including legal theories;
>
> (c) a concise statement of defendant's defenses and claims, including crossclaims and claims of third-party plaintiffs, and defenses of cross defendants or third-party defendants, including legal theories;
>
> (d) a statement of any stipulated facts or other matters;
>
> (e) issues of fact to be litigated;
>
> (f) issues of law to be litigated;
>
> (g) evidence problems likely to arise at trial;
>
> (h) a list of witnesses to be called unless reasonable notice is given that they will not be called, and a list of witnesses that may be called, listed by category as follows:
>
> > (*i*) live lay witnesses;
> >
> > (*ii*) lay deposition transcripts or videos including resolving objections and identifying portions to be read or played;
> >
> > (*iii*) live expert witnesses; and
> >
> > (*iv*) expert deposition transcripts or videos including resolving objections and identifying portions to be read or played.
>
> (i) a list of exhibits with stipulations or objections to admissibility;
>
> (j) an itemized statement of damages and stipulations to those items not in dispute;

[6]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(1) and MCR 2.408(C)(1) to civil pretrials. See Section 1.15 for more information on videoconferencing.

(k) estimated length of trial;

(*i*) time for plaintiff's proofs;

(*ii*) time for defendant's proofs; and

(*iii*) whether it is a jury or nonjury trial.

(l) trial date and schedule;

(m) whether the parties will agree to arbitration;

(n) a statement that counsel have met, conferred and considered the possibility of settlement and alternative dispute resolution, giving place, time and date and the current status of these negotiations as well as plans for further negotiations;

(o) rules governing conduct of trial;

(p) jury instructions;

(q) trial briefs;

(r) voir dire; and

(s) any other appropriate matter." MCR 2.401(H)(2).

"If the court finds at a final pretrial conference that due to a lack of reasonable diligence by a party the action is not ready for trial, the court may enter an appropriate order to facilitate preparation of the action for trial and may require the offending party to pay the reasonable expenses, including attorney fees, caused by the lack of diligence." MCR 2.401(H)(1).

Committee Tip:

• Final pretrial conferences should be set 3-4 weeks before trial and should last approximately 15 minutes to one hour, depending on the case.

H. Mediation of Discovery Disputes

If a discovery dispute arises and unless precluded by MCR 3.216(C)(3), the dispute may be mediated upon stipulation of the parties or order of the court. MCR 2.411(H). If the parties agree, the discovery mediator may be the same mediator as otherwise selected

under MCR 2.411(B). MCR 2.411(H). All provisions of MCR 2.411 apply to a discovery mediator, except:

> "(1) The order under [MCR 2.411(C)(1)] will specify the scope of issues or motions referred to the discovery mediator, or whether the mediator is appointed on an ongoing basis.
>
> (2) The mediation sessions will be conducted as determined by the mediator, with or without parties, in any manner deemed reasonable and consistent with these rules and any court order.
>
> (3) The court may specify that discovery disputes must first be submitted to the mediator before being filed as a motion unless there is a need for expedited attention by the court. In such cases, the moving party shall certify in the motion that it is filed only after failure to resolve the dispute through mediation or due to a need for immediate attention by the court.
>
> (4) In cases involving complex issues of ESI [(electronically stored information)], the court may appoint an expert under MRE 706. By stipulation of the parties, the court may also designate the expert as a discovery mediator of ESI issues under this rule, in which case the parties should address in the order appointing the mediator whether the restrictions of MCR 2.411(C)(3) and [MCR] 2.412(D) should be modified to expand the scope of permissible communications with the court." MCR 2.411(H).

See Section 6.6 for general information on mediation.

I. Award of Expenses

Unless it would be manifestly unjust:

- the court *must* order the party seeking discovery to pay the expert's reasonable fee for time spent in a deposition if the party is seeking to depose, or discover through alternative means, an expert hired by the opposing party. 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*).

"MCR 2.302(B)(4) applies to experts who are third parties to the litigation; such experts examine the facts from a distance, offer opinions, and have no financial stake in the outcome other than receiving a court-approved witness fee." *Spine Specialists of Mich, PC v State Farm Mut Auto Ins Co*, 317 Mich App 497, 503 (2016). Accordingly, "[a]s the sole owner of [the plaintiff medical facility] and the physician who treated [a patient] on [plaintiff's] behalf, [the owner-physician] was obligated to provide deposition testimony" in the plaintiff's action to recover payment for services rendered to the patient following a motor vehicle accident, and was therefore "ineligible [under MCR 2.302(B)(4)(c)(*i*)] to charge a fee for his deposition"; "[w]hile a party (or an employee of a party, as here) with specialized knowledge may offer an expert opinion within his or her field, the court rules do not contemplate payment to a party offering an opinion on its own behalf." *Spine Specialists*, 317 Mich App at 502, 503, 504 (noting that the owner-physician would "serve as [the plaintiff's] spokesperson at trial, and [had] a vested interest in the outcome of [the] case").

J. Determining an Appropriate Discovery Violation Sanction

The court must choose a sanction that is "proportionate and just[.]" *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87 (2000). 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 (2011). In *Hedrick*, the trial court found that although the plaintiff had been severely prejudiced by the defendant's late and incomplete discovery responses, entry of a default judgment was not warranted because the defendant did not "impair discovery in a malicious sense." *Id*. at 659. Thus, the trial court imposed what it considered to be "an appropriate *lesser sanction*": precluding the defendant from presenting any witnesses or evidence, and limiting the defendant to challenging the plaintiff's expert witness through cross-examination. *Id*. at 657, 659. The Court of Appeals concluded that "[e]ven though the [trial] court labeled its order as 'a lesser sanction,' [it] 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, [defendant] would have been permitted to present evidence to prove the extent of [plaintiff's] damages." *Id*. at 661. "Because the sanction was disproportionate and affected the entirety of the trial," the Court of Appeals found the sanction inappropriate. *Id*. at 664.

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 for a discovery violation:

> "(1) whether the violation was wilful 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."

Indeed, "trial courts are provided with broad authority to fashion remedies for discovery violations and those provisions included the power to stay a case pending compliance with the discovery order." *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg LLC*, ___ Mich App ___, ___ (2023) (holding the "trial court had the authority to sanction plaintiffs' discovery violations by fashioning an appropriate remedy, which could include an order to compensate [defendants] for their costs and reasonable attorney fees caused by the misconduct involving the dispute over plaintiffs' expert witnesses"). Thus, "the trial court could rely on its inherent authority to order a stay pending payment of the award, if the decision to stay the proceedings was consistent with fairness and justice under the totality of the circumstances." *Id*. at ___ (observing that the "relevant question is whether the trial court abused its discretion").

In *Tolas*, "plaintiffs did not make a good-faith effort to comply with discovery requests involving the experts and compounded that failure by giving inadequate and misleading responses after the trial court granted [defendant's] motion to compel. Plaintiffs continued to engage in dilatory tactics during the months that it took to resolve the dispute over a lesser sanction for the discovery violation." *Id*. at ___ (noting "the trial court had to hold three separate hearings to

resolve the matter"). Accordingly, "it was appropriate for the trial court to fashion a remedy that mitigated the harm caused by plaintiffs' initial failure to disclose and their subsequent violation of the order compelling disclosure" and "reasonable for the trial court to punish the misconduct and deter future misconduct by ordering plaintiffs to reimburse [defendants] for all the costs and reasonable attorney fees that they incurred in the dispute[.]" *Id*. at ___. The *Tolas* Court held that "[u]nder the totality of the circumstances, the decision to award those fees that could be directly attributed to plaintiffs' repeated failure to make adequate disclosures in discovery, and to comply with the court's order to compel, fell within the range of reasonable outcomes." *Id*. at ___. The Court further held that, "[u]nder the totality of these circumstances, it was entirely reasonable for the trial court to limit plaintiffs' ability to further engage in such tactics by staying the proceedings until plaintiffs demonstrated their commitment to moving the case forward by paying the sanction." *Id*. at ___. Therefore, "the trial court did not abuse its discretion when it ordered plaintiffs to pay the reasonable attorney fees and costs . . . as an alternate sanction to striking the experts" and "did not abuse its discretion when it stayed the proceedings pending payment of the sanction." *Id*. at ___.

K. Removal of Discovery Materials from File

1. Removal by Stipulation

"If the parties stipulate to the removal of . . . discovery materials from the file, the clerk may remove the materials and dispose of them in the manner provided in the stipulation." MCR 2.316(B)(1).

2. Removal by the Clerk

"The clerk may initiate removal of . . . discovery materials from the file in the following circumstances.

> (*i*) If an appeal has not been taken, 18 months after entry of judgment on the merits or dismissal of the action.
>
> (*ii*) If an appeal has been taken, 91 days after the appellate proceedings are concluded, unless the action is remanded for further proceedings in the trial court." MCR 2.316(B)(2)(a).

When possible, the clerk must notify the parties and counsel of record that materials will be removed from the file and destroyed on a specified date at least 28 days after the notice is

served, unless the party who filed the materials retrieves them from the clerk's office or a party files a written objection to the removal. MCR 2.316(B)(2)(b)(*i*)-(*ii*).

If an objection is filed, the clerk must schedule a hearing and provide notice to the parties. MCR 2.316(B)(2). MCR 2.119 applies to the hearing. See MCR 2.316(B)(2). The materials may only be removed upon court order following notice and the opportunity of the opposing party to be heard. *Id*.

3. Removal by Order

"On motion of a party, or on its own initiative after notice and hearing, the court may order . . . discovery materials removed at any other time on a finding that the materials are no longer necessary. However, no . . . discovery materials may be destroyed by court personnel or the clerk until the periods set froth in [MCR 2.316(B)(2)(a)(*i*)] or [MCR 2.316(B)(2)(a)(*ii*)] have passed." MCR 2.316(B)(3).

L. Standard of Review

A trial court's decision to grant or deny discovery is reviewed for an abuse of discretion. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616 (1998).

5.2 Disclosure

A. Required Initial Disclosures

"Except as exempted by [the Michigan Court Rules], stipulation, or court order, a party must, without awaiting a discovery request, provide to the other parties:

(a) the factual basis of the party's claims and defenses;

(b) the legal theories on which the party's claims and defenses are based, including, if necessary for a reasonable understanding of the claim or defense, citations to relevant legal authorities;

(c) the name and, if known, the address and telephone number of each individual likely to have discoverable information–along with the subjects of that information–that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

> (d) a copy–or a description by category and location–of all documents, ESI, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (e) a description by category and location of all documents, ESI, and tangible things that are not in the disclosing party's possession, custody, or control that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment. The description must include the name and, if known, the address and telephone number of the person who has possession, custody, or control of the material;
>
> (f) a computation of each category of damages claimed by the disclosing party. who must also make available for inspection and copying as under MCR 2.310 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;
>
> (g) a copy (or an opportunity to inspect a copy) of pertinent portions of any insurance, indemnity, security equivalent, or suretyship agreement under which another person may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment, including self-insured retention and limitations on coverage, indemnity, or reimbursement for amounts available to satisfy a judgment; and
>
> (h) the anticipated subject areas of expert testimony." MCR 2.302(A)(1).

Additional disclosures are required for no-fault cases, MCR 2.302(A)(2), and claims for personal injury damages, MCR 2.302(A)(3).

"A party must serve initial disclosures based on the information then reasonably available to the party. However, a party is not excused from making disclosures because the party has not fully investigated the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made its disclosures." MCR 2.302(A)(6). "Disclosures under [MCR 2.302(A)] are subject to MCR 2.302(G), must be in writing, signed,

and served, and a proof of service must be promptly filed." MCR 2.302(A)(7).

B. Cases Exempt from Disclosure

"Unless otherwise stipulated or ordered, the following are exempt from initial disclosure under [MCR 2.302](A)(1)-(3):

(a) an appeal to the circuit court under subchapter 7.100;

(b) an action in district court (see MCR 2.301[A][2]);

(c) an action under subchapter 3.200 [(domestic relations)];

(d) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(e) an action to enforce or quash an administrative summons or a subpoena;

(f) a proceeding ancillary to a proceedings in another court, including an action for a subpoena under MCR 2.305(E) or [MCR 2.305](F);

(g) an action to compel or stay arbitration or to confirm, vacate, enforce, modify, or correct an arbitration award;

(h) an action for collection of penalties, fines, forfeitures, or forfeited recognizances under MCR 3.605;

(i) personal protection proceedings under subchapter 3.700; and

(j) an action for habeas corpus under MCR 3.303 and [MCR] 3.304." MCR 2.302(A)(4).

C. Time for Initial Disclosures

The time for filing initial disclosures may be modified by stipulation or order. See MCR 2.302(A)(5)(a).

A party filing a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures within 14 days after any opposing party files an answer to the pleading. MCR 2.302(A)(5)(b)(*i*). The answering party must serve its initial disclosures within 14 days after the filing party's disclosures are due or 28 days after the answering party files its answer, whichever is later. MCR 2.302(A)(5)(b)(*ii*). Service of disclosures is only required

on parties that have appeared; however, later-appearing parties must be served disclosures within 14 days of their appearance. MCR 2.302(A)(5)(b)(*iii*).

"A party first served or otherwise joined after the time for initial disclosures under [MCR 2.302(A)(5)(a)-(b)] must serve its initial disclosures within 14 days after filing the party's first pleading, unless a stipulation or order sets a different time." MCR 2.302(A)(5)(c).

D. Failure to Disclose

A party seeking disclosure may file a motion to compel if a party fails to serve a disclosure as required by MCR 2.302(A). MCR 2.313(A)(2)(a). See Section 5.11 for information on motions to compel. "If a party fails to provide information or identify a witness as required by MCR 2.302(A) or [MCR 2.302](E), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." MCR 2.313(C)(1). See Section 5.12 for additional information about disclosure of witnesses.

E. Removal of Disclosure Materials from File

1. Removal by Stipulation

"If the parties stipulate to the removal of disclosure . . . materials from the file, the clerk may remove the materials and dispose of them in the manner provided in the stipulation." MCR 2.316(B)(1).

2. Removal by the Clerk

"The clerk may initiate removal of disclosure . . . materials from the file in the following circumstances.

> (*i*) If an appeal has not been taken, 18 months after entry of judgment on the merits or dismissal of the action.
>
> (*ii*) If an appeal has been taken, 91 days after the appellate proceedings are concluded, unless the action is remanded for further proceedings in the trial court." MCR 2.316(B)(2)(a).

When possible, the clerk must notify the parties and counsel of record that materials will be removed from the file and destroyed on a specified date at least 28 days after the notice is

served, unless the party who filed the materials retrieves them from the clerk's office or a party files a written objection to the removal. MCR 2.316(B)(2)(b)(*i*)-(*ii*).

If an objection is filed, the clerk must schedule a hearing and provide notice to the parties. MCR 2.316(B)(2). MCR 2.119 applies to the hearing. See MCR 2.316(B)(2). The materials may only be removed upon court order following notice and the opportunity of the opposing party to be heard. *Id*.

3. Removal by Order

"On motion of a party, or on its own initiative after notice and hearing, the court may order disclosure . . . materials removed at any other time on a finding that the materials are no longer necessary. However, no disclosure or discovery materials may be destroyed by court personnel or the clerk until the periods set froth in [MCR 2.316(B)(2)(a)(*i*)] or [MCR 2.316(B)(2)(a)(*ii*)] have passed." MCR 2.316(B)(3).

5.3 Depositions

A. Deposition of Party On Oral Examination

A party may take the oral deposition of another party.[7] MCR 2.306(A)(1). Leave of court must be obtained 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).[8] MCR 2.306(A)(1). "A reasonable time is deemed to have elapsed if:

(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).

[7]The oral deposition is subject to the scope of discovery discussed in Section 5.1(A).

[8]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.

The party seeking to depose 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). The party seeking the deposition may name certain entities as the deponent, in which case the notice must be served at least 14 days before the scheduled deposition. See MCR 2.306(B)(3).

"The deposition of each [party or] produced witness may not exceed one day of seven hours." MCR 2.306(A)(3); MCR 2.306(B)(3).

A party may also request that the party-deponent produce documents or tangible things. MCR 2.306(B)(2). "MCR 2.310 applies to the request." MCR 2.306(B)(2).

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' governmental 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." *Id*. 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 officer or public official must demonstrate that the relevant information cannot be obtained absent the disputed deposition." *Id.* at 339 (two high-ranking corporate officers were not required to attend a deposition 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 where the two corporate officers had *generalized* knowledge of the vehicle's defect, yet "had no unique or superior knowledge of, or role in designing, the vehicle at issue or in implementing manufacturing or testing processes").

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 and manner 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 a motion requesting termination or limited questioning. MCR 2.306(D)(3).

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)(4).

B. Deposition On Written Questions

Similar to MCR 2.305(A) and MCR 2.306(A),[9] a party may take testimony by deposition on written questions of any person, including another party.[10] MCR 2.307(A)(1). A non-party witness may be compelled to attend if subpoenaed pursuant to MCR 2.305.[11] 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 2.305(A)(6) or MCR 2.306(B)(3)." MCR 2.307(A)(1).

A notice must accompany the written questions when being served on a party, and a subpoena must accompany written questions being served on a non-party. MCR 2.305(A)(1); MCR 2.307(A)(2). Subject 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 if the parties stipulate or for cause shown. *Id.*

C. Non-Party Subpoena for Deposition

The procedure for issuing a subpoena to a non-party for a deposition depends on whether the party issuing the subpoena is represented by an attorney. See MCR 2.305(A)(1).[12] A *represented*

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[9] See Section 5.3(A) for more information on the circumstances identified in MCR 2.305(A) and MCR 2.306(A).

[10] The deposition on written questions is subject to the scope of discovery discussed in Section 5.1(A).

[11] "Notwithstanding any other provision of [MCR 2.305], a subpoena issued under [MCR 2.305] may require a party or witness to appear by telephone or by videoconferencing technology. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407." MCR 2.305(F).

party may issue the subpoena "upon court order or after all parties have had a reasonable opportunity to obtain an attorney, as determined under MCR 2.306(A)." MCR 2.305(A)(1). An *unrepresented* party may make a motion in court for issuance of a non-party subpoena. *Id*.

MCR 2.306(B)(1)-(2) and MCR 2.306(C)-(G) apply to a non-party subpoena under MCR 2.305. MCR 2.305(A)(1).

A subpoena issued to a non-party is subject to the rules in MCR 2.302(C) (regarding protective orders). MCR 2.305(A)(4). "[T]he court in which the action is pending or in which the subpoena is served, on timely motion made by a party or the subpoenaed non-party 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) conditionally deny the motion on prepayment by the party on whose behalf the subpoena is issued of the reasonable cost of producing documents, or other tangible things." MCR 2.305(A)(4).

"The non-party's obligation to respond to the subpoena is stayed until the motion is resolved." MCR 2.305(A)(4).

"Except for a subpoena for delivery of copies of documents only under [MCR 2.305(A)(2)], a non-party served with a subpoena in Michigan may be required to comply with the subpoena only in the county where the deponent resides, is employed, has its principal place of business or transacts relevant business; or at the location of the things to be inspected or land to be entered; or at another convenient place specified by order of the court." MCR 2.305(B).

D. Payment of Deposition Expenses

The court may order a party to pay another party's reasonable expenses associated with appearing at the deposition site, including reasonable attorney fees[13] 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

[12] "Notwithstanding any other provision of [MCR 2.305], a subpoena issued under [MCR 2.305] may require a party or witness to appear by telephone or by videoconferencing technology. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407." MCR 2.305(F).

[13] For more information on determining the reasonableness of attorney fees see Section 5.10(A)(3).

deposition in person or by attorney in reliance on the notice. MCR 2.306(G)(1)-(2).

5.4 Interrogatories

The use of interrogatories is only available to parties. See MCR 2.309(A)(1). Without leave of court, written interrogatories may be served on the plaintiff once the action has commenced. MCR 2.309(A)(1)(a). The defendant may be served with interrogatories "with or after the service of the summons and complaint on that defendant." MCR 2.309(A)(1)(b). "Each separately represented party may serve no more than twenty interrogatories upon each party. A discrete subpart of an interrogatory counts as a separate interrogatory." MCR 2.309(A)(2).

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."[14] "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, in the absence of an agreement, there is no discovery violation if the party submitting the interrogatories did not file a motion to compel under MCR 2.313(A). *Jilek,* 297 Mich App at 668.

5.5 Request for Documents

A. Generally

MCR 2.310 addresses the production of documents, tangible things, ESI, and entry on land for inspection and other purposes. There is a separate rule addressing medical records. See MCR 2.314.[15]

[14] See Section 5.11(A) for more information on filing motions to compel discovery.

[15] See Section 5.9 for a discussion about medical records.

B. Requests to Parties

A party may request that another party permit entry on land, or produce and permit the requesting party or someone acting on that party's behalf:

> "(*i*) to inspect and copy designated documents or
>
> (*ii*) to inspect and copy, test, or sample other tangible things that constitute or contain matters within the scope of MCR 2.302(B) and that are in possession, custody, or control of the party on whom the request is served[.]" MCR 2.310(B).

"The request may, without leave of court 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 requested items individually or by category and must describe each with reasonable particularity. *Id*. In addition, the request must include "a reasonable time, place, and manner of making the inspection and performing the related acts, as well as the form or forms in which electronically stored information is to be produced, subject to objection." *Id.* Generally, the party served with the request must serve a written response within 28 days after being served. MCR 2.310(C)(2). However, if the served party 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.* See MCR 2.310(C)(2) for more information on the content of responses and objections.

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)."[16] 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).

C. Requests on Nonparties

Upon court order, or after all parties have had a reasonable opportunity to obtain an attorney as determined under MCR 2.306(A), a party may issue a subpoena (or request the court issue a subpoena if the party is unrepresented) to a non-party for entry on land, or production or inspection of documents, tangible things, or ESI. MCR 2.305(A)(1). MCR 2.506(A)(2)-(3) apply to a request to produce ESI, and MCR 2.506(I) applies to a subpoena for hospital records. MCR 2.305(A)(1). Service of the subpoena must conform with MCR 2.506(G), and a copy of the subpoena must be served on all other parties on the date of issuance. MCR 2.305(A)(5). A subpoena issued under MCR 2.305[17] is subject to the provisions of MCR 2.302(C) (protective orders). MCR 2.305(A)(4). See Section 5.11(B) for information on protective orders.

If the person does not permit inspection or entry within the time specified in the subpoena, which may not be less than 14 days after the request is served unless a shorter period is ordered by the court, the requesting party may file a motion to compel. MCR 2.305(A)(3). "The motion must include a copy of the request and proof of service of the subpoena," and the "movant must serve the motion on the non-party as provided in MCR 2.105." MCR 2.305(A)(3). See Section 5.11 for information on discovery motions.

"Upon written request from another party and payment of reasonable copying costs," a party that subpoenaed items from a non-party must "provide copies of documents received pursuant to a subpoena." MCR 2.305(A)(7).

[16] See Section 5.11(B) regarding motions for protective orders.

[17] "Notwithstanding any other provision of [MCR 2.305], a subpoena issued under [MCR 2.305] may require a party or witness to appear by telephone or by videoconferencing technology. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407." MCR 2.305(F).

D. 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).

5.6 Foreign Subpoenas

The Uniform Interstate Depositions and Discovery Act (UIDDA)[18] governs the issuance of a subpoena under the authority of a court situated outside Michigan – a foreign subpoena. See MCL 600.2201 *et seq*.

"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.[19]

"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.

"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.[20]

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[18] Effective April 1, 2013, 2012 PA 362 enacted the UIDDA, which applies to requests for discovery in actions pending on April 1, 2013. MCL 600.2208.

[19] See Section 3.4 regarding process of service.

"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.

5.7 Medical Examinations

A. Generally

"When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control." MCR 2.311(A). Some statutes also require an examination under certain circumstances. See e.g., MCL 500.3151, which requires a person to submit to mental or physical examination at the request of an insurer when the person's mental or physical condition is material to a claim for past or future personal protection insurance benefits. In the context of no-fault cases, it has been determined that the No-Fault Act, not MCR 2.311(A), governs any conditions placed on independent medical examinations. See *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178 (2007). The rest of this section discusses medical examinations in the context of the general rules governing medical examinations (MCR 2.311 and MCL 600.1445). Discussion of medical examinations in particular types of cases governed by particular acts is beyond the scope of this section.

"The order may be entered only on motion for good cause with notice to the person to be examined and to all parties." 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[.]' A trial court has broad discretion to determine what constitutes 'good cause.'" *Thomas M Cooley Law Sch v Doe*, 300 Mich App 245, 264 (2013) (alterations in original). "'[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 v KAM Transp, Inc*, 301 Mich App 482, 489 (2013), 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

[20] See Section 5.11(B) regarding protective orders.

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.

"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. Upon request of a party, the order may also provide that (1) the attorney for the person to be examined may be present at the examination, or (2) a mental examination be recorded by video or audio." MCR 2.311(A). "If the court orders that a mental examination be recorded, the recording must (1) be unobtrusive, (2) capture the examinee's and the examiner's conduct throughout the examination, and (3) be filed under seal." MCR 2.311(B).

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(C)(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(C)(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(C)(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(C)(4).[21]

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

[21]See Section 5.10 for a discussion of privileged materials.

of discretion. *Burris v KAM Transp, Inc*, 301 Mich App 482, 487 (2013).

5.8 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 and Requirements

"Within the time for completion of discovery, a party may serve on another party a written request for the admission[.]" MCR 2.312(A). "The request must clearly identify in the caption and before each request that it is a Request for Admission," and "[e]ach matter of which an admission is requested must be stated separately." *Id*.

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

Admissions under MCR 2.312(A) are written requests seeking the truth of a matter within the scope of discovery relating to statements or opinions of fact or the application of law to 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, Inc*, 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 v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 419 (1996). 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. *Id*. "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*, 453 Mich 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). 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 should 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. *Id*. 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." *Janczyk,* 125 Mich App at 691-692 (internal citations omitted).

The trial court did not abuse its discretion in allowing the defendants to amend their answer where 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 the defendants' late discovery of documents critical to the lawsuit (i.e. the reason they sought to amend their answer) was inadvertent. *Bailey v Schaaf*, 293 Mich App 611, 622-623 (2011), aff'd in part, vacated in part on other grounds 494 Mich 595 (2013).[22] 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.

[22]For more information on the precedential value of an opinion with negative subsequent history, see our note.

E. Effect

Admissions under MCR 2.312 are judicial admissions, not evidentiary admissions. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420 (1996). 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) or MCR 2.116(C)(10) to be supported by admissions.

The procedures in MCR 2.312 are not self-executing; the party seeking to rely upon any conclusive admission must 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)(2).

"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) (internal quotation marks and citations omitted) (the 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 a response, withdraw a response, or file a late response is reviewed for an abuse of discretion. *Janczyk v Davis*, 125 Mich App 683, 691 (1983).

5.9 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 medical information. 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:

- make the information available,
- assert a privilege,
- object to the request, or
- provide the requesting party with the location of the information and a sufficient number of 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); MCR 2.314(C)(2).

A party with a valid privilege may assert it to prevent discovery of medical information 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.[23] 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

[23] "The privilege must be asserted in the party's dislcosure under [MCR] 2.302(A), in written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C)." MCR 2.314(B)(1).

medical information that must be disclosed or is 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."[24] MCR 2.314(B)(2).

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.*

5.10 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). The court may alter this time limit for good cause. *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).

If the custodian does not comply with the request, a subpoena may be issued pursuant to MCR 2.305(A). MCR 2.314(D)(6). See also MCR 2.305(A)(1).

[24] See Section 5.10(A) for more information on asserting a privilege regarding medical information.

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(13) (applicable to health facilities, health agencies, and certain institutions of higher education) and MCL 333.21515 (applicable to hospitals and certain universities), both state essentially the same thing:

> "The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in [Michigan] that has colleges of osteopathic and human medicine, are confidential, must be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena."[25] MCL 333.20175(13). See also MCL 333.21515.

"The scope of the [peer review] privilege is not without limit." *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 261 (2015). "[T]he privilege only applies to records, data, and knowledge that are collected for or by the committee under [MCL 333.20175(13) and

[25] MCL 333.20175 "does not apply to a health facility or agency that is a health maintenance organization." MCL 333.20175(14).

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).[26]

"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[27] 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.

"Nothing in the pertinent language of [MCL 333.20175(13)] suggests that the privilege does not extend to a freestanding surgical outpatient facility exercising the same credentialing-review function under MCL 333.20813(c) that a hospital performs under MCL 333.21513(c)." *Dorsey v Surgical Institute of Mich, LLC*, 338 Mich App 199, 228 (2021).[28] MCL 333.21515 references Article 17, "which governs a wide variety of health facilities or agencies, including freestanding surgical outpatient facilities. However, the specific provision is set forth in Part 215 of Article 17, which addresses matters related to the narrower category of entities that constitute hospitals." *Dorsey*, 338 Mich App at 228. "[D]espite the placement of MCL 333.21515 in Part 215 alongside other provisions applicable to hospitals, the Legislature's reference to the review functions in Article 17, as opposed to Part 215, evidences its intent to extend the statutory privilege for peer-review materials to all health facilities and agencies with review functions imposed by Article 17." *Dorsey*, 338 Mich App at 229 (concluding the peer review privilege in MCL 333.21515 applied to defendant (a freestanding surgical outpatient facility), that "[t]he plain language of [MCL 333.20175(13)] limited the use of [the credentialing file] to purposes provided in Article

[26] At the time *Krusac* was decided, the peer-review privilege was located in MCL 333.20175(8); however, the statute was subsequently amended, and the peer review subsection of the statute is now MCL 333.20175(13). See 2023 PA 62.

[27] See MCL 333.21515.

[28] At the time *Dorsey* was decided, the peer-review privilege was located in MCL 333.20175(8); however, the statute was subsequently amended, and the peer review subsection of the statute is now MCL 333.20175(13). See 2023 PA 62.

17," and that "the file was not subject to discovery and should not have been admitted at trial").

C. Personnel Records

Disclosure of personnel records 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:
>
> > *(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 [MCL 423.509].
> >
> > *(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).

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 employee requests it or 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 a fee, limited to the actual incremental cost, 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[.]"[29]

E. Work Product and Attorney-Client Privilege

"Subject to the provisions of [MCR 2.302(B)(4)[30]], a party may obtain discovery of documents and tangible things otherwise discoverable under [MCR 2.302(B)(1)] and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.*" MCR 2.302(B)(3)(a) (emphasis added).

Regardless of the form of recorded drafts or communications, MCR 2.302(B)(3)(a) "protects drafts of any interrogatory answer required under [MCR 2.302(B)(4)(a)(*i*)]" and "communications between the party's attorney and any expert witness under [MCR 2.302(B)(4)], . . . except to the extent that the communications: (*i*) relate to compensation for the expert's study or testimony; (*ii*) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (*iii*) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." MCR 2.302(B)(4)(e)-(f).

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[29] See Section 5.11(B) for additional discussion regarding protective orders.

[30] Addressing discovery of facts known and opinions held by experts in anticipation of litigation or trial.

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 work product doctrine seeks to protect an attorney's freedom to generate documents and records in order to facilitate full preparation of his case." *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 656 (1986).

"'[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).

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). 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.* (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).

"[W]hether a party may assert the work-product privilege and whether a party has waived that privilege are questions of law that [are] review[ed] de novo." *D'Alessandro Contracting Group, LLC*, 308 Mich App at 76. "A court's factual findings underlying its determination of the existence and waiver of the work-product

privilege are reviewed for clear error." *Id*. Once the reviewing court has determined whether the privilege applies, it then reviews the trial court's order for an abuse of discretion. *Id*.

"Generally, a party in a civil lawsuit is not entitled to discovery of documents that are protected by the attorney-client privilege." *Citizens Ins Co of America v Livingston Co Road Comm*, ___ Mich App ___, ___ (2022). "The attorney-client privilege is personal to the client, and only the client can waive it." *Id*. at ___ (quotation marks and citation omitted). "When analyzing whether a privilege has been waived, a court should begin its analysis with a presumption in favor of preserving the privilege." *Id*. at ___ (quotation marks and citation omitted). To show waiver, "the party seeking waiver must demonstrate that the material to be discovered is relevant and that the party's assertion of the privilege seriously undermined the other party's position." *Id*. at ___. "[A] privilege can be waived through conduct that would make it unfair for the holder to insist on the privilege thereafter." *Id*. at ___ (quotation marks and citation omitted). "Thus, a waiver may be found when the privilege holder's conduct places the claimant in such a position, with reference to the evidence that it would be unfair and inconsistent to permit the retention of the privilege." *Id*. at ___ (quotation marks and citation omitted). "[I]f the court permits discovery of the privileged material, it should be narrowly limited to those portions of the privileged material that bear directly on the issues at hand." *Id*. at ___ (quotation marks and citation omitted).

In *Citizens*, "defendant raised attorney-client privilege in furtherance of its affirmative defenses," asserting that "no binding settlement agreement existed because its former lawyer lacked the authority to settle the case on [defendant's] behalf." *Citizens*, ___ Mich App at ___. "In doing so, [defendant] placed its lawyer's settlement authority at issue." *Id*. at ___. "In response, however, plaintiffs offered evidence that the [defendant's] former lawyer represented in two e-mails that the [defendant] had approved the settlement agreement." *Id*. at ___. "In light of the fact that the communications between the [defendant] and its former lawyer [were] relevant to the issue of whether he had authority to settle based on [defendant's] prior approval of the settlement agreement, and given that there, in the absence of those communications, plaintiffs' ability to dispute that affirmative defense would be severely undermined," the Court of Appeals concluded "that the trial court did not abuse its discretion by finding that the attorney-client privilege was waived." *Id*. at ___ (remanding for *in camera* review because "discovery allowed under these circumstances should be narrowly confined").

5.11 Disclosure and Discovery Motions[31]

Committee Tips:

- *Determine whether motion is routine or complex. Does motion address failure to disclose, failure to respond, or the response? If the motion addresses failure to disclose or 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 expending time and money traveling across the country questioning each witness individually.*
- *Consider whether to extend discovery.*
- *Build a record.*

A. Motion to Compel

Disclosure. The party seeking disclosure may file a motion to compel if a party fails to serve a disclosure as required by MCR 2.302(A). MCR 2.313(A)(2)(a).

Discovery. The party seeking discovery may file a motion to compel discovery if:

> "(*i*) a deponent fails to answer a question propounded or submitted under MCR 2.306 or [MCR] 2.307,

[31]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(3) and MCR 2.408(C)(3) to motions filed pursuant to MCR 2.119 regarding discovery. See Section 1.15 for more information on videoconferencing.

(*ii*) a corporation or other entity fails to make a designation under MCR 2.306(B)(3) or [MCR] 2.307(A)(1),

(*iii*) a party fails to answer an interrogatory submitted under MCR 2.309(A) and [MCR 2.309](B),

(*iv*) in response to a request for inspection submitted under MCR 2.310, a person fails to respond that inspection will be permitted as requested, or

(*v*) If a party; an officer, director, or managing agent of a party; or a person designated under MCR 2.306(B)(3) or [MCR] 2.307(A)(1) to testify on behalf of a party fails to appear before the person who is to take his or her deposition, after being served with a proper notice, the party seeking discovery may move for an order compelling compliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order." MCR 2.313(A)(2)(b).

Non-party discovery subpoena. "If a recipient of a non-party discovery subpoena under MCR 2.305[32] fails to comply, the issuing party may move to compel compliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. The motion must include a copy of the subpoena and proof of service of the subpoena. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105." MCR 2.313(A)(2)(c).

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[33]:

[32] "Notwithstanding any other provision of [MCR 2.305], a subpoena issued under [MCR 2.305] may require a party or witness to appear by telephone or by videoconferencing technology. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407." MCR 2.305(F).

[33] See Section 5.1() on determining an appropriate sanction.

- Establish that certain matters and designated facts stated in the moving party's claim are true.
- Refuse to allow disobedient party to support or oppose designated claims or defenses, or introduce designated matters into evidence.
- Strike pleadings or parts of pleadings, stay further proceedings until the order is obeyed, dismiss the action or parts of it, or enter a judgment by default.
- 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)-(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 person can show that he or she is unable to produce the person for examination. MCR 2.313(B)(2)(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."[34] MCR 2.313(B)(2). Expenses may be apportioned if the motion to compel is granted in part and denied in part. MCR 2.313(A)(5)(c). Both the party and the attorney may be sanctioned. MCR 2.313(A)(5); MCR 2.313(B)(2). See also *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 89 (1999).

If the court orders the sanction of dismissal under MCR 2.313(B)(2)(c) for failure to provide or permit discovery, the dismissal serves as an adjudication on the merits pursuant to MCR 2.504(B)(3), unless the court specifies otherwise. *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 523-524 (2016).

2. Failure to Preserve

"If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take

[34] See Section 5.12(A)(3) regarding an award of expenses.

reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may order appropriate remedies, including:
>
> > (a) a presumption that the lost information was unfavorable to the party;
> >
> > (b) a jury instruction directing that the jury may or must presume the information was unfavorable to the party; or
> >
> > (c) dismissal of the action or entry of a default judgment." MCR 2.313(D).[35]

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).

4. Award of Expenses

Expenses awarded for filing the motion to compel. The court may award reasonable expenses incurred as a result of the conduct and in making the motion, including attorney fees, to the moving party if the motion is granted, or the disclosure or requested discovery is provided after the motion was filed, unless the moving party filed the motion before attempting in good faith to obtain the disclosure or discovery without court action. MCR 2.313(A)(5)(a). If the motion is denied, the court may award reasonable expenses, including attorney fees, to the nonmoving party, 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)(b).[36] "If the motion is granted in part and denied in part, the court may,

[35]See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 1, for information regarding presumptions.

after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and other persons in a just manner." MCR 2.313(A)(5)(c). The court may also order such sanctions it deems just, including those authorized under MCR 2.313(B)(2)(a)-(c). MCR 2.313(A)(6).

"[T]he trial court did not abuse its discretion by denying the [plaintiff's] motion for fees and costs related to defendants' motion to compel discovery" where it found that the motion was not "inappropriate" rather than expressly finding that the motion was "substantially justified" or that an award of expenses would be "unjust" under the circumstances. *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 719 (2019).

Expenses awarded for failing to comply with order compelling discovery. The court must 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 an award of expenses unjust." MCR 2.313(B)(2).

B. Motions for Protective Orders

"Despite Michigan's broad discovery policy, a trial court should protect parties from excessive, abusive, or irrelevant discovery requests." *Thomas M Cooley Law School v John Doe 1*, 300 Mich App 245, 260-261 (2013). "To that end, [MCR 2.302(C)] allow[s] a party or a person from whom discovery is sought to move for a protective order." *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 398 (2015). "The movant must demonstrate good cause for the issuance of a protective order." *Id*.

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).

[36] MCR 2.313(A)(5) also applies to motions for protective orders. MCR 2.302(C). See Section 5.11(B) for more information on protective orders.

2. Types of Protective Orders

When issuing a protective order, the court may order one or more of the following:

- No discovery.
- Discovery on specified terms and conditions.
- Another method of discovery.
- Limit scope of discovery, including prohibiting discovery of certain matters altogether.
- Limit people present at discovery.
- Require court order to open sealed depositions.
- Deposition for discovery and impeachment purposes only.
- Nondisclosure or limited disclosure of trade secrets, confidential research, development, or commercial information.
- Simultaneous filing of specified documents in sealed envelopes, to be opened as directed by the court. MCR 2.302(C)(1)-(9).

"A protective order issued under MCR 2.302(C) may authorize parties to file materials under seal in accordance with the provisions of the protective order without the necessity of filing a motion to seal under [MCR 8.119]." MCR 8.119(I)(8). "Any person may file a motion . . . to unseal a document filed under seal pursuant to MCR 2.302(C)[.]" MCR 8.119(I)(9). A motion to unseal is governed by MCR 2.119. MCR 8.119(I)(9).

3. Denial of Motion for Protective Order

"If the motion for a protective order is denied in whole or in part, the court may, on terms and conditions as are just, order that a party or person provide or permit discovery." MCR 2.302(C).

4. Award of Expenses

MCR 2.313(A)(5) governs the award of expenses for protective order motions. See MCR 2.302(C). The court may award reasonable expenses incurred as a result of the conduct and in making the motion, including attorney fees, to the moving

party if the motion is granted, or the disclosure or requested discovery is provided after the motion was filed, unless the moving party filed the motion before attempting in good faith to obtain the disclosure or discovery without court action. MCR 2.313(A)(5)(a). If the motion is denied, the court may award reasonable expenses, including attorney fees, to the nonmoving party, 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)(b).[37] "If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and other persons in a just manner." MCR 2.313(A)(5)(c).

C. Standard of Review

A court's decision regarding the imposition of discovery sanctions and the amount of attorney fees awarded is reviewed for an abuse of discretion. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 697 (2003). However, a court's decision whether to award attorney fees is reviewed for clear error. *Id*.

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). Whether a trial court "applied the correct legal standards in determining whether to issue a protective order in the first place" is reviewed de novo. *Dep't of Health and Human Servs v Genesee Circuit Judge*, 318 Mich App 395, 407 (2016).

5.12 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.'" *Id*., 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

[37] MCR 2.313(A)(5) also applies to motions for protective orders. MCR 2.302(C). See Section 5.11(B) for more information on protective orders.

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. *Id*. at 32. See Section 5.1() for additional discussion of the *Dean* case and a nonexhaustive list of factors to consider when determining what is an appropriate sanction.

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).

Chapter 6: Trial Alternatives

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6.1 Early Scheduling Conference

"At any time after the commencement of the action, on its own initiative or the request of a party, the court may direct that the attorneys for the parties, alone or with the parties, appear for a conference. The court shall give reasonable notice of the scheduling of a conference. More than one conference may be held in an action." MCR 2.401(A).[1]

See Section 5.1(F) for information on ESI conferences and Section 5.1(G) for information on final pretrial conferences.

A. Purposes

Setting an early scheduling conference may serve the following collective purposes:

- To consider whether jurisdiction and venue are proper;
- To consider whether the case is frivolous;
- To decide whether an alternative dispute resolution (ADR) process is appropriate[2] and to discuss possible methods of ADR;
- To consider the complexity of the case and to enter a scheduling order;
- To consider issues associated with disclosure, discovery, preservation, and claims of privilege of ESI (electronically stored information), including the timing of disclosures under MCR 2.302(A) and the staging and the modification of the extent of discovery;
- 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 discuss the pretrial order;

[1]The use of videoconferencing technology is presumed through the application of MCR 2.408(B)(2) and MCR 2.408(C)(2) to early scheduling conferences under MCR 2.401(B). See Section 1.15 for more information on videoconferencing. DS: HAVING TROUBLE GETTING CROSSREF TO WORK.

[2]See Section 6.4 regarding alternative dispute resolution.

- To propose limitations on the number of expert witnesses and discuss disclosure and discovery periods for experts and expert reports;
- To discuss consolidation of actions, separation of issues, and the order of trial when some issues will be tried by the jury and some issues will be tried by the court;
- To discuss the possibility of settlement;
- To discuss whether various alternative dispute resolution (ADR) methods would be appropriate for the case and the mechanisms available to provide ADR services;
- To identify witnesses actually testifying at trial;
- To discuss the estimated length of trial;
- 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(B)(1)(a)-(r).

Committee Tip:

• It is also 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), the voir dire process, and proposed jury instructions.

B. Participants

Attorneys, either alone or with the parties, may be ordered to participate in an early scheduling or pretrial conference. MCR 2.401(A); MCR 2.401(F) (not applicable to early scheduling conferences). The order may specify that the attorneys who intend to try the case must be present. See MCR 2.401(E). The attorney must be prepared and have the authority to fully participate in the conference. *Id*. The conference may be held in chambers or by conference call. See MCR 2.402.

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(E)-(F). The court cannot designate who will be a party'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 in a pretrial conference, 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 conference may be held in chambers or by conference call. See MCR 2.402. "The court's order may specify whether the availability is to be in person or by telephone." MCR 2.401(F).

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 and enter a just order. MCR 2.401(G)(2)(a)–(b). "The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2)." 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).

A party represented by counsel is not required to appear in person for a civil proceeding unless he or she has been ordered by the court or subpoenaed to appear. *Rocky Produce, Inc v Frontera*, 181 Mich App 516, 517-518 (1989) (the trial court erred in entering a default judgment against the defendant, who was represented by counsel, for failing to appear at trial absent a subpoena or court order).

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.

C. Scheduling Orders

When creating a scheduling order, 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 expected and 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 and serve 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 request. *Id.*

If the court concludes that a scheduling order will "facilitate the progress of the case," it must "establish times for events and adopt other provisions the court deems appropriate, including

> (*i*) the initiation or completion of an ADR process,
>
> (*ii*) the amendment of pleadings, adding of parties, or filing of motions,
>
> (*iii*) what, if any, changes should be made in the timing, form, or requirement for disclosures under MCR 2.203(A),
>
> (*iv*) what, if any, changes should be made to the limitations on discovery imposed under these rules and whether other presumptive limitations should be established,
>
> (*v*) the completion of discovery,
>
> (*vi*) the exchange of witness lists under [MCR 2.401(H)(2)(h)], and

(*vii*) the scheduling of a pretrial conference, a settlement conference, or trial." MCR 2.401(B)(2)(a)(*i*)-(*v*).

While "trial courts may issue scheduling orders to establish times for events including filing of motions" under MCR 2.401(B)(2)(a)(*ii*), "the failure to file a timely brief in response to a dispositive motion is not, by itself, grounds for dismissal as a sanction." *Cleveland v Hath*, ___ Mich App ___, ___ (2024) (cleaned up).

The scheduling order may also include provisions related to initial disclosure, ESI, claims of privilege, and preserving discoverable information. MCR 2.401(B)(2)(c).

D. 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).

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).

6.2 Offer of Judgment

MCR 2.405 sets forth procedures applicable to offers of judgment. "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).

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 in which 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).

A. Procedure and Timing

A party may serve an offer of judgment for a sum certain on an adverse party until 28 days before trial. MCR 2.405(B). The party may accept the offer, reject it, or submit a counteroffer (which constitutes a rejection). See MCR 2.405(A)(2); MCR 2.405(C).

The adverse party may accept an offer or counteroffer by serving written notice of acceptance on the other parties and filing it and proof of service with the court within 21 days of being served with the offer or counteroffer. MCR 2.405(C)(1); MCR 2.405(C)(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); MCR 2.405(C)(3).

The adverse party may reject[3] an offer or counteroffer by:

> "(a) expressly reject[ing] it in writing, or
>
> (b) . . . not accept[ing] it as provided by [MCR 2.405(C)(1)]." MCR 2.405(C)(2)(a)-(b); MCR 2.405(3).

Costs must be ordered if an offer or counteroffer is rejected and the offeror receives a more favorable decision. See MCR 2.405(D). See also Section 6.2(B) for further discussion.

B. Costs Payable Upon Rejected Offer

"If an offer is rejected, costs are payable as follows:

> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial." MCR 2.405(D)(1)-(2).[4]

The court must determine the actual costs incurred. MCR 2.405(D)(3).

"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). "A judgment adjudicating the rights and liabilities of the particular parties, so 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 v Bolser*, 286 Mich App 425, 433-434 (2009) (finding 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

[3] "A rejection does not preclude a later offer by either party." MCR 2.405(C)(2).

[4] The other subsections of MCR 2.405(D) are discussed separately below.

precise amount of taxable costs and interest had not yet been determined).

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). Other interest of justice exceptions may apply, such as cases involving an issue of public interest. *Id*. Viewed in light of the purpose of MCR 2.405 to encourage settlement and deter protracted litigation, the *interest of justice* exception "should not be applied absent unusual circumstances." *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 518-519 (2014) (quotation marks and citations omitted). Granting attorney fees under MCR 2.405(D) "should be the rule rather than the exception" in order to avoid expanding the *interest of justice* exception "to the point where it would render the rule ineffective." *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76, 94 (2017) (quotation marks and citations omitted). Whether the interests of justice exception applies must be decided on a case-by-case basis. *Id*.

Because they are "too common to fit within the 'interest of justice' exception," factors that should *not* be considered when determining whether the exception applies include:

- the economic position of the parties,
- the nonfrivolousness of a party's claim, or
- the reasonable refusal of an offer. *Luidens v 63rd Dist Court*, 219 Mich App 24, 34-35 (1996).

"[T]he exception may be applied when an offer is made for the purpose of gamesmanship and not a sincere effort at negotiation." *AFP Specialties, Inc*, 303 Mich App at 519 (quotation marks and citations omitted).

"[A] party may not recover appellate fees and costs as actual costs under MCR 2.405" because they "are not incurred as a result of a party's decision to reject an offer of judgment[.]" *Lech v Huntmore Estates Condo Ass'n*, 310 Mich App 258, 259, 263 (2015), vacated in part on other grounds 498 Mich 968 (2016).[5]

MCR 2.405 does not apply to class action cases filed under MCR 3.501. MCR 2.405(E).

[5]For more information on the precedential value of an opinion with negative subsequent history, see our note.

C. Standard of Review

A trial court's decision to award offer of judgment sanctions is reviewed for an abuse of discretion. *Haliw v City of Sterling Hts (Haliw III) (On Remand)*, 266 Mich App 444, 450 (2005).

6.3 Original Action to Enter a Consent Judgment or Consent Order

MCR 3.223 "governs practice and procedure for entering a consent judgment or consent order as an original action." MCR 3.223(A).

A. Commencing an Action

To commence an action, the parties must "file a petition to submit to court jurisdiction and request for entry of a proposed consent judgment or proposed consent order on a form approved by the State Court Administrative Office [(SCAO)]." MCR 3.223(C)(1). The petition must "be brought 'In the Matter of' the names of Party A and Party B and the subject matter of the proposed consent judgment or proposed consent order using the case type codes under MCR 8.117." MCR 3.223(C)(1)(a).

The petition must also:

- contain the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request to enter the judgment or order;
- satisfy the requirements of MCR 2.113, MCR 3.206(A), and MCR 3.206(B);
- be signed by both parties;
- be accompanied by the proposed judgment or order that complies with MCR 3.211 and is signed by both parties;
- be accompanied by a verified statement if required by MCR 3.206(C), a judgment information form if required by MCR 3.211(F), and domestic violence screening forms (separately completed for each party) pursuant to MCL 691.1345. MCR 3.223(C)(1)(a).

A petition filed under MCR 3.223(C)(1)(a) "serves as a complaint and answer unless a party files an objection under [MCR 3.223(C)(5)]. It also serves as an appearance of the attorney who signs the petition." MCR 3.223(C)(2).

Upon receipt of a petition filed under MCR 3.223(C)(1), and payment of applicable filing fees, the court clerk must:

> "(a) assign a case number and judge, and shall issue a notice of the filing on a form approved by [SCAO] to be served by Party A as provided in MCR 2.103 and [MCR] 2.105. The court clerk shall not issue a summons under MCR 2.102(A), and
>
> (b) schedule a hearing date on the proposed consent judgment or consent order but shall not schedule the matter for any pretrial proceedings unless requested by the parties on filing of a motion. The hearing date may not be scheduled sooner than 60 days after the date of the notice of filing. . . ." MCR 3.223(C)(3).

"The notice of the filing must be issued 'In the name of the people of the State of Michigan,' under the seal of the court that issued it." MCR 3.223(C)(4). The notice "must be directed to both parties and include:

> (a) the name and address of the court,
>
> (b) the names of the parties,
>
> (c) the case number and name of assigned judge,
>
> (d) the names, addresses, and bar numbers of any attorneys representing the parties,
>
> (e) the date on which the notice of filing was issued,
>
> (f) the date on which the proposed consent judgment or order will be heard by the court,
>
> (g) a statement that if either party objects to this summary proceeding at any time before entry of the proposed consent judgment or consent order, the case will be dismissed, and
>
> (h) a statement that the hearing on the proposed consent judgment or consent order will be held under MCR 3.210 at the conclusion of any applicable statutory waiting period." MCR 3.223(C)(4).

After the filing of a proposed consent judgment or proposed consent order, "the parties may file stipulations and motions and the court may enter temporary orders." MCR 3.223(C)(6).

Divorce cases. The parties may include a request to waive the six-month statutory waiting period under MCL 552.9f in the petition, and

nothing in MCR 3.223 precludes the court from granting the request. MCR 3.223(C)(1)(b); MCR 3.223(C)(3)(b).

B. Entry of Final Consent Judgment or Consent Order

"The court shall conduct a hearing on the proposed consent judgment or proposed consent order in accordance with MCR 3.210. Except when a consent judgment is derived through MCR 3.222 [Uniform Collaborative Law Act process and agreements], both petitioners shall be present for this hearing. The final consent judgment or final consent order shall be served in accordance with MCR 2.602(D)." MCR 3.223(D).

C. Dismissal

"A party may dismiss a matter commenced under this rule at any time under MCR 2.504 or as provided under [MCR 3.223(C)(5)]." MCR 3.223(E).

The court must dismiss the case if either party objects to the summary proceeding prior to entry of the proposed consent judgment or proposed consent order. MCR 3.223(C)(5).

6.4 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). 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). "The chief judge shall exercise general supervision over the implementation of [MCR 2.410] and shall review the operation of the court's ADR plan at least annually to assure compliance with [MCR 2.410]." MCR 2.410(F).

"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). Unless the rule under which the case was referred provides otherwise, the order must provide for the selection and payment of the ADR provider and set time limits for initiation and completion of the process. MCR 2.410(C)(2). In addition, the court may order other provisions as it considers appropriate, and the order may require attendance at ADR proceedings as provided in MCR 2.410(D). MCR 2.410(C)(2); MCR 2.410(3). 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, parties, and representatives of lienholders or insurance carriers can be required to attend or be available at the time of the ADR proceedings and have adequate information and

authority "for responsible and effective participation in the conference for all purposes[.]" MCR 2.410(D). The court may allow the entity to appear by telephone. *Id*.

Failure to attend an ADR proceeding, as ordered, may result in a default or dismissal of the action. MCR 2.410(D)(3)(a). However, the court must excuse a failure to attend and enter a just order other than a default or dismissal upon a finding that manifest injustice would occur if a default or dismissal is ordered, or that "the failure to attend was not due to the culpable negligence of the party or the party's attorney." MCR 2.410(D)(3)(b). "The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2)." MCR 2.410(D)(3).

"In a case in which a discovery plan has been filed with the court under MCR 2.401(C),[6] an included stipulation to use an ADR process other than case evaluation[7] must:

> (a) identify the ADR process to be used;
>
> (b) describe the timing of the ADR process in relation to other discovery provisions; and
>
> (c) state that the ADR process be completed no later than 60 days after the close of discovery." MCR 2.403(A)(2).

"In a case in which no discovery plan has been filed with the court, a stipulated order to use an ADR process other than case evaluation must:

> (a) be submitted to the court within 120 days of the first responsive pleading;
>
> (b) identify the ADR process to be used and its timing in relationship to the deadlines for completion of disclosure and discovery; and
>
> (c) state that the ADR process be completed no later than 60 days after the close of discovery." MCR 2.403(A)(3).

"Parties who participate in a stipulated ADR process approved by the court may not subsequently be ordered to participate in case evaluation without their written consent." MCR 2.403(A)(1).

Parties may also agree to a collaborative alternative dispute process. See Section 6.7.

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[6] See Section 5.1 for information on discovery plans.

[7] See Section 6.5 for information on case evaluation.

6.5 Case Evaluation

A. Scope and Applicability

"The general purpose of case evaluation under MCR 2.403 is to expedite and simplify the final settlement of cases to avoid a trial." *Vandercook v Auto-Owners Ins Co*, 325 Mich App 195, 202 (2018).

Any civil action in which the relief sought is primarily money damages or division of property may be submitted to case evaluation, including actions filed in district court, unless the parties stipulate to an ADR process outlined in MCR 2.403(A)(2)-(3),[8] in which case the parties cannot be subsequently ordered to participate in case evaluation without their written consent. MCR 2.403(A)(1); MCR 2.403(A)(5).

"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)(4). However, when a trial court does not exempt any aspect of plaintiff's claim under MCR 2.403(A)(4), neither party objects to case evaluation, and the case involves one plaintiff against one defendant, the case evaluation panel has the entire case for consideration and determination. *Vandercook*, 325 Mich App at 204-205 (finding that plaintiff's failure to address certain claims in his case evaluation summary did not serve to exempt those claims from the panel's consideration). Parties do not have the authority to exempt claims from case evaluation without court approval. See *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 557 (2002).

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) if the parties have not submitted an ADR plan under [MCR 2.403(A)]."MCR 2.403(B)(1).

[8] See Section 6.4 for more information on ADR and MCR 2.403(A)(2)-(3).

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. Fees

Each party must pay a case evaluation fee. MCR 2.403(H)(1). "Only a single fee is required of each party, even where there are counterclaims, cross-claims, or third-party claims." MCR 2.403(H)(2). Similarly, "[i]f one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid[.]" MCR 2.403(H)(3). The court must waive a case evaluation fee imposed under MCR 2.403(H) if the person is entitled to a fee waiver under MCR 2.002.[9] MCR 2.403(H)(2). See Section 1.11 for additional discussion of fee waivers.

Refundable fees. Fees paid pursuant to MCR 2.403(H) must be refunded to the parties if:

- the order submitting the matter to case evaluation is set aside by the court;
- the court adjourns the case evaluation hearing on its own initiative; or
- with at least 14 days written notice to the ADR clerk, the parties settle, dismiss, enter a judgment disposing of the action, or an order of adjournment is entered by stipulation or motion. MCR 2.403(H)(4).

Nonrefundable fees. Fees paid pursuant to MCR 2.403(H) must not be refunded if:

- the fees are applied to an adjourned hearing date; or
- absent good cause, a requested adjournment is made and granted less than 14 days before the scheduled case evaluation. MCR 2.403(H)(5).

[9] "Notwithstanding any other provision of [MCR 2.002], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." MCR 2.002(L).

E. Submission of Summary and Supporting Documents

At least 14 days prior to the hearing, parties are required to serve a case evaluation summary and supporting documents pursuant to MCR 2.107, and file proof of service and three copies of the summary and supporting documents with the ADR clerk. MCR 2.403(I)(1)(a)-(b). "Each failure to timely file and serve the materials identified in [MCR 2.403(I)(1)] and each subsequent filing of supplemental materials within 7 days of the hearing, subjects the offending attorney or party to a $150 penalty to be paid in the manner specified in the case evaluation hearing. Filing and serving the materials identified in [MCR 2.403(I)(1)] within 24 hours of the hearing subjects the offending attorney or party to an additional $150 penalty." MCR 2.403(I)(2).

F. Case Evaluation Decision[10]

The panel's case evaluation must be in writing and submitted to the ADR clerk within 7 days after the case evaluation hearing. MCR 2.403(K)(1). The evaluation must indicate if it is a nonunanimous award. *Id*.The panel must provide a written copy of the evaluation to the attorney for each party if an evaluation is made immediately following the hearing. *Id*. "If an evaluation is not made immediately following the hearing, the evaluation must be served by the ADR clerk on each party within 14 days after the hearing." *Id*. 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). For purposes of MCR 2.403(K)(2), "all such claims filed by any one party against any other party shall be treated as a single claim." *Id*. In addition, although the evaluation cannot include a separate award on any equitable claim, the panel may consider equitable claims when determining the award amount. MCR 2.403(K)(3).

In certain tort cases, "if the panel unanimously finds that a party's action or defense as to any other party is frivolous, the panel shall so indicate on the evaluation." MCR 2.403(K)(4). If a party's claim or defense is found to be frivolous, that party may file a motion within 14 days seeking judicial review of the panel's finding. See MCR 2.403(N)(2). For more information on a proceeding involving a potentially frivolous claim, see Section 6.5(G).

In certain medical malpractice cases, the evaluation must specifically find whether there has been a breach of the applicable standard of

[10] Discussion of the case evaluation hearing is outside the scope of this benchbook. For more information on the hearing itself, see MCR 2.403(J).

care, or whether reasonable minds could differ on whether a breach occurred. MCR 2.403(K)(5). Although specific discussion of case evaluation in the context of medical malpractice is outside the scope of this benchbook, see Section 9.11 for more information on medical malpractice actions generally. In addition, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4, for information on expert testimony, including experts in medical malpractice cases.

G. Judicial Review of Panel Finding a Claim or Defense Frivolous

"In a tort case to which MCL 600.4915(2) or MCL 600.4963(2) applies, if the panel unanimously finds that a party's action or defense as to any other party is frivolous, the panel shall so indicate on the evaluation." MCR 2.403(K)(4). "Except as provided in [MCR 2.403(N)(2)], if a party's claim or defense was found to be frivolous under [MCR 2.403(K)(4)], that party shall post a cash or surety bond, pursuant to MCR 3.604, in the amount of $5,000 for each party against whom the action or defense was determined to be frivolous." MCR 2.403(N)(3). "The bond must be posted within 56 days after the case evaluation hearing or at least 14 days before trial, whichever is earlier." MCR 2.403(N)(3)(a). An insurance company that insures a defendant against a claim may not act as the surety. MCR 2.403(N)(3)(b). The court must dismiss a claim found to be frivolous or enter a default against a defendant whose defense was declared frivolous if the party fails to post bond as required. MCR 2.403(N)(3)(c). "The action shall proceed to trial as to the remaining claims and parties, and as to the amount of damages against a defendant in default." *Id*.

A party whose claim or defense was unanimously declared frivolous "may request that the court review the panel's finding by filing a motion within 14 days after the ADR clerk sends notice of the rejection of the case evaluation award." MCR 2.403(N)(2). Oral arguments are permitted at the court's discretion, but the motion can only be supported by summaries and documents that were considered by the case evaluation panel. MCR 2.403(N)(2)(a). "If the court agrees with the panel's determination, the provisions of [MCR 2.403(N)(3)] apply, except that the bond must be filed within 28 days after the entry of the court's order determining the action or defense to be frivolous." MCR 2.402(N)(2)(c). A judge who hears a motion under MCR 2.402(N) cannot preside at a nonjury trial of the action. MCR 2.402(N)(2)(d).

MCR 2.403(N) does not apply to actions that sound in contract. *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 552 (2002).

H. Acceptance or Rejection of Evaluation

Within 28 days of being served with the evaluation,[11] each party must file with the ADR clerk a written acceptance or rejection of the evaluation. MCR 2.403(L)(1). Failure to do so constitutes a rejection. *Id*. "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.*

When the evaluation involves multiple parties, specific rules apply:

> "(a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.
>
> (b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if
>
> > (*i*) all opposing parties accept, and/or
> >
> > (*ii*) the opposing parties accept as to specified coparties."
>
> If such a limitation is not included in the acceptance, an accepting party is deemed to have agreed to entry of judgment, or dismissal as provided in [MCR 2.403(M)(1)], as to that party and those of the opposing parties who accept, with the action to continue between the accepting party and those opposing parties who reject." MCR 2.403(L)(3).

"The grammar of [MCR 2.403(L)(3)(a)-(b)] 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 Ctr, LLC*, 305 Mich App 215, 225 (2014) (finding that although the case evaluation panel failed to follow the court rules when it issued a single award for multiple parties, the plaintiff's partial acceptance/ partial rejection of the single award was an improper response that constituted a rejection of the entire evaluation).

A party's acceptance or rejection cannot be disclosed until the expiration of the 28-day period. MCR 2.403(L)(2). Once the 28 days has passed, the ADR clerk must send a notice indicating each party's response to the evaluation. *Id*.

[11] For cases filed in district court this time period may be shortened. See MCR 2.403(A)(1).

1. Issues Regarding Rejection

If the evaluation is rejected, "the action proceeds to trial in the normal fashion."[12] MCR 2.403(N)(1). Before trial, the ADR clerk will place a copy of the case evaluation in a sealed envelope and file it with the clerk of the court. MCR 2.403(N)(4). In a bench trial, the envelope should not be opened, and the parties should not reveal the case evaluation amount until after the court has rendered its judgment. *Id*. Declaring a mistrial and reassigning the case to another judge 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 v Med Evaluation Specialists*, 244 Mich App 227, 231-233 (2000). See also MCR 2.403(N)(2)(d) ("[t]he judge who hears a motion under [MCR 2.403(N)] may not preside at a nonjury trial of the action"). However, "a new trial is [not] required in every case in which a violation of MCR 2.403(N)(4) occurs." *Cranbrook Prof Bldg, LLC v Pourcho*, 256 Mich App 140, 144 (2003) (new trial was not required where "case evaluation was revealed to the court before commencement of trial under the presumption that the case would be tried by a jury" and plaintiffs did not seek a new trial under MCR 2.403(N)(4) until an adverse judgment was entered). "[T]he appropriate sanction depends on the particular facts of the case." *Cranbrook*, 256 Mich App at 144.

2. Issues Regarding Acceptance

"If all parties accept the panel's evaluation, the case is over." *CAM Constr v Lake Edgewood Condo 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, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice." MCR 2.403(M)(1). "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*.,[13] 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." MCR 2.403(M)(1). See also *Magdich & Assoc, PC v Novi Dev Assoc LLC*, 305 Mich App 272, 274-275 (2014), where the parties accepted a case evaluation award without qualification

[12] See Chapter 7 for discussion of civil trials.

and the plaintiff paid the award to the defendant before the trial court granted defendant's motion to amend its counter-complaint. 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, which the trial court denied. *Magdich*, 305 Mich App at 275. The Michigan Court of Appeals reversed, holding that "both parties accepted the case evaluation award without qualification, and therefore, the case is over." *Id.* at 281 (noting that the court rule does not allow a party to make a showing that less than all issues were submitted to case evaluation).

"If only a part of an action has been submitted to case evaluation pursuant to [MCR 2.403(A)(4)] 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).

In cases involving multiple parties, the judgment or dismissal referenced in MCR 2.403(M)(1) must "be entered as to those opposing parties who have accepted the portions of the evaluation that apply to them." MCR 2.403(M)(3).

I. Motion to Set Aside Case Evaluation

Although a case is completely settled once both parties accept a case evaluation award, a party is not precluded from filing a motion to set aside its acceptance. *Goch Props, LLC v C Van Boxell Transp, Inc*, 477 Mich 871 (2006). A trial court has discretion to set aside an acceptance of the award before or after entry of a judgment on the award, but should set aside after entry of a judgment "only if failure to do so would result in substantial prejudice." *Reno v Gale*, 165 Mich App 86, 92-93 (1987).

6.6 Mediation

A. Generally

Mediation is the process "in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement.

[13] MCL 500.3101 *et seq*. governs no-fault cases. In "no-fault cases involving the right to PIP benefits, the trial court's judgment may not dispose of claims that have not accrued as of the date of the case evaluation hearing." *Vandercook v Auto-Owners Ins Co*, 325 Mich App 195, 205 (2018). However, any claims that have accrued "at the time of the case evaluation are, as a matter of law, disposed of pursuant to MCR 2.403(M)(1)." *Vandercook*, 325 Mich App at 205 (any wage loss that had accrued prior to the date of the case evaluation hearing was deemed resolved despite plaintiff's refusal to address accrued wage loss in his case evaluation summary, or the notation inserted in his acceptance form).

A mediator has no authoritative decision-making power." MCR 2.411(A)(2).

1. Selection of Mediator

A mediator may be selected by the parties or by the court using an established selection process. See MCR 2.411(B)(1); MCR 2.411(B)(3). If the court selects the mediator, the individual must satisfy the minimum qualifications set forth in MCR 2.411(F). However, a mediator selected by agreement of the parties need not meet these minimum qualifications. MCR 2.411(B)(1).

If the mediation order does not specify a mediator, the order must set a deadline by which the parties are to agree upon a mediator. MCR 2.411(B)(2). If the parties select a mediator, the court must appoint that mediator unless he or she is unable to serve during the scheduled time frame. MCR 2.411(B)(1). If the parties do not agree on a mediator, one will be selected by the court from the approved list of mediators as set forth in MCR 2.411(B)(3). MCR 2.411(B)(2).

Generally, the court must not appoint, recommend, direct, or otherwise influence the selection of a mediator other than as provided by MCR 2.411. MCR 2.411(B)(4). However, "[t]he court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record." *Id*.

Mediators are subject to the same disqualification rules as a judge. MCR 2.411(B)(5).

2. Scheduling and Conduct of Mediation

"The order referring the case for mediation shall specify the time within which the mediation is to be completed." MCR 2.411(C)(1). The court's ADR clerk must send a copy of the order to each party and the selected mediator. *Id*. Multiple mediation sessions can be held if it appears that the process is moving toward settlement. MCR 2.411(C)(2). Within 7 days of completing mediation, the mediator must notify the court only of the following information: (1) the date the process was completed; (2) who participated in the process; (3) whether a settlement was reached; and (4) whether additional ADR proceedings have been contemplated. MCR 2.411(C)(3). If settlement is reached, the parties must prepare and submit the appropriate documents to the court within 21 days. MCR 2.411(C)(4).

3. Confidentiality

"Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants except as provided in [MCR 2.412(D)]." MCR 2.412(C). "Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation." MCR 2.412(E)(3).

"The term 'mediation communications' is defined expansively to include statements that 'occur during the mediation process' as well as statements that 'are made for purposes of . . . preparing for . . . a mediation.' MCR 2.412(B)(2)." *Tyler v Findling*, 508 Mich 364, 371 (2021) (alterations in original). There is no requirement that "a mediator . . . meet with the parties and attorneys before the definition of 'mediation communications' under MCR 2.412(B)(2) and the mediation confidentiality provision set forth in MCR 2.412(C) both attach." *Tyler*, 508 Mich at 371. "The confidentiality protections cover '[m]ediation communications,' MCR 2.412(C), which are not limited to communications made by a 'mediation party' but extend to, among other things, any statement 'made for purposes of . . . participating in . . . a mediation.' MCR 2.412(B)(2). This clearly encompasses statements made by a 'mediation participant.'" *Tyler*, 508 Mich at 372 (alterations in original). "[T]here is no requirement in MCR 2.412 that a 'mediation communication' be uttered by any particular party or participant. Rather, the rule simply explains *to whom* confidential mediation communications can be *disclosed*. All mediation communications made by participants are afforded confidentiality protections." *Tyler*, 508 Mich at 371-372 (concluding that a conversation between attorneys that "took place within the mediator's designated 'plaintiff's room' while parties to the mediation were waiting for the mediation session to start . . . [was] part of the 'mediation process'").

4. Fees

Unless the parties agree, or the court orders otherwise, the costs of mediation must be divided between the parties on a pro-rata basis. MCR 2.411(D)(2). The mediator's fee must be paid no later than 42 days after mediation is concluded or a dismissal or judgment is entered, whichever occurs first. *Id*. The court may modify the payment deadline if the mediator consents. MCR 2.411(D)(3). An order to enforce payment of the fee as a cost of the action may be entered by the court. MCR 2.411(D)(4). If a

party objects to the total fee, a hearing may be held by the court to determine the reasonableness of the fee. MCR 2.411(D)(5).

B. Domestic Relations Mediation

"All domestic relations cases . . . and actions for divorce and separate maintenance that involve the distribution of property are subject to mediation under [MCR 3.216], unless otherwise provided by statute or court rule." MCR 3.216(A)(1). Domestic relations mediation is nonbinding, but if the parties and mediator agree, "the mediator may provide a written recommendation for settlement of any issues that remain unresolved at the conclusion of a mediation proceeding." MCR 3.216(A)(2).

C. Child Protection Mediation

Child protection mediation is governed by MCR 3.970. See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 7, for additional information on child protection mediation.

D. Mediation of Discovery Disputes

If a discovery dispute arises, the dispute may be mediated upon stipulation of the parties or order of the court. MCR 2.411(H). See Section 5.1(H) for information on mediation of discovery disputes.

6.7 The Uniform Collaborative Law Act

The Uniform Collaborative Law Act, MCL 691.1331 *et seq.*, "allow[s] 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 MCL 691.1333—MCL 691.1352 and MCR 3.222–MCR 3.223 for a complete discussion of collaborative alternative dispute resolution. See also Section 6.3 for additional information on original actions to enter a consent judgment or consent order.

6.8 Settlements

"A settlement agreement is a binding contract." *Dabish v Gayar*, ___ Mich App ___, ___ (2022) (quotation marks and citation omitted). "To settle a lawsuit, there must be an offer and acceptance." *Id.* at ___ (quotation marks and citation omitted). "Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Id.* at ___ (quotation marks and citation omitted). "Further, a contract requires mutual assent or a meeting of the minds on all the essential terms." *Id.* at ___ (quotation marks and citation omitted). "An enforceable settlement

depends on an offer and an acceptance that is unambiguous and in strict conformance with the offer." *Id*. at ___ (cleaned up).

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. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 456 (2006).

"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(G)]."[14] *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 668-669 (2002).

Notes regarding possible settlement terms in the activity log of an insurance adjuster are "distinguishable from both an attorney-signed letter and a party-signed proposal," and "does not rise to a level sufficient to satisfy the writing requirement of [MCR 2.507(G)]."[15] *Mich Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 486 (2001).

An exchange of e-mails may satisfy the requirement that the settlement be in writing as long as it is also *subscribed*. *Kloian*, 273 Mich App at 459. *Subscription* as contemplated by the court rule means "to append, as one's signature, *at the bottom of a document* or the like; sign." *Id*. (citation and quotation marks omitted). Accordingly, an "e-mail containing the terms of the settlement offer was subscribed by plaintiff's attorney because he typed, or appended, his name at the end of the e-mail message" as did the defendant's attorney's reply e-mail, whereas a subsequent modification by e-mail did not comply with the subscription requirement because the plaintiff's attorney's name was at the top of the e-mail. *Id*. at 459-460.

Where the "parties' attorneys exchanged a host of e-mails in an effort to settle the matter, but the two key documents—the 'Settlement Agreement and Release' and the 'Membership Interest Purchase Agreement'—were never signed by plaintiff," the purported

[14] Formerly MCR 2.507(H).

[15] Formerly MCR 2.507(H).

settlement agreement was not enforceable pursuant to MCR 2.507(G). *Dabish v Gayar*, ___ Mich App ___, ___ (2022) (noting the "purported settlement was not 'made in open court,'" and thus, could "only be enforced if it was 'in writing, subscribed by the party against whom the agreement is offered or by that party's attorney'"). Further, "there [was] nothing in the e-mail correspondence demonstrating that [plaintiff] ever accepted defendants' offer." *Id*. at ___.

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).

B. Attorney's Authority and Duty

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).[16]

Duty. "It is the lawyer's professional duty to ensure that his 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 [party's] lawyer—not the opposing party or its counsel. If the [party's] lawyer fails to fulfill this obligation—and does not ensure that he and his client consider all possible claims before signing a settlement agreement—the lawyer cannot shift this responsibility to the opposing party or opposing counsel." *Id.* (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 [a PIP benefit], or to advise [him or] her to include those claims in [a] settlement").

[16] "[A]n attorney's charging lien for fees may not be imposed upon the real estate of a client . . . unless (1) the parties have an express agreement providing for a lien, (2) the attorney obtains a judgment for the fees and follows the proper procedure for enforcing a judgment, or (3) special equitable circumstances exist to warrant imposition of a lien." *George*, 201 Mich App at 478.

C. Court 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 settlements of class actions and settlements for minors and incompetent persons. MCR 3.501(E); MCR 2.420(B).[17] Court approval may be requested by the personal representative for wrongful death settlements. MCL 600.2922(5).[18]

> **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) ("[a]lthough [the minor defendant] was never served, resulting in his dismissal, the action against him had been commenced," requiring the assigned judge to approve or reject the proposed settlement pursuant to MCR 2.420).

Taxable costs are deemed included in the settlement unless otherwise specified. MCR 2.625(H).

D. Conditional Dismissal[19]

"The court may enter a consent order for conditional dismissal under the following conditions:

> (1) A consent order for conditional dismissal shall be signed and approved by all parties and shall clearly state the terms for reinstatement of the case and entry of judgment.

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[17]See Section 6.8(F) regarding settlements for minors and legally incapacitated individuals. See also the Michigan Judicial Institute's checklist on settlements for minors and legally incapacitated individuals.

[18]See Section 6.8(E) regarding wrongful death settlements. See also the Michigan Judicial Institute's checklist on wrongful death settlements.

[19]See the Michigan Judicial Institute's *Conditional Dismissal Flowchart*.

(2) If the breaching party defaults on the terms of the settlement agreement as provided for in the conditional dismissal order, the non-defaulting party may seek entry of an order for reinstatement of the case and entry of judgment.

(a) To obtain an order for reinstatement of the case and entry of judgment, the non-defaulting party shall file with the court an affidavit stating that the breaching party defaulted on the terms of the settlement agreement.

(b) The non-defaulting party shall serve a copy of an affidavit of non-compliance on the breaching party at its current address listed in the court records and file proof of service with the court.

(c) If the order for conditional dismissal states that judgment may be entered without notice or further process, the court shall enter the proposed judgment upon determining the conditions for entry of judgment in the conditional dismissal order are satisfied.

(d) If the order for conditional dismissal does not provide for immediate entry of judgment, the affidavit shall be accompanied by a notice to the breaching party that an order for reinstatement and for entry of judgment is being submitted to the court for entry if no written objections to its accuracy or completeness are filed with the court clerk within 14 days after service of the notice. Unless an objection is filed within 14 days after service of the notice, an order for reinstatement of the case and entry of judgment shall be signed by the court and entered.

(*i*) An objection must be verified and state with specificity the reasons that an order for reinstatement of the case and entry of judgment should not enter.

(*ii*) If an objection is filed, the court shall set a hearing and serve notice of that hearing to all parties.

(*iii*) This 14-day notice provision may be waived in cases filed pursuant to MCR 4.201 if such waiver is acknowledged in writing.

> (3) For the purposes of any statute of limitation, an action conditionally dismissed under this rule is deemed to have been initiated on the date the original complaint was properly filed.
>
> (4) All parties to a conditional dismissal bear the affirmative duty to inform the court with jurisdiction over that case of any change of address until the terms of the settlement agreement have been satisfied." MCR 2.602(C).

E. Wrongful Death Settlements

MCL 600.2922 governs wrongful death settlements.[20] The personal representative may request court approval of a settlement involving a claim of damages in a wrongful death action. MCL 600.2922(5). 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, when the court is determining how the proceeds of a settlement will be distributed. MCL 600.2922(6)(d).

Committee Tip:

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 contingency fee agreements in wrongful death cases.

F. Settlements for Minors and Legally Incapacitated Individuals

MCR 2.420 governs settlements for minors and legally incapacitated individuals.[21] A hearing must be conducted. MCR 2.420(B)(1); *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).

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[20] See the Michigan Judicial Institute's checklist on wrongful death settlements.

[21] See the Michigan Judicial Institute's checklist on settlements for minors and legally incapacitated individuals.

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).

If a settlement for a minor involves an immediate payment to the minor that exceeds $5,000, or involves installment payments which exceed more than $5,000 during any single year of minority, the probate court must appoint a conservator prior to entry of the judgment or dismissal. MCR 2.420(B)(4). "The court shall not enter the judgment or dismissal until it receives written verification . . . that the probate court has passed on the sufficiency of the bond of the conservator." MCR 2.420(B)(4)(a).[22]

"If a settlement or judgment provides for the creation of a trust for the minor or legally incapacitated individual, the circuit court shall determine the amount to be paid to the trust, but the trust shall not be funded without prior approval of the trust by the probate court pursuant to notice to all interested persons and a hearing." MCR 2.420(B)(5).

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 v Walcon Corp*, 207 Mich App 566, 571 (1994). "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 had 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

[22] "If the settlement or judgment does not require payments of more than $5,000 to the minor in any single year, the money may be paid in accordance with the provisions of MCL 700.5102." MCR 2.420(B)(4)(b).

defendant] had knowledge of [the] charge . . . when it made the settlement agreement." *Id.* at 388, 398-400.

"[S]ettlement agreements are binding until rescinded for cause. . . . [T]ender 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). Additionally, a party "must tender the recited consideration before there is a right to repudiate [a] release." *Id.* at 165. "The only recognized exceptions in Michigan are a waiver of the plaintiff's duty by the defendant and fraud in the execution." *Id*. "A valid tender of performance of agreement to pay money requires an actual offer to pay and an ability at the time of offer to pay the amount due. . . . Furthermore, the tender must be without stipulation or condition." *Swain v Kayko*, 44 Mich App 496, 501 (1973) (internal citation omitted).

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).[23] "Following the jury verdict, upon motion of the defendant, the court shall make the necessary calculation and find the amount by which the jury verdict will be reduced." *Id*.

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 to the jury must be weighed against the countervailing interests in encouraging settlements and avoiding prejudice to the parties." *Id*. 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).

[23]See also the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2, regarding the admissibility of settlements and settlement negotiations.

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. *Id*.

Chapter 7: Trial

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Part I: Trial in General

7.1 Is Disqualification an Issue?

"Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either
>
> > (*i*) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US 868 [(2009)], or
> >
> > (*ii*) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.
>
> (c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> (d) The judge has been consulted or employed as an attorney in the matter in controversy.
>
> (e) 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.
>
> (f) 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 more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.
>
> (g) 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:
>
> > (*i*) is a party to the proceeding, or an officer, director, or trustee of a party;
> >
> > (*ii*) is acting as a lawyer in the proceeding;
> >
> > (*iii*) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or
> >
> > (*iv*) is to the judge's knowledge likely to be a material witness in the proceeding." MCR 2.003(C)(1).

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(C)(2)(a).

"Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive the disqualification must be made by all parties to the litigation and shall be in writing or placed on the record." MCR 2.003(E).

"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." *In re Contempt of Henry*, 282 Mich App 656, 679 (2009).

For more information on judicial disqualification, including examples of situations involving disqualification, see the Michigan Judicial Institute's book, *Judicial Disqualification in Michigan*. See also the Michigan Judicial Institute's checklist and flowchart on judicial disqualification.

7.2 Pretrial Motions

The trial court is not required to explain its reasoning and state its findings of fact on pretrial motions, unless such findings are required by

a particular rule. MCR 2.517(A)(4). See, e.g., MCR 2.504(B). However, doing so is helpful for appellate review. *People v Shields*, 200 Mich App 554, 558 (1993). "When an appellate court orders a new trial, that includes all phases of trial, including all pretrial matters such as motions for summary disposition." *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, ___ Mich App ___, ___ (2023).

7.3 Separate or Joint Trial

The trial court has discretion to consolidate or sever trials. MCR 2.505. See Section 4.6 for additional information.

7.4 Oaths or Affirmations of Witnesses and Interpreters[1]

This section does not discuss juror oaths. For information on that topic, see Section 7.20(D) and Section 7.20(J).

"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. Oath for Witness

Together, MCL 600.1432, MCL 600.1434, and MRE 603 govern the oath or affirmation of a testifying witness. Although the statutes set forth "[t]he typical manner for administering oaths" as well as "exceptions to this general rule, . . . the administration of oaths and affirmations is a purely procedural matter, and it thus falls within the authority of our Supreme Court to promulgate rules governing the practices and procedures for administering oaths." *People v Putman*, 309 Mich App 240, 243-244 (2015). Accordingly, "to the extent that MRE 603 conflicts with MCL 600.1432 and MCL 600.1434, MRE 603 prevails over the statutory provisions[.]" *Putman*, 309 Mich App at 245.

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." *Putman*, 309 Mich App at 244 (citation, quotation marks, and alterations 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

[1]See the Michigan Judicial Institute's *Oaths and Affirmations Table*.

to testify truthfully or some similar variation of that question," and each witness answered affirmatively. *Id*. at 244-245 (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 prevails over the statutory provisions, meaning that no specific formalities are required of an oath or affirmation").

Committee Tip:

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?"

If a witness is opposed to swearing under oath, he or she may instead make a solemn and sincere affirmation under the pains and penalties of perjury. MCL 600.1434. Similarly, "witnesses need not raise their right hands when taking an oath to testify truthfully, and such oaths need not be prefaced with any particular formal words." *Putman*, 309 Mich App at 244.

B. Oath for Child Witness

Presumably, the general rules that apply to oaths and affirmations of testifying witnesses, also apply to child witnesses. See Section 7.4(A) for more information. See also M Crim JI 5.9, which states that "[f]or a witness who is a [young] child, a promise to tell the truth takes the place of an oath to tell the truth." (Alteration in original.)

C. Oath for Interpreter

"An interpreter must be qualified and must give an oath or affirmation to make a true translation." MRE 604.

Foreign language interpreters. "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).

Deaf or deaf-blind interpreters. 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.

7.5 Subpoenas

A. In General

MCR 2.506 identifies the process by which a subpoena may be issued. Subpoenas may compel the attendance of certain individuals at various proceedings, require the production of evidence, or enjoin the transfer of assets pursuant to MCL 600.6119. See MCR 2.506(A); MCL 600.1455(1).

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, see 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 5.6.

B. Subpoena for Party or Witness

MCL 600.1455(1) authorizes courts of record to issue subpoenas requiring the attendance of testifying witnesses in any matter "pending or triable in such courts[.]" See also MCR 2.506(A)(1), which provides "[t]he court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court[.]"

Whomever signs the subpoena must serve it on the witness "sufficiently in advance of the trial or hearing to give the witness reasonable notice of the date and time the witness is to appear. Unless the court orders otherwise, the subpoena must be served at least 2 days before the appearance or 14 days before the appearance when documents are requested." MCR 2.506(C)(1). Service requirements are set out in MCR 2.506(G). The issuer of the subpoena bears additional responsibilities as set out in MCR 2.506(C)(2)-(3).

C. Subpoena Duces Tecum (Subpoena for Production of Evidence)

A party or witness may be required to produce documents or other portable tangible things when they appear to testify. MCR 2.506(A)(1). The request to produce these items must comply with

MCR 2.302(B) and any scheduling order, and a copy of the subpoena must be provided to the opposing party or their counsel. MCR 2.506(A)(1). Subpoenas issued pursuant to MCR 2.506(A)(1) "does not apply to discovery subpoenas (MCR 2.305) or requests for documents to a party where discovery is available (MCR 2.310)." MCR 2.506(A)(1).

"A subpoena may specify the form or forms in which ESI [(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 ESI only needs to "produce the same information in one form." *Id.*

A subpoena for hospital medical records is controlled by MCR 2.506(I).

"A person or entity subpoenaed under [MCR 2.506] may file written objections to the request for documents before the designated time for appearance; such objections shall be adjudicated under [MCR 2.506(H)]." MCR 2.506(A)(1). See Section 7.5(D) for information on adjudications under MCR 2.506(H).

D. Motion to Quash Subpoena

MCR 2.506(H) provides that a person served with a subpoena under MCR 2.506 may appear and challenge the subpoena in person or in writing. The witness may be excused for good cause, with or without a hearing. MCR 2.506(H)(2)-(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). However, any obligation to produce documents is stayed pending resolution upon the filing of timely written objections. *Id*. Additionally, "[a]ny party may move to quash or modify a subpoena by motion under MCR 2.302(C) filed before the time specified in the subpoena, and serve same upon the nonparty, in which case the non-party's obligation to respond is stayed until the motion is resolved." MCR 2.506(H)(5).

7.6 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." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 24 (1989) (internal citations omitted). See also MRE 614(a)-(b). "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*, 174 Mich App at 24.

In bench trials, courts are afforded more discretion when questioning witnesses. *In re Jackson (Rebeacca)*, 199 Mich App 22, 29 (1993) (notwithstanding, a reversal may be in order when the questions are "intimidating, argumentative, prejudicial, unfair, or partial"). "Nevertheless, a judge's comments and conduct can indicate a possible bias." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 153 (1992). In order to prove bias, a litigant must "show that the judge's views controlled his decision-making process." *Id.* at 154.

B. Judicial Impartiality During a Jury Trial

The discussion in the following sub-subsections addresses judicial impartiality in the context of a post-trial claim of an unfair and partial trial. For discussion of judicial bias/impartiality in the context of a motion for judicial disqualification, see the Michigan Judicial Institute's *Judicial Disqualification in Michigan* publication. See also the Michigan Judicial Insitute's judicial disqualification checklist and flowchart.

While MJI makes every attempt to include civil cases in this book, there do not appear to be civil cases addressing this issue. The appellate courts have not indicated whether there is a different standard for civil and criminal cases.

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 defendant must overcome a heavy presumption of judicial impartiality when claiming judicial bias." *People v Biddles*, 316 Mich App 148, 152 (2016). "A single instance of misconduct generally does not create an appearance that the trial judge is

biased, unless the instance is 'so egregious that it pierces the veil of impartiality.'" *Id.*, quoting *Stevens*, 498 Mich at 171.

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." *Stevens*, 498 Mich 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." *People v Stevens*, 498 Mich 162, 178 (2015) (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 (citations omitted).

3. Analysis of Factors

Nature of Judicial Conduct. "'[I]t is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional relevant information.'" *People v Swilley*, 504 Mich 350, 372 (2019), quoting *People v Stevens*, 498 Mich 162, 173 (2015). "However, 'undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses . . . may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto[.]'" *Swilley*, 504 Mich at 372, quoting *Stevens*, 498 Mich at 174 (alterations in original).

"A judge should not exhibit disbelief of a witness intentionally or unintentionally or permit his own views on disputed issues of fact to become apparent to the jury, [and a] judge should avoid questions that are intimidating, argumentative, or skeptical." *Swilley*, 504 Mich at 372-373 (quotation marks and citation omitted). "[I]t is not the role of the court to impeach a witness or

undermine a witness's general credibility." *Id*. at 373. "Questions from a judge that are designed to emphasize or expose incredible, unsubstantiated, or contradictory aspects of a witness's testimony are impermissible." *Id*. at 374 (the trial judge's conduct weighed in favor of finding that he pierced the veil of judicial impartiality where his "questioning of [the witness] did not serve to clarify any of the issues or produce fuller testimony but, instead, served to impeach and to undermine the witness's general credibility"). See also *Loranger v Jageman*, 169 Mich 84, 86 (1912) (defendant did not receive a fair and impartial trial where the jury heard the judge's opinions on the facts of the case).

Tone and Demeanor. "Because of the jury's inclination to follow the slightest indication of bias on the part of the judge, '[t]o ensure an appearance of impartiality, a judge should not only be mindful of the substance of his or her words, but also the manner in which they are said.'" *Swilley*, 504 Mich at 381, quoting *Stevens*, 498 Mich at 175. Controversial manner, tone, pert remarks, and quips should be avoided, and "[a]dversarial cross-examination of a witness by a judge is impermissible." *Swilley*, 504 Mich at 381. While "[j]udicial questioning might be more necessary when confronted with a difficult witness who refuses to answer questions or provides unclear answers, . . . judicial intervention is less justified when a witness provides clear, responsive answers, or has done nothing to deserve heated judicial inquiry." *Id*. at 381-382 (the trial judge's repeated use of questions that suggested the witness's actions were illogical or unnatural cast doubt on the witness's truthfulness and indicated the judge was skeptical of the witness; the judge's use of questions to make substantive points and arguments supported a conclusion of judicial partiality).

Context and Scope of Judicial Intervention. "[I]n a long or complicated trial, it may be more appropriate for a judge to intervene a greater number of times than in a shorter or more straightforward trial." *Swilley*, 504 Mich at 386 (quotation marks and citation omitted). "However, the focus is not solely on whether the trial *itself* was long or complicated. . . . [A]n appellate court must consider the scope of the judicial conduct in the context of the length and complexity of the trial, *as well as the complexity of the issues therein*." *Id*. (quotation marks and citation omitted). "[A] judge's inquiries may be more appropriate when a witness testifies about *a topic* that is convoluted, technical, scientific, or otherwise difficult for a jury to understand." *Id*. at 387 (quotation marks and citation omitted; alteration in original). "[W]hen a witness testifies on a clear or straightforward issue, judicial questioning is less warranted,

even if the testimony occurs within the context of a lengthy trial, or one that involves other complex but unrelated matters." *Id*. (concluding this factor "support[ed] the conclusion that the [trial] judge pierced the veil of judicial impartiality" when he "intervened extensively and inappropriately" during testimony that "was not technical, convoluted or scientific").

Extent Judicial Conduct was Directed At One Side. "Judicial partiality may be exhibited when an imbalance occurs with respect to *either* the frequency of the intervention *or* the manner of the conduct." *Swilley*, 504 Mich at 388 (quotation marks and citation omitted). "This inquiry is therefore twofold: in order to determine whether judicial questioning was imbalanced, a reviewing court must evaluate *both* the frequency of the questions *and* the manner in which they were asked." *Id*. "[T]o assess whether judicial questioning was imbalanced, [an appellate court does] not simply look at the number of questions but also the nature of those questions." *Id*. ("stark difference[s] between the trial judge's treatment of witnesses on opposing sides of [the] case . . . support[ed] a conclusion of judicial partiality").

Presence of a Curative Instruction. "[A] judge's administration of curative instructions does not always guarantee that a defendant has received an impartial trial; in some instances judicial conduct may so overstep its bounds that no instruction can erase the appearance of partiality." *Swilley*, 504 Mich at 390 (quotation marks and citation omitted) (although the trial judge instructed the jury throughout the trial that he had no interest in the case's outcome, "his lengthy badgering of [witnesses] suggested the opposite," leaving curative instructions "particularly empty"). See also *In re Parkside Housing Project*, 290 Mich 582, 599-600 (1939) (judge's repeated curative instructions did not erase the appearance of partiality in light of his conduct during trial).

7.7 Stipulations

A. 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)(1); 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 Mech*

Contracting, Inc v Howlett, 451 Mich 74, 77-78 (1996). Generally, rules of contract construction apply to stipulated orders that have been accepted by the trial court. *Phillips v Jordan*, 241 Mich App 17, 21 (2000) ("contract principles do not govern child custody matters," where the court must "independently determine what is in the best interests of the child").

B. 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). "If the parties have stipulated to facts sufficient to enable the court to render judgment in the action, the court shall do so." MCR 2.116(A)(1).

Stipulations of law are not binding on the court. *Staff*, 242 Mich App at 535. "It is within the inherent power of a court, as the judicial body, to determine the applicable law in 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." *In re Finlay Estate*, 430 Mich 590, 595-596 (1988).

C. 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), aff'd in part, rev'd in part on other grounds 424 Mich 310 (1986).[2] 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.*

[2]For more information on the precedential value of an opinion with negative subsequent history, see our note.

7.8 Witness Examination

"The court must exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid waisting time; and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a). Unless otherwise ordered by the court, the plaintiff must introduce its evidence first. MCR 2.507(B).[3] However, if the defendant's answer admits facts and allegations asserted in plaintiff's complaint to the extent that judgment should be entered in favor of plaintiff, and the defendant has advanced a defense (either as a counterclaim or affirmative defense) for which the defendant has the burden of proof, the defendant must present its evidence first. *Id*.

"The court must exercise reasonable control over the appearance of parties and witnesses so as to: (1) ensure that the fact-finder can see and assess their demeanor; and (2) ensure their accurate identification." MRE 611(b). Only one attorney for a party is permitted to examine a witness, unless otherwise ordered by the court. MCR 2.507(C).[4]

A. Direct Examination

Leading questions are only permissible on direct examination "as necessary to develop a witness's testimony." MRE 611(d)(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. However, leading questions may be asked of hostile witnesses, an adverse party, or a witness identified with an adverse party on direct examination. MRE 611(d)(1)(B).

B. Cross-Examination

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(c). 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] beyond the scope of the witness' testimony on direct examination."

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[3] 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.

[4] See Section 7.6 regarding the calling and questioning of witnesses by the court.

Ordinarily, leading questions are permissible during cross-examination. MRE 611(d)(1)(A). However, the court is not always required to allow them. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 517-518 (2004).

C. 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*, 105 Mich App at 8.

D. 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 (Kenneth)*, 135 Mich App 128, 138 (1984), rev'd on other grounds 429 Mich 505 (1988).[5]

7.9 Objections

A party may only claim error in a ruling to admit or exclude evidence if it affects a substantial right of the party. MRE 103(a). To preserve a claim of error regarding the trial court's ruling on the admission of evidence, the party opposing admission of the evidence must timely object or move to strike on the record. MRE 103(a)(1)(A). The objecting party must also state the specific ground for the objection unless it was apparent from the context. MRE 103(a)(1)(B). "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). To preserve a claim of error regarding the trial court's exclusion of evidence,

[5]For more information on the precedential value of an opinion with negative subsequent history, see our note.

a party must inform "the court of its substance by an offer of proof, unless the substance of the evidence was apparent from the context." MRE 103(a)(2). Once the court rules definitively on the record (either before or at trial) a party need not renew an objection or offer of proof to preserve a claim of error for appeal. MRE 103(b).

"The court may make any statement about the character or form of the evidence, the objection made, and the ruling," and "may direct that an offer of proof be made in question-and-answer form." MRE 103(c)."To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." MRE 103(d). "A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." MRE 103(e).

7.10 Mistrial

A. Generally

While the issue of mistrial typically arises in a jury trial, it can be an issue in a bench trial as well. See, e.g., *Bennett v Med Evaluation Specialists*, 244 Mich App 227 (2000).

"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).

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 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*, 416 Mich at 102.

"[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, 365 (2013) (quotation marks and citation omitted)

(holding that although defense counsel "intended to divert 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").

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." *Reetz*, 416 Mich at 102-103.

B. Sanctions

"[A] court's inherent power to sanction misconduct . . . includes the power to 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 v William Beaumont Hosp*, 238 Mich App 626, 640-641 (1999) (the trial court properly limited the request for attorney fees to only the fees associated with time spent during trial; an award of attorney fees as mistrial sanctions cannot include the fees associated with trial preparation or the retrial itself).

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 222, 228 (2002).

Part II: Bench Trials

7.11 Opening Statements

Parties have the right to present opening statements. See MCR 2.507(A). Unless the parties and the court agree otherwise, "the party who is to commence the evidence must make a full and fair statement of that party's case and the facts the party intends to prove" before introducing evidence. MCR 2.507(A). Immediately thereafter, or immediately before presenting evidence, the adverse party must make a similar statement. MCR 2.507(A).

The court may impose reasonable time limits on opening statements and "make separate time allowances for co-parties whose interests are adverse." MCR 2.507(F). However, the court "must give adequate time for argument, taking into consideration the complexity of the action." *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 625 (1992). The trial court's decision to limit the time allotted for statements or arguments is reviewed for an abuse of discretion. *Id*.

A. Motion on Opening Statement

A motion for directed verdict may be based upon the insufficiencies of the opposing party's opening statement. *Jones v Hicks*, 358 Mich 474, 485 (1960). See Section 7.32(C) for additional information on motions for directed verdict following opening statement.

Similarly, 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). See Section 7.10 for additional information on mistrial.

7.12 Evidentiary Issues[6]

"Bench trials stand in sharp contrast to jury trials. A jury is required to consider all the evidence and to render a unanimous verdict, without the

need for explanation. In a bench trial, however, the trial court is obligated to 'find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." *People v Wang*, 505 Mich 239, 250 (2020); MCR 6.403; MCR 6.410(B). "Because of this, reviewing courts are provided greater insight into the specific evidence found by the trial court to support verdicts in bench trials." *Wang*, 505 Mich at 250.

Opening the evidence. Unless otherwise ordered by the court, the plaintiff must introduce its evidence first. MCR 2.507(B).[7] However, if the defendant's answer admits facts and allegations asserted in plaintiff's complaint to the extent that judgment should be entered in favor of plaintiff, and the defendant has advanced a defense (either as a counterclaim or affirmative defense) for which the defendant has the burden of proof, the defendant must present its evidence first. *Id*.

Judicial notice. In a jury trial, jurors are allowed to "consider all the evidence in . . . light of [their] own general knowledge and experience in the affairs of life, and . . . take into account whether any particular evidence seems reasonable and probable." M Civ JI 3.11. A judge presiding over a bench trial may view the evidence in a similar light. See *Hinterman v Stine*, 55 Mich App 282, 285 (1974).

7.13 Court View

"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).[8]

7.14 Motion for Dismissal/Directed Verdict

In a bench trial, a directed verdict motion should be treated as a motion for involuntary dismissal under MCR 2.504(B)(2). See *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[9] because 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 favor, or to determine whether there [is] a genuine issue of material fact."

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[6] For more information on evidentiary issues in general, see the Michigan Judicial Institute's *Evidence Benchbook*.

[7] 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.

[8] See Section 7.31 for additional information regarding a jury view.

[9] See Section 7.32 for more information on directed verdicts in a jury trial.

Williamstown Twp v Hudson, 311 Mich App 276, 289 (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 Servs, 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).

7.15 Closing Arguments

Either side may waive its right to present a closing argument. MCR 2.507(E). However, it is reversible error to deny a party's right to closing argument. *United Coin Meter Co v Lasala*, 98 Mich App 238, 242 (1980).

The court may impose reasonable time limits on the closing arguments and "make separate time allowances for co-parties whose interests are adverse." MCR 2.507(F). However, the court "must give adequate time for argument, taking into consideration the complexity of the action." *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 625 (1992).

7.16 Rebuttal

After opposing counsel's final argument, the party who first presented the evidence is entitled to present a rebuttal argument to the court that is limited to the issues raised in the preceding argument. MCR 2.507(E).

7.17 Decision[10]

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). 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).

[10] See the Michigan Judicial Institute's *Bench Trial Decision Checklist*.

"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:

- *Applicable statutes;*
- *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.*

A trial court's conclusions on questions of law are reviewed de novo. *Haliw v City of Sterling Hts (Haliw II)*, 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 findings are clearly erroneous only where [the reviewing court is] left with a definite and firm conviction that a mistake has been made." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639 (1995) (quotation marks and citation omitted).

For more information on written and oral opinions, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Chapter 3.

Part III: Jury Trials

7.18 Right to a Jury Trial

"A right to a jury can exist either statutorily or constitutionally." *Madugula v Taub*, 496 Mich 685, 696 (2014). 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) (discussing the right to a jury trial in the context of the Whistleblower's Protection Act). In determining whether the right to a jury trial exists, the court should first examine "the plain language of the statute to determine whether the Legislature intended to provide a statutory right to a jury trial. *Madugula*, 496 Mich at 696, 696 n 18 (by first examining the statute, the court may not need to reach the constitutional question). If no statutory right to a jury trial exists, the court should then consider whether a constitutional right exists. *Id*. at 696. See Const 1963, art 1, §14 ("The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law."). "The right of trial by jury as declared by the constitution must be preserved to the parties inviolate." MCR 2.508(A).

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).

Actions seeking only equitable relief. There is no right to a jury trial where the relief sought is solely equitable in nature. See *New Prod Corp v Harbor Shores BHBT Land Dev, LLC*, 308 Mich App 638, 659 (2014). However, the parties may consent to a jury trial on equitable claims under MCR 2.509(D). *McPeak v McPeak*, 457 Mich 311, 315-316 (1998). In *McPeak*, the defendant appealed the jury verdict, asserting plaintiff's claim was equitable in nature and should not have been submitted to a jury. *Id*. at 314. The Michigan Supreme Court held that a new trial was not warranted even if the claim was equitable in nature because: (1) the parties consented to a jury trial where the plaintiff made a jury demand; (2) both parties participated in jury selection and submitted proposed jury instructions; (3) both parties mostly agreed on the verdict form; and (4) the defendant never objected to submitting the issues to the jury. *Id*. at 316.

Civil infractions. 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).

7.19 Jury Waiver and Jury Demand

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.

A jury demand must be made "within 28 days after the filing of the answer or a timely reply," and it "must be filed as a separate document." MCR 2.508(B)(1). The party must pay the required jury fee at the time the demand is filed. *Id.* Failing to file a jury demand or pay the jury fee

waives trial by jury. MCR 2.508(D)(1). 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).

A jury demand is deemed to apply to all triable issues, unless a party specifies the demand only applies to certain issues. MCR 2.508(C)(1). Within 14 days of service of a limited jury demand, or less time as ordered by the court, another party may serve a demand for a jury trial on other, or all, issues. MCR 2.508(C)(2).

"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 'on the record' language . . . encompasses an expression of agreement implied by the conduct of the parties . . . under a 'totality of the circumstances' test." *Marshall Lasser, PC v George*, 252 Mich App 104, 107-108 (2002) (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 should have decided the issue).

"A motion for directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts." MCR 2.516.[11]

7.20 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 must be used. See MCR 2.511(A)(3); MCL 600.1328.

A. Juror Qualification

Juror qualification is governed by both statute and court rule. See MCL 600.1307a and MCR 2.511(E). To qualify as a juror, the individual must:

[11]See Section 7.32 for additional information regarding directed verdict.

- be a United States Citizen;
- be 18 years of age or older;
- reside in the county where the trial is being held;
- reside in the district where the trial is being held if the trial is being held in a second or third class district court;
- be able to communicate in the English language;
- be physically and mentally able to serve as a juror[12];
- not have served on a petit or grand jury in a court of record within the last 12 months[13]; and
- not have any felony convictions. MCL 600.1307a(1).

See Section 7.20(E) for information regarding a challenge to a juror's qualification raised during voir dire.

B. Juror Exemption

An individual over 70 years of age may serve as a juror, but is exempt upon submitting a request to be excused from service. MCL 600.1307a(2). Additionally, "[a] nursing mother may claim exemption from jury service for the period during which she is nursing her child and must be exempt upon making the request if she provides a letter from a physician, a lactation consultant, or a certified nurse midwife verifying that she is a nursing mother." MCL 600.1307a(3).

"An individual who is a participant in the address confidentiality program created under the address confidentiality program act . . . may claim exemption from jury service for the period during which the individual is a program participant." MCL 600.1307a(4). To obtain an exemption, "the individual must provide the participation card issued by the department of attorney general upon the individual's certification as a program participant to the court as evidence that the individual is a current participant in the address confidentiality program." *Id*.

"An individual who is a service member of the United States Armed Forces may claim exemption from jury service for the period during which the individual is on active duty and must be exempt upon making the request of the court and providing a copy of the service

[12] "Temporary inability must not be considered a disqualification." MCL 600.1307a(1)(c).

[13] For purposes of MCL 600.1307a, "an individual has served as a juror if that individual has been paid for jury service." MCL 600.1307a(7).

member's orders." MCL 600.1307a(5). "An individual who is the spouse of a service member of the United States Armed Forces may claim exemption from jury service for the period during which the individual resides outside of this state or the United States due to the service member's active duty status"; "[t]he spouse . . . must be exempt upon making the request of the court and providing a copy of the service member's orders." MCL 600.1307a(6).

C. Composition of Jury Panel

"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 authorizes "any other fair and impartial method directed by the court or agreed to by the parties." MCR 2.511(A)(4).

1. Number of Jurors

The minimum number of jurors required in a civil case is six, unless the parties agree otherwise. MCL 600.1352; MCL 600.8353; MCR 2.514(A)(1). 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. *Id.*[14] However, by agreement of the parties, the court may allow all of the impaneled jurors to participate in deliberations. *Id.*; MCR 2.514(A)(3).[15]

2. Identity of Jurors

Access to juror personal history questionnaires is governed by court rule and the court's local administrative order. See MCR 2.510(C)(2).

"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

[14]See Section 7.20(K) for discussion of alternate jurors and removal or substitution of a juror at trial.

[15]See Section 7.35(D) for discussion of the number of jurors required to reach a verdict.

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. *Id*.

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*, 233 Mich App 604, 630 (1999).

Juror questionnaires must be kept on file for at least three years, unless the chief judge orders them to be kept longer. MCL 600.1315; MCR 2.510(C)(3). The answers on the juror questionnaires are confidential, unless otherwise ordered by the chief judge. MCL 600.1315.

D. Juror Oath Before Voir Dire[16]

The judge should advise the juror that he or she is about to be sworn in. See M Civ JI 1.04, which provides:

> "I will now ask you to swear or affirm to answer truthfully, fully, and honestly all the questions that you will be asked about your qualifications to serve as a juror in this case. Please stand and raise your right hand.
>
> '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?'"

E. Voir Dire

"Voir dire is the process by which litigants may question prospective jurors so that challenges to the prospective jurors can be intelligently exercised." *Bynum v ESAB Group, Inc*, 467 Mich 280, 283 (2002). Either the court or the lawyers for the parties may conduct voir dire. MCR 2.511(C). If the court examines the prospective jurors, it must permit the attorneys for the parties to ask or submit further questions that the court considers proper. MCR 2.511(C)(1)-MCR 2.511(C)(2). "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, 439 (1939). The court must provide the prospective jurors with sufficient factual

[16]See the Michigan Judicial Institute's *Oaths and Affirmations Table*.

information so they can intelligently answer the voir dire questions. *Kuisel v Farrar*, 6 Mich App 560, 563 (1967).

"Jurors are presumed to be qualified. The burden of proving the existence of a disqualification is on the party alleging it." *Bynum v ESAB Group, Inc*, 467 Mich 280, 283 (2002).[17] "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." MCR 2.511(D). See also MCL 600.1337.

F. Noncompliance with Jury Selection Rules

"Failure to comply with the provisions of [Chapter 13 of the Revised Judicature Act] shall not . . . affect the validity of a jury verdict unless the party . . . claiming invalidity has made timely objection and unless the party demonstrates actual prejudice to his cause and unless the noncompliance is substantial." MCL 600.1354(1).

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 was properly excusable for cause and that the juror's presence on the jury resulted in actual prejudice. *People v Miller*, 482 Mich 540, 561 (2008) (a new trial for a violation of the statutory right to a jury free of convicted felons pursuant to MCL 600.1307a(1)(e) was not warranted where "[the] defendant failed to establish that he was actually prejudiced by the presence of a convicted felon on his jury). The 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*, 482 Mich at 547.

G. Challenges for Cause[18]

Prospective jurors may be challenged for cause under MCR 2.511(E), which states:

> "The parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:

[17] See Section 7.20(A) for information on juror qualification.

[18] See the Michigan Judicial Institute's *Juror Challenge for Cause Flowchart*.

> (1) is not qualified to be a juror[19];
>
> (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.
>
> Exemption from jury service is the privilege of the person exempt, not a ground for challenge."

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." *Id*. "[H]owever, the

[19] See Section 7.20(A) for more information on juror qualification under MCL 600.1307a.

decision to grant or deny a challenge for cause is within the sound discretion of the trial court." *Id*. at 236.

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) (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).

"Where a prospective juror expresses a strong opinion but promises to remain impartial, "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*, 433 Mich at 236-237. "When balancing discretionary power with a litigant's right to a fair trial, a trial judge should, in cases where apprehension is reasonable, err on the side of the moving party." *Id*. at 238.

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, . . . 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*, 433 Mich at 240-241.

H. Peremptory Challenges

A peremptory challenge excuses a juror without cause. MCR 2.511(F)(1). In a civil case, each party typically has three peremptory challenges. MCR 2.511(F)(2). "Two or more parties on the same side

are considered a single party for purposes of peremptory challenges. However, when multiple parties having adverse interests are aligned on the same side, three peremptory challenges are allowed to each party represented by a different attorney, and the court may allow the opposite side a total number of peremptory challenges not exceeding the total number of peremptory challenges allowed to the multiple parties." *Id*.

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(F)(3).

I. Discrimination During Voir Dire

The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination during voir dire. *Batson v Kentucky*, 476 US 79, 89 (1986). See also *Edmonson v Leesville Concrete Co*, 500 US 614, 616 (1991) (extending *Batson* to civil cases and holding that discrimination during civil jury selection is prohibited); *Pellegrino v Ampco Sys Parking*, 486 Mich 330, 338-339 (2010).

MCR 2.511(G)(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 any of those factors for the purpose of achieving a balanced, proportionate, or representative jury in terms of those characteristics is not an excuse or justification for a violation of MCR 2.511(G)(1). MCR 2.511(G)(2).

1. *Batson* Factors

In *Batson v Kentucky*, 476 US 79, 96-98 (1986), the United States Supreme Court set out a three-step process for determining the constitutional propriety of a peremptory challenge in criminal cases. Later, the Michigan Supreme Court stated that there is "no

reason why these standards, developed in the criminal trial context, are not equally applicable in the civil trial context." *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319 n 9 (1996). The factors are discussed throughout this subsection.

a. Prima Facie Showing of Discrimination by the Opponent of the Peremptory Challenge

"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 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." *People v Knight*, 473 Mich 324, 336 (2005) (internal citations omitted), habeas corpus gtd *Rice v White*, 660 F3d 242 (CA 6, 2011).[20]

In the first *Batson* step, the opponent of the challenge is not required to actually prove discrimination. *Knight*, 473 Mich at 336. Rather, "the sum of the proffered facts [must] give[] rise to an *inference* of discriminatory purpose[.]" *Id*. at 336-337 (quotation marks and citation omitted). See also *People v Armstrong*, 305 Mich App 230, 238 (2014). In *Armstrong*, the Court of Appeals concluded that the defendant, a member of a cognizable racial group, failed to demonstrate an inference that the challenge excluded a prospective juror on the basis of race 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 234-235, 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*. at 239 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*.

[20] Although the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to the defendant and vacated his conviction under 28 USC 2254(d)(2), the legal principles cited by *Knight*, 473 Mich at 335-348, were not implicated by the Sixth Circuit's decision in *Rice*, and they remain good law. See *Rice*, 660 F3d at 253-254 (reiterating the *Batson* process detailed in *Knight*, 473 Mich at 335-338).

b. Race-Neutral Explanation for the Peremptory Challenge by the Challenger

"Once the [opponent of the challenge] makes a prima facia showing, the burden shifts to the [challenger] to come forward with a neutral explanation for challenging [the juror]." *Batson v Kentucky*, 476 US 79, 97 (1986). *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.* "A neutral explanation . . . 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." *People v Knight*, 473 Mich 324, 337 (2005) (quotation marks and citation omitted), habeas corpus gtd *Rice v White*, 660 F3d 242 (CA 6, 2011).[21]

c. Determination by the Trial Court Whether Opponent of the Challenge has Established Purposeful Discrimination

"Finally, if the proponent [of the challenge] provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext 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." *People v Knight*, 473 Mich 324, 337-338 (2005) (internal citations omitted), habeas corpus gtd *Rice v White*, 660 F3d 242 (CA 6, 2011).[22] "In making a finding at step three, the trial court is required to assess the plausibility of the race-neutral explanation 'in light of *all* evidence with a bearing

[21] Although the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to the defendant and vacated his conviction under 28 USC 2254(d)(2), the legal principles cited by *Knight*, 473 Mich at 335-348, were not implicated by the Sixth Circuit's decision in *Rice*, and they remain good law. See *Rice*, 660 F3d at 253-254 (reiterating the *Batson* process detailed in *Knight*, 473 Mich at 335-338).

[22] Although the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to the defendant and vacated his conviction under 28 USC 2254(d)(2), the legal principles cited by *Knight*, 473 Mich at 335-348, were not implicated by the Sixth Circuit's decision in *Rice*, and they remain good law. See *Rice*, 660 F3d at 253-254 (reiterating the *Batson* process detailed in *Knight*, 473 Mich at 335-338).

on it.'" *People v Tennille*, 315 Mich App 51, 64 (2016), quoting *Miller-El v Dretke*, 545 US 231, 251-252 (2005).

2. Caselaw

a. Raising a *Batson* Challenge

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).

b. Conducting a *Batson* Hearing

"[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." *People v Knight*, 473 Mich 324, 339 (2005), habeas corpus gtd *Rice v White*, 660 F3d 242 (CA 6, 2011).[23] 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*, 473 Mich at 347.

Committee Tip:

The best practice is to excuse the jury while conducting a Batson hearing.

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c. Improper Application of the *Batson* Factors

In *People v Tennille*, 315 Mich App 51, 62 (2016), the trial court "failed to afford defense counsel an opportunity to rebut the prosecutor's stated reason for dismissing [two African-American] jurors" and failed to make any "findings of fact regarding whether the prosecutor's justification for the strikes[, i.e., the jurors' show of

[23] Although the Sixth Circuit Court of Appeals affirmed the federal district court's grant of a conditional writ of habeas corpus to the defendant and vacated his conviction under 28 USC 2254(d)(2), the legal principles cited by *Knight*, 473 Mich at 335-348, were not implicated by the Sixth Circuit's decision in *Rice*, and they remain good law. See *Rice*, 660 F3d at 253-254 (reiterating the *Batson* process detailed in *Knight*, 473 Mich at 335-338).

disgust in reaction to another juror's assertions that he would give a police officer's testimony more credence than that of another witness,] seem[ed] credible under all of the relevant circumstances, including whether the jurors actually exhibited the expressions claimed and whether the averred reactions were the real reasons for the strikes." The trial court "improperly conflated steps two and three of the *Batson* framework," by perfunctorily "stat[ing] that it 'accepted' the prosecutor's explanation as 'a valid race neutral reason'" to deny the challenge, thus, the trial court did not reach step three. *Id*. at 62, 68, 71, 73 (because "[the] record [did] not permit a conclusion that the prosecutor's stated reason for the strikes was nondiscriminatory," it was necessary to "remand to the trial court for an evidentiary hearing during which the trial court [was required to] conduct the third-step [*Batson*] analysis it omitted at defendant's trial).

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." *People v Bell*, 473 Mich 275, 293 (2005). 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. *Id*. at 293-295.

d. Challenges Based on a Juror's Demeanor

"When a prosecutor's sole explanation for a strike resides in a juror's appearance or behavior, the third step bears heightened significance. Explanations for peremptory challenges based solely on a juror's demeanor are particularly susceptible to serving as pretexts for discrimination." *People v Tennille*, 315 Mich App 51, 65 (2016) (quotation marks and citation omitted).

The prosecution's proffer of a pretextual explanation gives rise to an inference of discriminatory intent. *Snyder v Louisiana*, 552 US 472, 485 (2008). At that stage, the trial court must weigh the credibility of the prosecutor by considering "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." *Id*. at 477.

In *Snyder*, 552 US at 478, 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. 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 [that the prosecutor declined to use a peremptory strike on a white juror with more pressing work and family obligations]—the record [did] not show that the prosecution would have pre-emptively challenged [the juror] based on his nervousness alone." *Id*. at 477-483, 485.

In *Thaler v Haynes*, 559 US 43, 44 (2010), two different judges presided at different stages of voir dire, and the judge who decided the peremptory challenges was not the same judge who presided when the attorneys questioned the prospective jurors.[24] 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 United States Supreme Court disagreed with defendant's argument on appeal that "'a trial judge who did not witness the actual voir dire cannot, as a matter of law, fairly evaluate a *Batson* challenge,'" stating:

> "[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

[24]See Section 7.20(L) regarding substitution of judges after voir dire.

> 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 45, 48.

e. Denial of a Peremptory Challenge

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 v Ampco Sys Parking*, 486 Mich 330, 347 (2010). 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. *Id*. 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. *Id*. 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.

f. Proper Exercise of Peremptory Challenge

Defense counsel's use of "a peremptory challenge to exclude . . . a pregnant, African-American woman" "was not inherently discriminatory, [and survived] plaintiff's *Batson* challenge" where the "case involved the tragic death of a seven-month-old baby," and "[t]he questions that defense counsel asked during voir dire show[ed] that he was trying to impanel a jury that would put aside emotions when deciding the case." *Carlsen Estate v Southwestern Mich Emergency Servs, PC*, 338 Mich App 678, 690, 691, 692 (2021) (defense counsel "asked at least seven potential jurors—male and female—whether they made decisions based more on emotion or on logic"). "Furthermore, defense counsel exercised only two peremptory challenges, both of which were used on jurors who admitted to varying degrees that emotions might affect their deliberations" and "[d]efense counsel's exercise of peremptory strikes [did] not show a pattern of striking jurors on the basis of their gender . . . but on counsel's estimation of whether there were any indications that a juror, for whatever reason, might not view the facts of the case with the level of dispassion desired by the defense." *Id*. at 692.

J. Juror Oath Following Selection[25]

After being selected, the clerk of the court swears in the entire jury. See MCR 2.511(I)(1), which 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.'"

[25]See the Michigan Judicial Institute's *Oaths and Affirmations Table*.

See also M Civ JI 1.10, which provides essentially the same language.

Although the juror oath following jury selection is mandatory, see MCR 2.511(I)(1), failure to use the precise language of MCR 2.511(I)(1) will not automatically require reversal of a jury verdict, see *People v Cain*, 498 Mich 108, 128-129 (2015) (the mistaken use of the juror oath given before voir dire "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," 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"). Although the oath that was administered "was not a perfect substitute for the oath required by [MCR 2.511(I)(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").

K. Alternate Jurors and Removal or Substitution of a Juror at Trial

The court may direct that alternate jurors be impaneled to sit. MCR 2.511(B). "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." *Id*. 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.*

L. Substitution of Judge

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).

M. Standard of Review

A judge's decision on the scope of voir dire is reviewed for an abuse of discretion. *White v City of Vassar*, 157 Mich App 282, 289 (1987).

A trial court's underlying factual findings regarding the first *Batson* step (whether the opponent of the challenge has made a prima facie showing of discrimination) are reviewed for clear error, and questions of law are reviewed de novo. *People v Knight*, 473 Mich 324, 345 (2005). A trial court's determination regarding the second *Batson* factor (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law) is reviewed de novo. *Id*. A trial court's determination regarding the third *Batson* step (whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination) is reviewed for clear error." *Id*.

7.21 Conducting a Jury 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).[26]

7.22 Opening Statements

Opening statements are meant to help jurors understand the viewpoints and claims of the parties. See 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." MCR 2.513(C). See also MCR 2.507(A). Parties have the right to present opening statements. See MCR 2.513(C); MCR 2.507(A). However, the parties and the court may agree otherwise. See MCR 2.513(C).

The court may impose reasonable time limits on opening statements. MCR 2.513(C). See also MCR 2.507(F). However, the court "must give adequate time for argument, taking into consideration the complexity of the action." *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 625 (1992). The trial court's decision to limit the time allotted for statements or arguments is reviewed for an abuse of discretion. *Id*.

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

[26]See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 1, for discussion of limitations on evidence.

(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. *Id*. at 503-504.

The trial court has discretion to determine what constitutes a fair and proper opening statement. *Hunt v Freeman*, 217 Mich App 92, 97 (1996).“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. *Id*. at 714.

A. 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. *Id*. at 327-328. Because the statements were aimed at arousing the jury’s bias and prejudice, and the trial court did not give a timely curative instruction, the *Kakligian* Court concluded that the plaintiff was entitled to a new trial. *Id.* at 329.

B. Motion on Opening Statement

A motion for directed verdict may be based upon the insufficiencies of the opposing party’s opening statement. *Jones v Hicks*, 358 Mich 474, 485 (1960). See Section 7.32(C) for additional information on motions for directed verdict following opening statement.

Similarly, 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). See Section 7.10 for additional information on mistrial.

7.23 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.

7.24 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). See also MCR 2.507(F). However, the court "must give adequate time for argument, taking into consideration the complexity of the action." *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 625 (1992).

Either side may waive its right to present a closing argument. MCR 2.513(L). See also MCR 2.507(E). However, it is reversible error to deny a party's right to closing argument. *United Coin Meter Co v Lasala*, 98 Mich App 238, 242 (1980).

"[A] request for curative instructions or an objection to the instructions is necessary to preserve the issue of the propriety of a closing argument." *Danaher v Partridge Creek Country Club*, 116 Mich App 305, 317 (1982).

A. Scope 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) (finding that deposition testimony that was not part of the record was not a proper subject of summation). Reversal may be required if a curing instruction is not sufficient to counter "either a deliberate and continuous course of conduct or an outrageous statement." *Id*.

In making a closing argument, "counsel is permitted to draw reasonable inferences from the testimony."*In re Miller*, 182 Mich App 70, 77 (1990) (an attorney's use of the phrases "I believe" and "I have to conclude," was permissible where the attorney "did not depart from stating what the evidence showed and what inferences could be drawn from the evidence"). "[The] [d]efendant ha[s] the right to ask the jury to believe his case, however improbable it may . . . [seem]." *Hunt v Freeman*, 217 Mich App 92, 99 (1996). 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).

B. Remarks Designed to Invite Sympathy From Jury

It is reversible error for the defense to ask the jurors to consider the effect that their judgment will have on them personally. *Duke v American Olean Tile Co*, 155 Mich App 555, 564 (1986) (plaintiff's counsel suggested that family members of the jurors may be injured by the defendant's tile product in the future if the jury returned a verdict favorable to defendant). However, an isolated invitation to the jury to put itself in the defendant's shoes "without a studied purpose to prejudice the jury" is harmless error. *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).

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) (citation omitted), 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).

C. 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. *Id*. 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.

D. 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.'" (Second

and third alterations in original.) 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. *Id.* (alterations in original).

7.25 Rebuttal

After opposing counsel's final argument, the party who first presented evidence is entitled to present a rebuttal argument to the court or jury that is limited to the issues raised in the preceding argument. MCR 2.507(E); MCR 2.513(L).

7.26 Summation of Evidence and Final Instructions

"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). See M Civ JI 3.17, which provides instructions to the jury regarding the court's summation of the evidence.

"After closing arguments are made or waived, the court must orally instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may orally instruct the jury before the parties make closing arguments." MCR 2.513(N)(1).[27]

7.27 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

[27] See Section 7.33(D) for additional discussion of final jury instructions.

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.

7.28 Jury Note Taking

"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." MCR 2.513(H). See also M Civ JI 2.13.

7.29 Juror Discussion

During a civil trial, 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.*

7.30 Jury Questions

The court may allow the jury to ask questions of any witness. MCR 2.513(I).

If the court permits jurors to ask questions, it must inform the jury "of the procedures to be followed for submitting questions to witnesses." MCR 2.513(I). The court must address any questions to a witness on the juror's behalf, after ensuring "that inappropriate questions are not asked, and that the parties have [had] an opportunity outside the hearing of the jury to object to the questions." *Id.* See M Civ JI 2.11 for how to instruct the jury when allowing them to question a witness.

7.31 Jury View

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 "an 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.*

The purpose of a jury view is not to furnish new evidence, but rather 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 decision whether to permit a jury view is reviewed for an abuse of discretion. *West v Livingston Co Rd Comm*, 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. *Id*.

7.32 Directed Verdict[28]

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

"When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441 (2011). "A directed verdict is appropriate where reasonable minds could not differ on a factual question." *Id*. 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).

C. Motion on Opening Statement

Although a motion for directed verdict may be based upon the insufficiencies of the opposing party's opening statement, *Jones v Hicks*, 358 Mich 474, 485 (1960), "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

[28] For more information on directed verdicts in a bench trial, see Section 7.14.

establish a plaintiff's right to recover," *Young v Barker*, 158 Mich App 709, 720 (1987). "The specific test to be used in examining the opening statement is whether it encompasses all of the ultimate facts proposed to be proven and essential to plaintiff's cause of action." *Fenton Country House, Inc v Auto-Owners Ins Co*, 63 Mich App 445, 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. 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 trial court's factual findings are reviewed for clear error. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639 (1995) (equitable action).

7.33 Jury Instructions

A. Pretrial Instructions

"After the jury is sworn and before evidence is taken, the court shall orally 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 orally instructed about the elements of all civil claims . . . , as well as the legal presumptions and burdens of proof. The court shall also provide each juror with a written copy of such instructions. MCR 2.512(D)(2) [(requiring that pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions, or a predecessor committee, be given)] does not apply to such preliminary instructions." MCR 2.513(A).[29]

B. 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

[29]See Section 7.33(E) for additional information on model civil jury instructions.

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.*

C. Request for Instructions

Parties must file a written request for instructions within a time period reasonably directed by the court. MCR 2.512(A)(1). If a time has not been directed by the court, a written request for instructions must be made at or before the close of the evidence. *Id*. See also MCR 2.513(N)(1). "A copy of the requested instructions must be served on the adverse party in accordance with MCR 2.107." MCR 2.512(A)(3). "The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury." MCR 2.512(A)(4).

D. Final Instructions[30]

1. Required Instructions

The trial court must orally 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 orally 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*.

MCR 2.513(N)(1) gives "the trial court broad authority to carry out its duty to instruct the jury properly, and this authority extends to instructing the jury even during deliberations." *People v Craft*, 325 Mich App 598, 607 (2018). "There is nothing in the court rules that precludes the trial court from supplementing its original instructions . . ., nor is there anything in the rules to suggest that a party's acquiescence to the original instructions [bars] the trial court [from] supplementing its instructions." *Id*.

2. Soliciting Questions from the Jury

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." MCR 2.513(N)(2). In addition, after orally delivering 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.*

[30]See the Michigan Judicial Institute's *Final Matters Before Releasing the Jury to Deliberate Checklist*.

If questions arise during deliberation, "the court and the parties shall convene, in the courtroom or by other agreed-upon means," so that the question may be read into the record and the attorneys can offer suggestions for an appropriate response. MCR 2.513(N)(2). The court has discretion whether to provide the jury with a specific response, but 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.*

3. 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.*

4. 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).[31]

Committee Tip:

Before releasing the jury to deliberate, it may be helpful to review the verdict form with jurors and inquire if they have any questions regarding the form. The court will also need to address the release and instruction of alternate jurors. See Section 7.20(K) for more information.

The court should inquire if the parties and their counsel are satisfied with the instructions on the record. Express approval of the instructions serves as a waiver to any error upon appellate review. See People v Kowalski, *489 Mich 488, 504-505, (2011).*

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[31] See Section 7.34(D) for discussion of a hung jury.

E. 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."[32]

Whether a model jury instruction is applicable and accurate is a matter within the trial court's discretion. *Alfieri v Bertorelli*, 295 Mich App 189, 197 (2012).

A trial court's failure to give a requested, applicable, and accurate model jury instruction does not amount to reversible error unless the noncompliance results 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) (quotation marks omitted).[33]

If the court decides to give an instruction when no instruction is recommended by the committee, 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).

F. Supplemental 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

[32] MCR 2.512(D)(2) does not apply to preliminary jury instructions. MCR 2.513(A).

[33] The *Johnson* Court considered a violation of MCR 2.516(D)(2), which is substantially similar to current MCR 2.512(D)(2).

> must be concise, understandable, conversational, unslanted, and nonargumentative."

It is within the trial court's discretion whether a supplemental instruction requested by a party is applicable and accurate. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 451 (2008). However, "when the [model] jury instructions do not accurately cover an area and a party requests a supplemental instruction, the trial court is obligated to give the instruction if it properly informs the jury of the applicable law and is supported by the evidence." *Id*.

G. Objections to Instructions

A party may object to the giving or the failure to give a jury instruction, "only if the party objects 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 "stat[e] specifically the matter to which the party objects and the grounds for the objection." *Id*. The court must give the objecting party the opportunity to make the objection without the jury present. *Id.*

The "only if" language in MCR 2.512(C) "does not act as a bar to proceedings in the trial court, but rather as a restriction on appeal." *People v Craft*, 325 Mich App 598, 605 (2018). Accordingly, "a party can alter its position on the appropriateness of jury instructions [during trial court proceedings] when a question is subsequently raised," and "is not barred from asking for supplemental instructions even if the party . . . earlier acquiesced to the original . . . instructions." *Id*. at 600, 605 (finding the prosecutor did not waive, and was not estopped, from arguing in favor of supplemental instructions after approving the original instructions).

H. Statement of Issues and Theory of Case

"[A]fter the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted." MCR 2.512(A)(2). "The court need not give the statements of issues or theories of the case in the form submitted" by the parties, so long as "the court presents to the jury the material substance of the issues and theories of each party." MCR 2.512(A)(5).

I. Standard of Review

Claims of instructional error are reviewed de novo, with the instructions being examined as a whole to determine if reversible error occurred. *Case v Consumers Power Co*, 463 Mich 1, 6 (2000). "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id*.

"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), aff'd in part, rev'd in part on other grounds 439 Mich 408 (1992).[34] "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).

7.34 Jury Issues Arising During Deliberations

A. Communication with the Jury

There are three categories of communication with a deliberating jury (substantive, administrative, and housekeeping). *People v France*, 436 Mich 138, 142-143 (1990).[35] 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 occurred in open court and was recorded. *Salvatore v 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 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*, 372 Mich at 21.

[34]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[35]The Michigan Supreme Court stated that the *France* holding applies to both criminal and civil proceedings. *France*, 436 Mich at 142 n 3.

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." *People v France*, 436 Mich 138, 143 (1990).

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." *People v France*, 436 Mich 138, 143 (1990).

Instruction from the trial court to the jury on how to complete the verdict form is an administrative communication. *Meyer v City of Center Line*, 242 Mich App 560, 565 (2000).

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." *People v France*, 436 Mich 138, 143 (1990).

Committee Tips:

In anticipation of questions, provide the jury with envelopes and paper for questions.

When preparing a written response to a written jury question:

• 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.

B. Materials in Jury Room

The court *must* allow the jurors to take their notes (if they were permitted to take notes)[36] and final jury instructions[37] 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).[38]

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 created a real and substantial possibility [that] could have affected the jury's verdict." *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 627 (2009) (quotation marks and 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." *Id*. 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, time line of events, 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. *Id.* at 627-628.

C. 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

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[36] See Section 7.28 for information on jury note taking.

[37] See Section 7.33(D)(3) for information on providing copies of final jury instructions to the jurors.

[38] See Section 7.27 for additional information on reference documents.

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, 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).

D. 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).

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) (res judicata does not bar the relitigation of a claim following a mistrial[39]).

Committee Tips:

If a jury appears to be deadlocked, 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?*

[39]See Section 2.16 for further discussion of res judicata.

• Do the jurors appear to have fundamental differences that cannot be resolved?

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.

7.35 Verdict[40]

A. Number

When a jury trial is requested in a civil action, "the trial shall be by a jury of 6." MCL 600.1352. "Except in cases involving the possible commitment of a person to a mental, correctional or training institution, a verdict in any civil case . . . shall be received when 5 jurors agree." *Id*. The parties may stipulate to a jury of all jurors impaneled, to a jury of less than six, or a verdict by an agreed majority. MCR 2.514(A). Where a less than a unanimous jury is permitted, the same jurors who agree on liability must also agree on damages. *Klanseck v Anderson Sales & Svc, Inc*, 136 Mich App 75, 84 (1984).[41]

For information on handling a hung jury, see Section 7.34(D).

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 2.514(B)(2). "If the number of jurors agreeing is less than required, the jury must be sent back for further deliberation[.]" MCR 2.514(B)(3).

"[O]nce a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict." *Put v FKI Indus, Inc*, 222 Mich App 565, 569 (1997). However, before being discharged, a jury may change the form and substance of a verdict to coincide with its intention; the jury may be allowed to reconvene where, after the jury has announced its verdict, a poll of the jurors

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[40] See the Michigan Judicial Institute's *Verdict Checklist*.

[41] The *Klanseck* Court considered former GCR 1963, 512.1, which provided "in civil cases, tried by six jurors, a verdict shall be received when five jurors agree." *Klanseck*, 136 Mich App at 84. The language of GCR 1963, 512.1 is substantially similar to MCL 600.1352.

indicates that they might be confused. *Id*. at 569-570. Allowing the jury to resume deliberations furthers the purpose of MCR 2.514(B)(2). *Put,* 222 Mich App at 570.[42]

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.

C. Special Verdict

"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 and evidence; or
>
> (3) the issues by another method, and require the written findings it deems most appropriate." MCR 2.515(A).

The court must adequately instruct the jury on the matter submitted so that the jury is able to make findings on each issue. MCR 2.515(A).

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 with respect to an issue omitted without a demand. 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.*

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[42] 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.

Unlike a general verdict, which "is either all wrong or all right, because it is an inseparable and inscrutable unit," errors in a special verdict can be "localized so that the sound portions of the verdict may be saved and only the unsound portions [are] subject to redetermination through a new trial." *Sudul v Hamtramck*, 221 Mich App 455, 458-459 (1997) (quotation marks and citation omitted).

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) (quotation marks and citation omitted). 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) (quotation marks and citation omitted). "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).

A verdict is not inconsistent if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury. *Lagalo*, 457 Mich at 282.

Chapter 8: Posttrial Proceedings

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8.1 Judgments

A. Entry of Judgment (Order)

Except as otherwise provided in MCR 2.602 and MCR 2.603, "all judgments and orders must be in writing, signed by the court, and dated with the date they are signed." MCR 2.602(A)(1). The date the judgment or order is signed is the date of entry, MCR 2.602(A)(2), and the signed judgment or order must be retained in the case file, MCR 2.602(D). "Where electronic filing is implemented, judgments and orders must be issued under the seal of the court." MCR 2.602(A)(4).

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)(3). "Such a statement must also appear on any other order that disposes of the last pending claim and closes the case." *Id.*

Committee Tip:

Review a final order or judgment before signing and entering it to make sure the document indicates whether it resolves the last pending claim and closes the case. This will assist the clerk's office in knowing how to process the order or judgment prevent the need to enter a separate administrative order closing the case in the future.

With the exception of default judgments[1] governed by MCR 2.601(B), "every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings." MCR 2.601(A).

The court must enter a judgment or 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, 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

[1] See Section 4.11 for information regarding the entry of defaults and default judgments.

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 judgment or order if no written objections have been filed within 7 days after service of notice, as long as 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). A motion fee may not be charged. *Id*.

While "a court speaks through its written orders and not its oral pronouncements, the orders and judgments arising from MCR 2.602(B)(3) are to comport with [the court's] earlier oral pronouncements." *Jones v Jones*, 320 Mich App 248, 261 n 5 (2017) (internal citation omitted). Accordingly, "if the court modifies what it previously stated orally, some type of explanation, at a minimum, would be warranted." *Id.* (holding that the trial court erred by entering the plaintiff's proposed judgment, which "did not comport with [the court's] earlier oral ruling").

MCR 2.602(B)(3) "only comes into effect after the trial court actually grants a judgment." *Hein v Hein*, 337 Mich App 109, 123 (2021). "Its plain terms provide that it is a mechanism for the entry of an order or judgment reflecting a decision made by the trial court. Thus, it is definitionally not a mechanism for entering a consent judgment, nor can it be a mechanism for entering an order that is not an effectuation of a trial court's ruling." *Id*. at 123-124.

A party objecting to the entry of a proposed judgment under MCR 2.602(B)(3) is not required to provide a transcript of the prior proceeding. *Jones*, 320 Mich App at 261 (holding that the trial court erred by rejecting the defendant's objections to the proposed judgment based on the lack of a transcript and noting that "given the compressed timing requirements under [MCR 2.602], it is doubtful that timely obtaining a copy of a transcript would be possible in most circumstances").

B. 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(E)(1).

C. 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). However, MCR 7.208(A) and MCR 7.208(C) govern procedures for correcting errors once a claim of appeal is filed. MCR 2.612(A)(2).

Judgments or orders may 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. *Id*. at 241. The plaintiff 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 timely enter a judgment. *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.*

"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." *Id*.

D. Relief from Judgment

A party may seek relief from a judgment or order on the grounds set forth in MCR 2.612(C). See Section 4.12(C) for more information on setting aside a final judgment under MCR 2.612.

E. Enforcement of Judgment

"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 installment payments, garnishment, attachment, and judgment debtor discovery proceedings. See, e.g., MCL 600.6107; MCL 600.6201 *et seq.*; MCR 3.101; MCR 3.103; 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).[2]

F. Satisfaction of Judgment

A judgment may be satisfied in whole or in part by:

- filing with the clerk a signed and acknowledged satisfaction of judgment by the party or parties, or their attorneys, in whose favor the judgment was rendered;
- for money judgments only, paying the judgment, interest, and costs to the clerk; or
- filing a motion and having an order entered that the judgment has been satisfied.[3] 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.

[2] "[A] garnishee defendant is not permitted to file an objection to a writ of garnishment under the Michigan Court Rules." *Velocity MRS Fund IV v Nextgen Pain Assoc & Rehab*, ___ Mich App ___, ___ (2023).

[3] The court must hear proofs to determine whether to enter the order. MCR 2.620.

G. Renewal of Judgment

Judgments from courts of record must be renewed after 10 years, and 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).

8.2 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).

Timing. A motion under MCR 2.610 or MCR 2.611 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

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. *Wilkinson v Lee*, 463 Mich 388, 391 (2000). "If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 605-606 (2016) (alteration, quotation marks, and citation omitted). A party's motion for JNOV is properly denied when judgment in that party's favor is "not required as a matter of law based on the jury's findings of fact[.]" *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684, 718 (2019), rev'd in part on other grounds 507 Mich 272 (2021).[4]

[4]For more information on the precedential value of an opinion with negative subsequent history, see our note.

C. Failure to Timely Raise a Request for JNOV

Failure to request JNOV at the trial court renders the issue unpreserved for appeal. *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684, 718 (2019), rev'd in part on other grounds _507 Mich 272 (2021).[5] 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 v Jacobs*, 429 Mich 222, 230 (1987).

D. Motion for New Trial Standard

"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).[6]

[5]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[6]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).

A party is not entitled to a new trial unless the party proves one of the grounds listed in MCR 2.611(A)(1). *Kelly v Builders Square, Inc*, 465 Mich 29, 38-39 (2001) (the trial court abused its discretion in granting the plaintiff's motion for a new trial upon a finding that the jury's "failure to award pain and suffering damages was 'inconsistent' and 'incongruous,'" because "MCR 2.611(A)(1) does not identify inconsistency or incongruity as a ground for granting a new trial").

"There is a distinction between the requirements of MCR 2.611(A)(1)(f) and [MCR 2.611(A)(1)(h)]"; under MCR 2.611(A)(1)(f), a trial court may grant a new trial when the substantial rights of a party are substantially affected by "material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." *Int'l Outdoor, Inc v SS Mitx, LLC*, ___ Mich App ___, ___ (2023) (cleaned up). In contrast, MCR 2.611(A)(1)(h) provides that a trial court may grant a new trial on the basis of "a ground listed in MCR 2.612 warranting a new trial." *Int'l Outdoor*, ___ Mich App at ___ (cleaned up). "Fraud is a ground listed in MCR 2.612 justifying relief from a judgment, and thus falls into the category of MCR 2.611(A)(1)(h), not MCR 2.611(A)(1)(f)." *Int'l Outdoor*, ___ Mich App at ___ (holding that "MCR 2.612(C)(1)(c) does not impose a requirement of due diligence upon a party seeking relief from judgment on the basis of fraud, misrepresentation, or other misconduct of an adverse party.")

"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
>
> (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).

A court's decision whether to grant a motion for new trial under MCR 2.611 is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34 (2001).

8.3 Remittitur and Additur

Committee Tip:

Before conducting a remittitur or additur hearing, the court may wish to consider submitting a case to post-verdict mediation in an attempt to allow the parties to resolve the judgment amount without court intervention.

A. Procedure and Timing

If the only error in the trial is that the amount of damages are 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 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:

"• whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact;

- whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and

- whether the amount actually awarded is comparable with awards in similar cases within the state and in other jurisdictions." *Palenkas*, 432 Mich at 532-533 (bullets added).

If money damages awarded by a jury are grossly excessive as a matter of law, the judge may order remittitur, a complete new trial, or a trial limited to the issue of damages. MCR 2.611(A)(1)(c); MCR 2.611(E)(1). See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 763-764 (2004), for an analysis of an excessive verdict for which relief was permitted under MCR 2.611(A)(1)(c).

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 (10th ed).

"The proper consideration when reviewing a grant or denial of additur is whether the jury award is supported by the evidence." *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 608 (1997). "The trial court's inquiry is limited to objective considerations regarding the evidence adduced and the conduct of the trial." *Id*.

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 either remittitur or additur is reviewed for an abuse of discretion. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531 (1989); *Hill v Sacka*, 256 Mich App 443, 460 (2003).

8.4 Sanctions

"[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." *Id*. at 640 (quotation marks and citation omitted). In addition, MCL 600.611 provides circuit courts with the "'jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction

and judgments.'" *Persichini*, 238 Mich App at 640. A circuit court also "has inherent authority to impose sanctions on litigants appearing before it regardless of whether the court also rules it lacks jurisdiction over a complaint." *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 731 (2017).

A motion for sanctions should be considered timely filed if, in the trial court's discretion, "the motion was filed within a reasonable time after the prevailing party was determined." *In re Attorney Fees and Costs (Septer)*, 233 Mich App 694, 699 (1999).

A trial court may not delegate its sanction-imposing authority to its court clerks. *Credit Acceptance Corp v 46th Dist Court*, 481 Mich 883 (2008) (sanctions imposed under MCR 1.109[7] 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).

Types of sanctions include attorney fees, costs, and involuntary dismissal.[8]

8.5 Costs

A. Authority

"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). "The power to tax costs is wholly statutory, and the prevailing party cannot recover such expenses absent statutory authority." *Guerrero v Smith*, 280 Mich App 647, 670 (2008).

B. Rules for Determining the Prevailing Party

"If separate judgments are entered under MCR 2.116 or [MCR] 2.505(A) and the plaintiff prevails in one judgment in an amount and under circumstances which would entitle the plaintiff to costs, he or she is deemed the prevailing party. Costs common to more than one judgment may be allowed only once." MCR 2.625(B)(1).

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[7] Effective September 1, 2018, ADM File 2002-37 deleted MCR 2.114(E) that was discussed in the *Credit Acceptance Corp* decision and created MCR 1.109(E), which now incorporates the rule that allows the court to impose sanctions for filing documents with the court that have improper signatures. See MCR 1.109(E) for guidance on what constitutes a proper signature.

[8] See Section 8.6 on attorney fees, Section 8.5 on costs, and Section 4.10(E) on involuntary dismissal.

"In an action involving several issues or counts that state different causes of actions or different defenses, the party prevailing on each issue or count my be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party." MCR 2.625(B)(2).

"If there are several defendants in one action, and judgment for or dismissal of one or more of them is entered, those defendants are deemed prevailing parties, even though the plaintiff ultimately prevails over the remaining defendants." MCR 2.625(B)(3).

Because the plaintiff is entitled to plead alternative claims pursuant to MCR 2.111(A)(2), the plaintiff needs to prevail on only one theory when alternative theories are pleaded to be considered the prevailing party. *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 560-561 (1999).

In order to be considered the *prevailing party*, the party must "show at the very least that he improved his position by the litigation." *Ullery v Sobie*, 196 Mich App 76, 82 (1992). Similarly, "[a]n appellant in the circuit court who improves his or her position on appeal is deemed the prevailing party." MCR 2.625(B)(4).

C. Procedure for Taxing Costs at the Time of Judgment

"Costs may be taxed by the court on signing the judgment, or may be taxed by the clerk . . . ." MCR 2.625(F)(1).

Where the trial court signs the judgment as prescribed under MCR 2.625(F)(1), a party entitled to costs is not required to file a bill of costs under MCR 2.625(G). *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429 (1996).

When costs are to be taxed by the clerk, the party entitled to costs must present a bill of costs 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).[9] "Failure to present a bill of costs within the time prescribed constitutes a waiver of the right to costs." *Id*. A copy of the bill of costs must be immediately served on the other party. *Id*. 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, were not necessary to be performed." MCL 600.2461. The clerk's action on the bill of costs is

[9]See Section 8.5(D) for additional information on bill of costs.

reviewable by the trial court on the motion of an affected party if the motion is filed within 7 days of notice of the taxing of costs being sent. MCR 2.625(F)(4). Upon review, the court may only consider "those affidavits or objections that were presented to the clerk[.]" *Id*.

Under MCR 2.625(F), "only the failure to present a bill of costs to the clerk within the time prescribed constitutes a waiver of the right to costs." *Wolfenbarger v Wright*, 336 Mich App 1, 31-32 (2021). While a "failure to immediately serve the bill of costs on [the opposing party] undoubtedly constitutes noncompliance with" MCR 2.625(F)(2), "the failure to *serve* [the opposing party does not] constitute[] a failure to *present*." *Wolfenbarger*, 336 Mich App at 31. "Therefore, because the court rule only provides for a waiver upon the failure to timely present the bill of costs, it should not be read to also allow for waiver for failing to satisfy *other* aspects of the court rule." *Id*. at 31-32 (finding the waiver provision inapplicable where plaintiffs failed to serve the defendant with a copy of the bill of costs but they did timely present the bill of costs to the clerk).

Generally, a trial court should hold an evidentiary hearing when there is a challenge to the reasonableness of the costs requested. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691 (2002). However, if the parties have created a sufficient record to review the issue, an evidentiary hearing is not required. *Id*.

D. Bill of Costs

Other than for fees to officers for services rendered, each item claimed in a bill of costs must be particularly specified. MCR 2.625(G)(1). The bill of costs must be supported by a verified[10] statement, which indicates that:

> "(a) each item of cost or disbursement claimed is correct and has been necessarily incurred in the action, and
>
> (b) the services for which fees have been charged were actually performed." MCR 2.625(G)(2).

Claims for witness fees must be supported with an affidavit stating the distance traveled and the days actually attended. MCR 2.625(G)(3). The affidavit must indicate the days the party actually testified as a witness if the fees claimed are for a party acting as a witness. *Id*.

[10] See MCR 1.109(D)(3) for verification requirements.

E. Procedure for Taxing Costs and Fees After Judgment

"A judgment creditor considered a prevailing party to the action under [MCR 2.625(B)] may recover from the judgment debtor(s) the taxable costs and fees expended after a judgment is entered, including all taxable filing fees, service fees, certification fees, and any other costs, fees, and disbursements associated with postjudgment actions as allowed by MCL 600.2405." MCR 2.625(K)(1).[11]

"Until the judgment is satisfied, the judgment debtor may serve on the judgment creditor a request to review postjudgment taxable costs and fees.

> (a) Within 28 days of receipt from a judgment debtor of a request to review postjudgment taxable costs and fees, the judgment creditor shall file with the court a memorandum of postjudgment taxable costs and fees and serve the same upon the judgment debtor. A memorandum of postjudgment taxable costs and fees shall include an itemized list of postjudgment taxable costs and fees. The memorandum must be verified by oath under MCR 1.109(D)(3).
>
> (b) Within 28 days after receiving the memorandum of postjudgment taxable costs and fees from the judgment creditor, the judgment debtor may file a motion to review postjudgment taxable costs and fees. Upon receipt of a timely motion, the court shall review the memorandum filed by the judgment creditor and issue an order allowing or disallowing the postjudgment costs and fees. The review may be conducted at a hearing at the court's discretion. If the court disallows the postjudgment costs and fees or otherwise amends them in favor of the judgment debtor, the court may order the judgment creditor to deduct from the judgment balance the amount of the motion fee paid by the judgment debtor under this rule.
>
> (c) The judgment creditor shall deduct any costs or fees disallowed by the court within 28 days after receipt of an order from the court disallowing the same.
>
> (d) Any error in adding costs or fees to the judgment balance by the judgment creditor or its attorney is not actionable unless there is an affirmative finding by the

[11] See Section 8.5(G) for more information on what items are allowable as costs/fees.

court that the costs and fees were added in bad faith." MCR 2.625(K)(2).

F. Attorney Fees

Unless otherwise directed, attorney fees may be taxed and awarded as costs if authorized by statute or by court rule. MCL 600.2405(6).[12] Specific statutes and court rules that have special provisions for awarding reasonable attorney fees include MCL 600.2591 (sanctions for frivolous actions), MCR 1.109(E)(6) (sanction for signature violations), and MCR 2.625(E) (costs in garnishment proceedings).

Several statutes *require* an award of attorney fees. See e.g., MCL 500.3148(1) (actions for overdue personal or property protection insurance benefits) and MCL 600.2961 (actions for unpaid sales commissions).

G. Fees and Expenses as Costs

Several statutes provide examples of fees that may be awarded as taxable costs. See e.g., MCL 600.1990; MCL 600.2405; MCL 600.2421b. Specific examples include:

- Electronic filing system fee. MCL 600.1990.
- Fees of individuals mentioned in MCL 600.2401 *et seq.* or MCL 600.2501 *et seq.*, unless a contrary intention is stated. MCL 600.2405(1).
- Legal fees for any newspaper publication required by law. MCL 600.2405(3).
- Attorney fees authorized by statute or court rule. MCL 600.2405(6). See also MCL 600.2421b(1)(c).
- Certified mail and federal express fees incurred to send documents *to* the court clerk for filing. *Vanalstine v Land O'Lakes Purina Feeds, LLC*, 326 Mich App 641, 655 (2018).
- Fees for deposition transcripts and certified copies of records when filed with the clerk's office and read into evidence at trial or necessarily used. MCL 600.2549. See also *Vanalstine*, 326 Mich App at 655 (defendant was not entitled to taxable costs because the depositions were not filed with the clerk's office or read into evidence); *Guerrero v Smith*, 280 Mich App 647, 674 (2008) ("[t]he costs of copying the video depositions . . . were properly

[12] See Section 8.6 for more information on attorney fees.

taxed because the depositions were filed in the clerk's office and used as evidence at trial"); *Herrera v Levine*, 176 Mich App 350, 358 (1989) (finding depositions and documents were not taxable because the case was dismissed before the items could be used or read into evidence at trial). 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, so long as the transcripts were filed in any clerk's office. *Portelli v IR Constr Prod Co, Inc*, 218 Mich App 591, 606 (1996).

Fees and expenses that are *not* taxable as costs include:

- Expenses incurred to enlarge exhibits;
- Traveling expenses of attorneys or parties[13];
- 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, 217-224 (2012); *Guerrero*, 280 Mich App at 671-674.

H. Standard of Review

A court's decision whether to tax costs is reviewed for an abuse of discretion. *Guerrero v Smith*, 280 Mich App 647, 670 (2008). Whether a particular expense is a taxable cost is a question of law that is reviewed de novo on appeal. *Id*.

"The determination whether a party is a 'prevailing party' for the purposes of awarding costs under MCR 2.625 is a question of law," which is reviewed de novo. *Fansler v Richardson*, 266 Mich App 123, 126 (2005). "When costs are denied to the prevailing party for reasons written and filed by the court, the court's determination should not be

[13]To the extent that MCL 600.2559 provides mileage may be taxed, MCL 600.2559(1) "makes clear that any mileage taxed under MCL 600.2559 must be related to out-of-court service of process or papers[.]" *Vanalstine*, 326 Mich App at 656 (holding that the defense attorney's request for mileage to attend depositions, hearings, and court proceedings was not covered by MCL 600.2559).

reversed on appeal unless [its] written reasons are totally unsupported by the facts involved in the case." *Gentris v State Farm Mut Ins Co*, 297 Mich App 354, 365 (2012) (quotation marks and citation omitted).

8.6 Attorney Fees

"Michigan adheres to the general rule that attorney fees are not recoverable, either as an element of costs or as an item of damages, unless expressly authorized by statute, court rule, or a recognized exception." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 286 (2008) (quotation marks and citation omitted).[14] "An attorney-client relationship must be established by contract before an attorney is entitled to payment for services rendered." *Plunkett & Cooney, PC v Capitol Bancorp, Ltd*, 212 Mich App 325, 329 (1995).

A. "Reasonable" Fees

To calculate a reasonable attorney fee, the court should first determine "the reasonable hourly or daily rate[15] 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."[16] *Id*. 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*, 481 Mich at 531. In *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 281 (2016), the Michigan Supreme Court distilled the factors from *Wood* and MRPC 1.5(a) into one list:

> "(1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
>
> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
>
> (3) the amount in question and the results obtained,
>
> (4) the expenses incurred,

[14] One commonly-recognized exception is where the parties have contractually stipulated to the payment of reasonable attorney fees. *Pransky v Falcon Group, Inc*, 311 Mich App 164, 194 (2015). See Section 8.6(F) for information on contractual attorney fees.

[15] See Section 8.6(A)(1) for more information on determining a reasonable rate.

[16] See Section 8.6(A)(2) for more information on determining a reasonable number of hours.

> (5) the nature and length of the professional relationship with the client,
>
> (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
>
> (7) the time limitations imposed by the client or by the circumstances, and
>
> (8) whether the fee is fixed or contingent." *Pirgu*, 499 Mich at 281-282.

The *Pirgu* factors "are not exclusive, and the trial court may consider any additional relevant factors." *Pirgu*, 499 Mich at 282. However, "ability to pay is not a relevant consideration." *Cadwell v Highland Park*, 324 Mich App 642, 657 (2018) (citation omitted). "In order to facilitate appellate review, the trial court should briefly discuss its view of each of the factors . . . on the record and justify the relevance and use of any additional factors." *Pirgu*, 499 Mich at 282-283 (holding that "[t]he trial court erred by not starting its analysis by multiplying a reasonable hourly rate by the reasonable number of hours expended[and] . . . by primarily relying on only one factor—the amount sought and results achieved—and failing to briefly discuss its view of the other factors").

"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 v Allstate Ins Co*, 292 Mich App 408, 436 (2011).

The trial court abused its discretion by "not comprehensively review[ing] and stat[ing] its findings with respect to all of the factors in the *Smith*/*Pirgu* framework, but rather focus[ing] on 'the amount in question and the results obtained,' as well as the fact that the fees at issue were contingency fees[.]" *Powers v Brown*, 328 Mich App 617, 624 (2019) (emphasis added).

Applicability of Reasonable Fee Analysis. "[W]hether the *Smith*/*Pirgu* framework for determining a reasonable attorney fee is applicable will 'depend on the plain language of the statute . . . at issue.'" *Powers*, 328 Mich App at 622, quoting *Pirgu*, 499 Mich at 278. "The operative language triggering the *Smith* analysis is the

Legislature's instruction that an attorney is entitled to *a reasonable fee*." *Pirgu*, 499 Mich at 279.

The framework for determining a reasonable attorney fee developed in *Smith* and its progeny has been applied to cases involving a variety of court rules and fee-shifting statutes permitting the award of attorney fees. *Kennedy v Robert Lee Auto Sales*, 313 Mich App 277, 290-293 (2015). For example, the *Smith* and progeny analysis has been applied to cases involving:

- attorney fee determinations under MCL 500.3148(1) (actions for overdue personal or property protection insurance benefits), see *Pirgu*, 499 Mich at 282;
- the Headlee Amendment, see *Adair v State (On Third Remand)*, 298 Mich App 383, 390 (2012), overruled on other grounds 494 Mich 852 (2013)[17];
- the Freedom of Information Act, see *Coblentz v Novi*, 485 Mich 961 (2009);
- case evaluation sanctions, see *Smith*, 481 Mich at 522;
- attorney fee determinations under the Michigan Consumer Protection Act (MCPA) and the Magnuson-Moss Warranty Act (MMWA), see *Kennedy*, 313 Mich App at 279;
- MCR 3.403(C), regarding the sale of premises and division of proceeds as substitution for partition, see *Silich v Rongers*, 302 Mich App 137, 146 (2013);
- the Whistleblowers' Protection Act (WPA), see *Cadwell*, 324 Mich App at 645; and
- MCL 600.2919a, regarding stolen, embezzled, or converted property, or the buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property, see *Powers*, 328 Mich App at 621.

It is unclear if the *Smith* framework applies to attorney fees awarded in domestic relations cases under MCR 3.206(D)(2)[18], because the Court of Appeals has inconsistently applied it in such actions. See *Riemer v Johnson*, 311 Mich App 632, 656-657 (2015) (declining to apply the *Smith* framework to attorney fees awarded under MCR

[17]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[18]Formerly MCR 3.206(C)(2).

3.206(D)(2) in a custody action); *Cassidy v Cassidy*, 318 Mich App 463, 489-492 (2017) (applying the *Smith* framework to attorney fees awarded under MCR 3.206(D)(2) in a divorce action).

"[P]ro bono representation is not an appropriate consideration in determining the reasonableness of attorney fees." *Woodman v Dep't of Corrections*, ___ Mich ___, ___ (2023). Although the Court of Claims "determined that the attorney fees were reasonable based on the hours and hourly rates provided by plaintiffs in support of their motion for fees but decided to reduce [the law firm's] fee by 90% solely on the basis of [the law firm's] pro bono representation," the *Woodman* Court determined that it abused its discretion because "pro bono representation is never an appropriate factor for a court to consider in determining the reasonableness of an attorney fee." *Id*. at ___. "[W]hether an attorney represents a client pro bono is not a valid consideration under the *Smith*/*Pirgu* framework because it is not relevant to the reasonableness of a fee." *Woodman*, ___ Mich at ___ (noting an issue of first impression in Michigan).

1. Determining the Reasonable Hourly Rate

In the context of determining 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 v Khouri*, 481 Mich 519, 531 (2008). 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) (the 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), rev'd in part on other grounds 497 Mich 265 (2015).[19] See also *Lakeside Retreats LLC v Camp No Counselors LLC*, 340 Mich App 79, 94-95 (2022) (holding that a billing rate "comfortably below" the 75th percentile of comparable attorneys in the county was not unreasonable "given the statewide mean billing rate for civil litigation, the fault of the [opposing party] in dragging [the case] out and adding to its complexity, and the above-average qualifications of the four attorneys" who worked on the case; the trial court properly considered the 2020 State Bar of Michigan Economics of Law Practice Survey in determining the customary local fee).

[19]For more information on the precedential value of an opinion with negative subsequent history, see our note.

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 (quotation marks and citation omitted). The fee applicant may support his or her request with "testimony or empirical data found in surveys and other reliable reports." *Id*. at 531-532. See also *Van Elslander*, 297 Mich App at 232. One such acceptable report may be the Economics of Law Practice Survey published by the State Bar of Michigan. See *id*. at 229.

Because "[t]he market rate is the rate that lawyers of similar ability and 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." *Van Elslander*, 297 Mich App at 233-234 (quotation marks and citation omitted). In addition, a trial court may consider other factors when determining a customary fee for similar legal services, including:

- Referral appreciation discounts;
- Attractive rates used to entice future business;
- Familial relationships; and
- Blended fee arrangements. *Van Elslander*, 297 Mich App at 234, 237.

2. 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 v Khouri*, 481 Mich 519, 532 (2008). The court must examine these records for reasonableness, 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.*

"Block billing refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." *Lakeside Retreats LLC v Camp No Counselors LLC*,

340 Mich App 79, 95 (2022) (quotation marks and citation omitted). Although block billing necessarily contains some entries that are vague, the use of block billing to calculate the reasonable number of hours expended on a case is not *per se* improper "so long as the block-billing entries are sufficiently detailed to permit an analysis of what tasks were performed, the relevance of those tasks to the litigation, and whether the amount of time expended on those tasks was reasonable." *Id.* at 98. For example, in *Lakeside Retreats*, block billing invoices were detailed enough to determine the number of reasonable hours spent on a case because the invoices were broken down by month, staff member, and the specific tasks undertaken each day. *Id*. at 98.

B. Evidentiary Hearing

Generally, 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). However, "[t]here was no error in failing to conduct an evidentiary hearing [on the reasonableness of the attorney fees] given the fact that there was a sufficient record to review the issue, and the court fully explained the reasons for its decision." *Cassidy v Cassidy*, 318 Mich App 463, 492 (2017) (noting that the defendant did not challenge the hourly rates, the work performed, or the affidavits and billings submitted to the court by the plaintiff). See also *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 150 (2019) (after failing to contest to the reasonableness of the attorney fees or request an evidentiary hearing in their response brief, defendants' request for an evidentiary hearing in their motion for reconsideration was "too late to preserve the request").

A "trial court abuse[s] its discretion when it fail[s] to hold [an evidentiary hearing]" where the resolution of attorney fees "involves an examination of many factors," some of which are not "capable of being addressed without an evidentiary hearing[.]" *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 360-361 (2019).

"[I]n relatively simple legal matters," expert testimony is not required "to establish the reasonableness of attorney fees." *Zeeland Farm Svcs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196 (1996).

C. 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.

D. 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*, 313 Mich App 277, 285 (2015) (holding that where "the parties reached a settlement in which 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 plaintiff was not entitled to statutory attorney fees because there was no judgment against defendant [was] without merit").

E. Self-Representation

Where there is "no agency relationship between two different people, there [is] no lawyer-client relationship as understood in the law"; accordingly, "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, 432 n 4 (2007) ("both a client and an attorney are necessary ingredients for an attorney fee award") (quotation marks and citation omitted).

In *Omdahl*, 478 Mich at 424, a pro se attorney-litigant sought to recover actual attorney fees pursuant to the Open Meetings Act. Similarly, in *Laracey v Fin Institutions Bureau*, 163 Mich App 437, 446 (1987), the Michigan Court of Appeals determined that an attorney representing himself in an action brought under the Freedom of Information Act was not entitled to statutory attorney fees because "[w]here no fees were paid, no fee award is merited."

While existing authority precludes an award of attorney fees sought by an attorney-litigant pursuant to a fee-shifting statute or court rule, it is unclear if such a preclusion applies when an attorney-litigant seeks compensation pursuant to a contractual agreement that provides for an attorney fee.[20] See *Bode & Grenier, LLP v Knight*, 31 F Supp 3d 111, 120 (2014), which concluded attorney fees were properly awarded to a law firm represented by its attorney members where there was "no language in the parties' contract which suggest[ed] that the parties intended to preclude fees incurred by [the law firm] while representing itself[.]"[21]

[20] See Section 8.6(F) for information on contractual attorney fees.

[21] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See *Abela v Gen Motors Corp*, 469 Mich 603, 606-607 (2004).

F. Contract Provides for Attorney Fee

"[T]he parties to an agreement may include within the agreement a provision respecting the payment of attorney fees, which courts will enforce like any other term unless contrary to public policy." *Pransky v Falcon Group, Inc*, 311 Mich App 164, 194 (2015). "[W]hen a contract specifies that a breaching party is required to pay the other side's attorney fees, only reasonable, not actual attorney fees should be awarded." *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 299 (1986).

"[A]ttorney fees sought under a contractual fee-shifting provision are a form of general damages and, as a result, are properly considered as part of the amount in controversy." *ABCS Troy, LLC v Loancraft, LLC*, 337 Mich App 125, 128 (2021). As such, a district court does not "err by capping the award of contractual attorney fees" "to fit within the court's jurisdictional limit[.]" *Id*. at 141. See Section 2.3 for additional discussion regarding the impact of contractual attorney fees on district court jurisdiction.

"Because the authority to award attorney fees arises under the terms of the agreement, the attorney fees are a type of general damages," and "the party seeking payment must sue to enforce the fee-shifting provision[.]" *Pransky*, 311 Mich App at 194. Accordingly, a trial court can only award the fees as general damages on a claim brought under the contract. *Id*. at 194-195 (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").

"'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 v Parikh*, 304 Mich App 373, 403 (2014), quoting *Central Transp, Inc v Fruehauf*, 139 Mich App 536, 549 (1984), vacated in part on other grounds *Talmer Bank & Trust*, 497 Mich 857 (2014).[22]

Where the parties' "contract provid[ed] that plaintiff agreed 'to reimburse [defendants'] attorney fees and costs as may be fixed by the court,' the parties agreed that the amount of reasonable attorney fees would be fixed by a court rather than a jury," the "plaintiff waived any right she had to a jury trial[.]" *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 34, 43 (2017) (second alteration in original) ("[t]he Court of Appeals erred when it held that the [parties' agreement] was 'ambiguous on the question whether the parties

[22]For more information on the precedential value of an opinion with negative subsequent history, see our note.

intended to have the reasonableness of contractual attorney fees decided by the trial court rather than a jury'") (citation omitted).

Corporate bylaws constitute a contract between the parties, and a bylaw providing for attorney fees in a particular case should be enforced by the court. *Great Lakes Shores, Inc v Bartley*, 311 Mich App 252, 255 (2015) (trial court erred in not awarding attorney fees pursuant to the bylaws).

Michigan authority provides that the factors outlined in *Smith v Khouri*, 481 Mich 519 (2008), are triggered by a statute's "'instruction that an attorney is entitled to *a reasonable fee*.'" *Powers v Brown*, 328 Mich App 617, 622 (2019), quoting *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 279 (2016).[23] Although it appears that no case has similarly stated the analysis for determining a *reasonable* attorney fee as contemplated in a contract, at least one case has indicated, in dicta, that the factors outlined in *Smith* may be applicable. See *Talmer Bank & Trust*, 304 Mich App at 403-404. See also *Lakeside Retreats LLC v Camp No Counselors LLC*, 340 Mich App 79, 93 (2022) (discussing that the non-exclusive list of factors outlined in *Smith* may be considered when determining a reasonable attorney fee, but "the starting point is to determine the fee customarily charged in the locality for similar legal services" (quotation marks and citation omitted)).

G. Contingency-Fee vs. Fixed-Fee Agreements

"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 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). Non-exclusive factors the court should consider when valuing fees based on quantum meruit include:

> "(1) the professional standing and experience of the attorney;
>
> (2) the skill, time and labor involved;
>
> (3) the amount in question and the results achieved;
>
> (4) the difficulty of the case;
>
> (5) the expenses incurred; and

[23] See Section 8.6(A) for more information on reasonable attorney fees.

> (6) the nature and length of the professional relationship with the client." *Plunkett & Cooney, PC*, 212 Mich App at 331.

However, "where the attorney is prematurely terminated," and "a fixed-fee agreement exists, the value of the services that the attorney has agreed to render has been established." *Plunkett & Cooney, PC*, 212 Mich App at 331. Accordingly, "in light of the client's implicit right to discharge the attorney, the attorney is not entitled to recover the entire contract price. Instead, the attorney is entitled to recover for the services rendered before the discharge. The value of those services constitutes the percentage of the services that have been completed pursuant to the contract, multiplied by the contract price." *Id*. "It is inappropriate to calculate damages on the basis of quantum meruit where a fixed-fee agreement explicitly provides the agreed-upon value of the services." *Id*.

H. 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 has 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*, 201 Mich App at 476 (internal citation omitted).

"[A]n attorneys' charging lien for fees may not be imposed upon the real estate of a client, even if the attorney has successfully prosecuted a suit to establish a client's title or recover title or possession for the client, unless (1) the parties have an express agreement providing for a lien, (2) the attorney obtains a judgment for the fees and follows the proper procedure for enforcing judgment, or (3) special equitable circumstances exist to warrant imposition of a lien." *George*, 201 Mich App at 478.

"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 should have inquired as to the claims of the attorney." *Doxtader v Sivertsen*, 183 Mich App 812, 815 (1990).

I. Referral Fees

A referral fee between lawyers who are not in the same law firm is only enforceable if "the client is advised of and does not object to the participation of all the lawyers involved" and "the total fee is reasonable." MRPC 1.5(e)(1)-(2). While "an untimely objection to a referral fee [agreement] is [not] completely irrelevant," there must be evidence "to prove that the clients objected to the referral-fee agreement at the time they were informed[.]" *Babi v Herman Estate*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). "[T]o allow subsequent events, such as a mere change of heart, to upset the referral arrangement is inconsistent with basic contract law, and would be unwise as a matter of policy[.]" *Id*. at ___ (quotation marks and citation omitted). Accordingly, "the clients must have objected at the time they were informed of the agreement in order for there to be a violation of MRPC 1.5(e)." *Babi*, ___ Mich App at ___ (quotation marks and citation omitted).

In *Babi*, ___ Mich App at ___, "[a]ccording to plaintiff's complaint, plaintiff and [defendants] had a professional relationship wherein plaintiff would send [defendants] client referrals in exchange for a referral fee." Plaintiff referred a prospective client to defendants, and when "the issue of an attorney's lien asserted by plaintiff against the settlement proceeds" was raised, the client denied being referred by plaintiff to defendants, and objected to plaintiff being paid a referral fee. *Id*. at ___. When plaintiff sued defendants to recover the referral fee, defendants argued "that on the basis of [the client's] testimony during the settlement hearing in which she objected to the sharing of the fee, any agreement between plaintiff and defendants was unenforceable under MRPC 1.5(e)." *Babi*, ___ Mich App at ___. The trial court "concluded that absent a written retainer agreement in which [the client] agreed to the fee, there was no genuine issue of material fact that [the client] objected to the fee and that no further discovery [could] reveal a different result[.]" *Id*. at ___ (quotation marks omitted). Defendants eventually "produced a signed and written copy of [the client's] retainer agreement with defendants, in which she agreed that" in the event she had been referred by another attorney, defendants could pay that attorney a referral fee. *Id*. at ___ (noting plaintiff also "submitted evidence in the form of e-mail and text message communications between plaintiff and defendants concerning plaintiff's referral") Thus, while the client's "objection at the settlement hearing was not completely irrelevant, it was not sufficient to render the purported referral fee agreement unenforceable under MRPC 1.5(e)"; accordingly, "the trial court erred when it granted summary disposition in favor of defendants because discovery had not begun in earnest and it would be premature to grant summary disposition when discovery had a reasonable chance of uncovering relevant information to plaintiff's claim," and also

"erred to the extent it considered [the client's] untimely objection made four years after the referral." *Babi*, ___ Mich App at ___.

J. 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." *Id*.

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).

8.7 Frivolous Motion, Claim, or Defense

A frivolous motion is distinct from a frivolous claim or defense. See *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 76 n 6, 78 n 9 (2017).

Frivolous motion. "Sanctions for the filing of a frivolous motion . . . must be evaluated under [MCR 1.109(E)(7)] not under MCL 600.2591, because MCL 600.2591 provides for sanctions related to a frivolous civil action or defense." *Home-Owners Ins Co*, 320 Mich App at 76 n 6.[24] "MCL 600.2591 is not applicable to a frivolous motion because a motion does not involve a claim or defense in a civil action." *Home-Owners Ins Co*, 320 Mich App at 78 n 9.

Frivolous claim or defense. The court must award reasonable costs and attorney fees to the prevailing party (unless the state is the prevailing party) against any attorney or party, or both, if it determines the claim or defense in a civil action was frivolous. MCL 600.2591; MCL 600.2421c; MCR 1.109(E)(7). 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 purpose." *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 722-723 (1988).[25]

"The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 147 (2019) (quotation marks and

[24]Effective September 1, 2018, ADM File 2002-37 deleted MCR 2.114 that was discussed in the *Home-Owners Ins Co* decision and created MCR 1.109(E)(7), which now provides for sanctions for frivolous claims and defenses.

[25]Effective September 1, 2018, ADM File 2002-37 deleted MCR 2.114 that was discussed in the *FMB-First Mich Bank* decision and created MCR 1.109(E)(7), which now provides for sanctions for frivolous claims and defenses.

citation omitted). 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).

"[MCR 1.109(E)(7)[26]] provides for an award of sanctions against both a party and his counsel for not making reasonable inquiry as to whether a [document] is well grounded in fact and warranted by either existing law or a good-faith argument for extension, modification or reversal of existing law."*Briarwood v Faber's Fabrics, Inc*, 163 Mich App 784, 792 (1987).

A. Caselaw Evaluating a Motion for Frivolousness

The trial court must "articulate a clear basis for its decision" regarding whether a motion is frivolous. *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 79 (2017) (vacating the trial court's order and remanding for "appropriate findings" where the trial court did not explain its finding of frivolousness on the record and its "written order gave no indication as to why it found that the motion was frivolous," even though it was "fairly apparent" from the record that the motion had no legal basis). The Court of Appeals employs the clearly erroneous standard to a trial court's determination regarding the frivolousness of a pleading; accordingly, "the trial court's failure to articulate a clear basis for its decision makes it impossible to ascertain whether the trial court clearly erred in finding the motion frivolous." *Id*. at 75, 79.

B. Caselaw Evaluating a Claim for Frivolousness

A trial court did not "clearly err[] when it found that plaintiffs did not bring the claims for an improper purpose" where the record also supported a contrary finding because the "trial court had overseen the proceeding for years," "had the opportunity to view the parties in person," and "was also intimately familiar with the legal arguments and evidence." *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg LLC*, ___ Mich App ___, ___ (2023).

The "trial court clearly erred by finding that plaintiffs' first amended complaint was frivolous and warranted sanctions" because it "ignored the factual and legal uncertainties that plaintiffs' attorneys faced and the reasonable decisions they made to protect plaintiffs' interests." *Bauer-Rowley v Humphreys*, ___ Mich App ___, ___ (2022) (noting "the circumstances presented here differ substantially from cases in which [the Court of Appeals] has affirmed such sanctions").

[26]Effective September 1, 2018, ADM File 2002-37 deleted MCR 2.114 that was discussed in the *Briarwood* decision and created MCR 1.109(E)(7), which now provides for sanctions for frivolous claims and defenses.

Specifically, the *Bauer-Rowley* Court held that "there was a question of fact regarding whether plaintiffs were eligible for [personal protection insurance] benefits under [the plaintiff's] policy[.] The legal effect of [an order issued by the State of Michigan Department of Insurance and Financial Services] was also unclear considering that the [Michigan Auto Insurance Placement Facility] processed claims for no-fault benefits in compliance with the order." *Id*. at ___. Accordingly, the Court of Appeals reversed the trial court's orders awarding attorney fees and costs under MCR 1.109(E) and MCL 600.2591. *Id*. at ___.

"Because [defendant] offered a plea in connection with MCL 333.7404, and entered probation over five weeks before plaintiff filed the complaint for forfeiture of her vehicle, plaintiff was issuing a demand that was then wholly without legal support, and that would have remained so even if [defendant] had later violated probation and ended up convicted under MCL 333.7404." *In re Forfeiture of $2,124*, ___ Mich App ___, ___ (2022) ("according to MCL 333.7521(1)(d)(iii), a violation of MCL 333.7404 did not subject her vehicle to forfeiture").[27] Thus, "at the time plaintiff filed the forfeiture compliant, the complaint lacked arguable legal merit to justify the forfeiture of [defendant's] vehicle." *In re Forfeiture of $2,124*, ___ Mich App at ___. Accordingly, the Court of Appeals held that "[t]he trial court clearly erred by finding that the claim was not frivolous, and [defendant was] entitled to costs and attorney fees incurred defending against the complaint." *Id*. at ___ (citing MCL 600.2591(1)).

The trial court did not clearly err in finding that the plaintiff's claims were frivolous and awarding sanctions under MCL 600.2591(3)(a) where "there was no basis in fact to support plaintiff's speculative belief that defendant had benefited unjustly from plaintiff's legal advice and reached a valuable settlement with [a third party], which was the foundation of plaintiff's claims of quantum meruit, unjust enrichment, and fraudulent misrepresentation"; the "evidence support[ed] the conclusion that plaintiff did not sufficiently investigate and research the factual bases of its claims," and "an objective assessment of the facts known and reasonably knowable, show[ed] that plaintiff 'had no reasonable basis to believe that the facts underlying [its] legal position were in fact true[.]'" *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 733, 734 (2017), quoting MCL 600.2591(3)(a)(*ii*) (internal citation omitted).

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

[27] See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 11, for additional information on drug forfeiture laws.

proceeded anyway. *BJ's & Sons Const Co, Inc v Van Sickle*, 266 Mich App 400, 408 (2005).

C. Caselaw Evaluating A Defense for Frivolousness

"[T]he mere fact that a party did not ultimately prevail on its legal position does not per se render that position frivolous[.]" *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 147 (2019) (quotation marks, alterations, and citation omitted). However, "the trial court did not clearly err in finding that defendant's defense was frivolous," where it applied a "deferential standard of review," that included "findings [that] went beyond a mere rejection of defendants' legal position." *Id.* at 147 (trial court "conducted a three-day bench trial . . . , made detailed findings of fact after trial, and its reference to those findings was sufficient to explain why it found the defense of these claims to be frivolous").

For purposes of a frivolous defense that is "devoid of arguable legal merit," see MCL 600.2591(3)(a)(*iii*), *devoid of arguable legal merit* means that the defense "is not sufficiently grounded in law or fact, such as when it violates basic, longstanding, and unmistakably evident precedent." *Bronson Health Care Group, Inc v Titan Ins Co*, 314 Mich App 577, 584-585 (2016) (holding that the trial court clearly erred in denying attorney fees and costs to the plaintiff pursuant to MCL 600.2591 where the defendant's "argument regarding its liability to pay penalty interest under MCL 500.3142 was devoid of arguable legal merit because it was contrary to basic, longstanding, and unmistakably evident precedent") (quotation marks and citations omitted).

"The plain language of [MCL 600.2591] 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 & Attorney Fees (Powell Prod, Inc)*, 250 Mich App 89, 102 (2002). Therefore, "sanctions may issue if any defense is frivolous." *Id.* at 103.

D. Self-Representation

Self-represented parties are not eligible for attorney fee sanctions under MCR 1.109(E)(7) or MCL 600.2591 because they require payment of "all reasonable costs *actually incurred*," and a self-represented party cannot *incur* attorney fees. *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 719, 726 (1998), quoting MCL 600.2591(2).[28]

[28]Effective September 1, 2018, ADM File 2002-37 deleted MCR 2.114 that was discussed in the *FMB-First Michigan Bank* decision, and created MCR 1.109(E)(7), which now provides for sanctions for asserting a frivolous claim or defense.

E. Standard of Review

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).

Chapter 9: Rules in Particular Actions

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9.1 Arbitration Under the Uniform Arbitration Act[1] (UAA)

A. Construct and Scope of Arbitration Agreements

Beginning July 1, 2013, statutory arbitration is governed by the Uniform Arbitration Act (UAA), set out at MCL 691.1681 *et seq*. See 2012 PA 370, repealing Michigan's former arbitration law, MCL 600.5001 *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).

Because "[a]rbitration is a matter of contract, . . . when interpreting an arbitration agreement, [courts should] apply the same legal principles that govern contract interpretation." *Altobelli v Hartmann*, 499 Mich 284, 295 (2016) (quotation marks and citation omitted). "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[2] except on a ground that exists at law or in equity for the revocation of a contract." MCL 691.1686(1). The court's "primary task is to ascertain the intent of the parties at the time they entered into the agreement, which [the court] determine[s] by examining the language of the agreement according to its plain and ordinary meaning." *Altobelli*, 499 Mich at 295. See also Section 9.1(C) regarding jurisdiction.

In determining the *scope* of an arbitration agreement, "[a] party cannot be required to arbitrate an issue which [it] has not agreed to submit to arbitration." *Altobelli*, 499 Mich at 295 (quotation marks and citation omitted; second alteration in original). The party seeking to avoid the agreement bears the burden of proof, not the party wishing to enforce the agreement. *Id.* "Ascertaining the arbitrability of an issue requires a court to consider whether the parties' contract contains an arbitration provision, whether the disputed issue arguably comes within the arbitration clause, and whether the dispute is expressly exempted from arbitration by the contract." *Legacy Custom Builders v Rogers*, ___ Mich App ___, ___ (2023).

"As a general matter, Michigan's public policy favors arbitration. But this general provision favoring arbitration does not go so far as

[1] For information on domestic relations arbitration, see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 7.

[2] See Section 9.1(B) for more information on waiving the right to arbitrate.

to override foundational principles of contractual interpretation." *Lichon v Morse*, 507 Mich 424, 437 (2021) (citation omitted). The expansion of this "application in the lower courts beyond collective bargaining agreements to a more general rule that parties are bound to arbitration if the disputed issue is 'arguably' within the arbitration clause . . . is not a rule [that has been] adopted outside the context of collective bargaining agreements[.]" *Id*. at 438. The "general practice of looking to federal precedent discussing the [National Labor Relations Act] to interpret the [state's Public Employment Relations Act (PERA), MCL 423.201 *et seq*.] is simply inapplicable [where] the PERA is not at issue." *Lichon*, 507 Mich at 438. "If litigating parties have an employment or other contractual relationship, one party will likely be able to find some factual connection, however remote, between their dispute and the relationship. But we require more than the barest factual connection for a claim to be relative to employment or another pertinent contractual relationship. In determining whether a claim is relative to employment, we adopt the approach that asks if the action could be maintained without reference to the contract or relationship at issue." *Id*. at 440 (cleaned up).

The Uniform Arbitration Act (UAA) "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).

B. Waiver of Requirements or Restriction of Rights Under Uniform Arbitration Act (UAA)

1. Authority to Waive or Alter Requirements

"Except as otherwise provided in subsections (2) and (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 this act to the extent permitted by law." MCL 691.1684(1). Waiver of the right to arbitrate may be either express or implied. *Nexteer Auto Corp v Mando America Corp*, 314 Mich App 391, 395 (2016).

[3] Both provisions prohibit the waiver of certain requirements or restriction of certain rights contained in the Uniform Arbitration Act (UAA).

Waiver of a contractual right to arbitration is not favored. *Nexteer*, 314 Mich App at 395. "The party arguing there has been a waiver of [the right to arbitration] bears a heavy burden of proof and must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts." *Id*. at 397 (quotation marks and citation omitted). "However, where there is an express waiver, the party seeking to enforce the waiver need not show prejudice." *Id*. (finding an express waiver where the party stipulated in a case management order that the arbitration provision in the arbitration agreement did not apply to the dispute).

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 Sch v Myers*, 247 Mich App 583, 588 (2001).

2. Prohibited Waivers or Restrictions

"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 arbitrator.
>
> (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]."

C. Jurisdiction: Courts and Arbitrators

"An agreement to arbitrate that provides for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award under [the Uniform Arbitration Act (UAA)]." MCL 691.1706(2). "A court of this state that has jurisdiction over the controversy and the parties may enforce an agreement to arbitrate." MCL 691.1706(1).

Judges and arbitrators have different roles in 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). See also *Registered Nurses, Registered Pharmacists Union v Hurley Med Ctr*, 328 Mich App 528 (2019). "To ascertain the arbitrability of an issue, the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Registered Nurses, Registered Pharmacists Union*, 328 Mich App at 531, 536 (quotation marks and citation omitted).

Whether a contract to arbitrate has terminated is a question to be decided by the courts, not by the arbitrator. *36th Dist Court v Mich AFSCME Council 25*, 295 Mich App 502, 515 (2012), rev'd in part, lv den in part 493 Mich 879 (2012).[6] Additionally, "the issue of whether a party breached a [collective bargaining agreement] involves the interpretation of a contract, which is a question of law that is decided by a court." *Registered Nurses, Registered Pharmacists Union*, 328 Mich App at 531.

"If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate,

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[4] MCL 691.1684 refers to "section 3(1) or (3)"; however, there is no subsection (3) in MCL 691.1683.

[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] For more information on the precedential value of an opinion with negative subsequent history, see our note.

the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders." MCL 691.1686(4).

D. Request for Judicial Relief

In order to receive judicial relief under the Uniform Arbitration Act (UAA), a party must request it:

> "Except as otherwise provided in [MCL 691.1708[7]], a request for judicial relief under this act must be made by motion to the court and heard 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). "Notice of an initial motion under this act may be served with the summons and complaint in the manner provided by court rule for the service of a summons in a civil action." *Id*. "Otherwise, notice of the motion must be given in the manner provided by court rule for serving motions in pending actions." *Id*.

"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 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.*

E. Specific Motions Heard by Court

1. Generally

> "If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section [to compel or stay arbitration] must be made in that court. Otherwise a motion under this section may be made in any court as provided in [MCL 691.1707[8]]." MCL 691.1687(5).

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[7] MCL 691.1708 governs appeals of decisions made under the UAA.

[8] See Section 9.1(D) for more information on MCL 691.1707.

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 this section." MCL 691.1687(6). If the court ultimately orders arbitration, "the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration." MCL 691.1687(7). "If a claim subject to the arbitration is severable, the court may limit the stay to that claim." *Id.*; see also MCR 3.602(C) (requiring a stay in an action involving an issue subject to arbitration if an order for arbitration or a motion for such an order has been made). Accordingly, the trial court erred when it summarily dismissed a lien foreclosure claim even though it correctly enforced the arbitration agreement because the Uniform Arbitration Act (UAA) and Michigan Court Rules require the court to stay the lawsuit pending arbitration. *Legacy Custom Builders v Rogers*, ___ Mich App ___, ___ (2023) (citing MCL 691.1687(6), MCL 691.1687(7), and MCR 3.602(C)). In *Legacy*, the Court of Appeals observed that "[h]ad the trial court stayed the lawsuit pending arbitration, instead of dismissing, it would have enforced the arbitration agreement while protecting [plaintiff's] compliance with the limitations period and ability to enforce the lien after arbitration." *Legacy*, ___ Mich App at ___.

"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).

2. Other Party Refuses to Arbitrate

Where a party's motion shows an arbitration agreement and alleges 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).

The court must not order the parties to arbitrate under MCL 691.1687(1) if it determines there is no enforceable arbitration agreement. MCL 691.1687(3).

3. 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.* The court must not order the parties to arbitrate under MCL 691.1687(2) if it determines there is no enforceable arbitration agreement. MCL 691.1687(3).

4. Provisional Remedies

Two situations exist where, upon motion of a party, 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 authorized 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)(a)-(b). The provisional remedy under MCL 691.1688(2)(a) may include interim awards and may also be issued to "promote the fair and expeditious resolution of the controversy[.]" *Id*.

"A party does not waive a right of arbitration by making a motion under [MCL 691.1688(1)-(2)]." MCL 691.1688(3).

5. Appointment of Arbitrator

On motion of a party to the arbitration proceeding, the court must appoint an arbitrator when the parties have not agreed on a method for appointing an arbitrator, the agreed upon method fails, or an appointed arbitrator fails or is unable to act and a successor has not been appointed. MCL 691.1691(1). An arbitrator appointed by the court "has all the powers of an arbitrator designated in the agreement to arbitrate or an arbitrator appointed by the agreed method." *Id*.

6. Consolidation of Separate Arbitration Proceedings

Unless the arbitration agreement prohibits the consolidation of claims, see MCL 691.1690(3), upon the motion of a party to the arbitration agreement, the court "may order consolidation of separate arbitration proceedings as to all or some of the claims[9] 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).

7. Motions to Enforce Witness Attendance and Out-of-State Subpoena or Discovery Order

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 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." MCL 691.1697(7). An out-of-state subpoena or discovery-related order must be served and enforced in the manner provided by law for service and enforcement of subpoenas in a civil action in Michigan. *Id*.[10]

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[9] 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."

[10] See Section 5.3(C) for information on subpoenas and Section 5.6 for information on foreign subpoenas.

8. Expedited Order to Confirm Award

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 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, modifies, or corrects the award under [MCL 691.1703 or MCL 691.1704[11]]."

9. Review of Arbitrator's Award

"Judicial review of an arbitrator's decision is narrowly circumscribed." *Mich Dept of State Police v Mich State Police Troopers Ass'n*, ___ Mich App ___, ___ (2023) (quotation marks and citation omitted). Every error of law committed by an arbitrator does not merit subsequent court intervention. *TSP Servs, Inc v Nat'l-Std, LLC*, 329 Mich App 615, 620 (2019). "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; MCL 691.1704; *Mich State Police Troopers*, ___ Mich App at ___ ("[a] court may also review an arbitrator's award for an error of law that clearly appears on the face of the award or in the reasons stated by the arbitrator for the decision").

"A court may not review an arbitrator's factual findings or decision on the merits or engage in contract interpretation." *Mich Dep't of State Police*, ___ Mich App at ___ (quotation marks and citation omitted). "A reviewing court may not substitute its judgment for that of the arbitrator, and instead may only decide whether the arbitrator's award draws its essence from the contract." *Id*. at ___ (quotation marks and citation omitted). "If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases." *Id*. at ___ (quotation marks and citation omitted).

"[I]n determining whether there is legal error, the court cannot engage in a review of an arbitrator's mental process, but instead must review the face of the award itself[.]" *TSP*, 329

[11] See Section 9.1(E)(9)(a) for more information on confirming an arbitrator's award.

Mich App at 620 (2019) (quotation marks and citations omitted). "The error must be so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Mich Dep't of State Police*, ___ Mich App at ___ (quotation marks and citation omitted).

Except with respect to awarding punitive damages or other exemplary relief under MCL 691.1701(1) or reasonable attorney fees and other reasonable expenses under MCL 691.1701(2), an arbitrator has the authority to "order remedies that the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding" as part of an award. MCL 691.1701(3). "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 section MCL 691.1703." MCL 691.1701(3).

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. See Section 9.1(E)(9)(c) for information on modifying or correcting an award.

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).

Timing. "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).

Arbitrator's Powers. "Arbitrators must abide by the terms and conditions that grant them jurisdiction and authority to resolve a dispute." *Mich Dept of State Police v Mich State Police Troopers Ass'n*, ___ Mich App ___, ___ (2023). "Arbitrators can fairly be said to exceed their power 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." *Id*. at ___ (cleaned up). "An arbitrator may not act on his own sense of personal justice, but is confined to interpretation and application of the agreement." *Id*. at ___ (cleaned up). "An arbitrator who refuses to abide by the terms of an agreement exceeds the limits upon which the contractual submission is based, exceeds the consensual authority bestowed upon him by the contract, and the award

resulting therefrom is without legal sanction." *Id*. at ___ (quotation marks and citation omitted). "Although the judicial policy favoring labor arbitration warrants a strong presumption in favor of enforcing arbitral awards, an award is properly vacated when that award is dependent upon . . . an arbitrator's disregard and contravention of provisions expressly limiting arbitral authority." *Id*. at ___ (citation omitted). Accordingly, where a collective bargaining agreement gives the arbitrator "the power to determine whether an employee was discharged without just cause," and the "arbitrator concluded the grievant was discharged without good cause and instead determined that unpaid suspension was proper," the trial court "erred by vacating the arbitrator's award." *Id*. at ___ (noting that although a police trooper's behavior might tarnish the reputation of the Michigan Department of State Police, it "is not the type of 'well defined and dominant' public policy violation that would warrant overturning the arbitrator's ruling.")

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 v Krist*, 246 Mich App 59, 62-65 (2001) (finding, however, that the arbitrator did *not* exceed his authority because his award was determined to be a division of marital property rather than 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 Hesperia*, 288 Mich App 222, 229 (2010). The Michigan Court of Appeals concluded that whether the issue was raised in the arbitration summaries was irrelevant to determining whether the arbitrator exceeded the scope of his powers granted by the terms of the arbitration agreement. *Id*.

Rehearing. "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).

Arbitrator Partiality, Corruption, or Misconduct. Upon timely objection by a party, a court may vacate an award on the grounds of partiality, corruption, or misconduct by the arbitrator, see MCL 691.1703(1)(b), if the arbitrator fails to make certain required disclosures under MCL 691.1692(1)-(2). MCL 691.1692(4). Failure to "disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under [MCL 691.1703(1)(b)]." MCL 691.1692(5).

If the parties agree to an arbitration organization's procedures or to procedures for challenging the arbitrator before an award is made, "substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under [MCL 691.1703(1)(b)]." MCL 691.1692(6).

Error of Law. "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).

Denial of Motion to Vacate. "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).

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." *Id*.

"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).

10. Judgment on Award

An arbitration agreement "that provides for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award under [the UAA]." MCL 691.1706(2). See Section 9.1(C) for more information on jurisdiction.

"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).

F. Civil Immunity and Competency to Testify for Arbitrator, Arbitration Organization, or Arbitration Organization Representative

"An arbitrator or an 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 arbitration proceeding 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).[12]

In judicial, administrative, or similar proceedings, arbitrators and arbitration organization representatives are "not competent to testify, 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). The "plain language of the statute prohibits compelling arbitrators from giving any factual evidence as a witness regarding any statements, conduct, decisions, or rulings that [they] may have made during the arbitration proceeding." *Elder v Gordon*, ___ Mich App ___, ___ (2022) (holding that while the "arbitrator could have been asked to clarify the factual question at issue in [the] case before the arbitration award was finalized and that underlying case was dismissed," "to ask the arbitrator a factual question [after], in a separate proceeding, would violate 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) or MCL 691.1703(1)(c)] if the moving party establishes prima facie that a ground for vacating the award exists," MCL 691.1694(4)(b).

[12] 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 9.1(E)(9)(b) for information on vacating an award.

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 a person 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).

G. 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.

(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).

H. Standard of Review

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).

9.2 Arbitration Procedures Under Court Rule

A. Applicability

MCR 3.602 applies to all forms of arbitration not governed by the Uniform Arbitration Act (UAA). Specifically, MCR 3.602(A) provides:

> "Courts shall have all powers described in [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)."[13]

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 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 issues 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

[13] MCL 691.1683(2) provides that the UAA "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)]."

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 [MCR 3.602]. 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).[14]

D. Arbitration Hearings

The procedures related to 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).[15]

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, or modified, or a decision is postponed, as provided in [MCR 3.602]." MCR 3.602(I).

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[14]Because MCR 3.602(C) requires a stay in an action involving an issue subject to arbitration if an order for arbitration or a motion for such an order has been made, the trial court erred when it summarily dismissed a lien foreclosure claim even though it correctly enforced the arbitration agreement. *Legacy Custom Builders v Rogers*, ___ Mich App ___, ___ (2023).

[15]See Section 5.3(C) for information on subpoenas and Section 5.6 for information on foreign subpoenas.

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 [MCR 3.602(J)(2)(c)-(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

"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." MCR 3.602(K)(1).

"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." MCR 3.602(K)(2).

"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." MCR 3.602(K)(3).

"A motion to modify or correct an award may be joined in the alternative with a motion to vacate the award." MCR 3.602(K)(4).

The Michigan Court of Appeals will "carefully evaluate claims of arbitrator error to ensure that they are not being used as a ruse to induce [it] to review the merits of the arbitrator's decision." *Nordlund & Assoc, Inc v Hesperia*, 288 Mich App 222, 230 (2010). In *Nordlund*, the plaintiff's allegation "that the calculation was faulty because the arbitrator failed to grasp the clear and concise meaning of the contract" actually implicated the arbitrator's interpretation of the underlying contract between the plaintiff and the defendant, not any mathematical calculations. *Id*. Because the plaintiff's allegation did not implicate a mathematical calculation, the only other option

under MCR 3.602(K)(2)(a) for modification or correction of the award would have been based on "an evident mistake in a description[.]" *Nordlund*, 288 Mich App at 229-230. Because there was no evident mistake, "the circuit court properly refused to modify the arbitration award on that basis." *Id*. 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).[16]

5. Appeals

"Appeals may be taken as from orders or judgments in other civil actions." MCR 3.602(N).

9.3 Class Action

A. Generally

One or more members of a class may sue or be sued as representative parties if all of the following exist:

- **Numerosity** – "the class is so numerous that joinder of all members is impracticable;" MCR 3.501(A)(1).
- **Commonality** – "there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;" MCR 3.501(A)(1). "However, it is not sufficient to merely raise common questions. The common contention must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will

[16]See Section 8.5 for information on costs.

resolve an issue that is central to the validity of each one of the claims in one stroke." *Breiner v State of Mich*, ___ Mich App ___, ___ (2022) (cleaned up). "[C]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury."*Id*. at ___ (quotation marks and citation omitted). "This factor does not require all issues in the litigation to be common, but merely requires the common issue or issues to predominate over those that require individualized proof." *Id*. at ___.

- **Typicality** – "the claims or defenses of the representative parties are typical of the claims or defenses of the class;" MCR 3.501(A)(1). "Typicality is concerned with whether the claims of the named representatives have the same essential characteristics of the class at large" and "requires that the class representatives share a common core of allegations with the class as a whole." *Breiner*, ___ Mich App at ___ (quotation marks and citation omitted).

- **Adequacy** – "the representative parties will fairly and adequately assert and protect the interests of the class;" MCR 3.501(A)(1).

- **Superiority** – "the maintenance of the action will be superior to other available methods of adjudication in promoting the convenient administration of justice." MCR 3.501(A)(1). See MCR 3.501(A)(2) for a non-exclusive list of factors a court must consider when determining whether superiority exists.

"[A] case cannot proceed as a class action when it satisfies only some, or even most, of [the] factors [in MCR 3.501(A)(1)]." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597-602 (2002).

A trial court may not accept "a party's bare assertion that the prerequisites [listed in MCR 3.501(A)(1)] have been met." *Henry v Dow Chem Co*, 484 Mich 483, 500 (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. *Id.* 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"; "otherwise individuals would simply be able to decide for themselves whether they wish to be included in the class[.]" *Mich Ass'n of Chiropractors v Blue Care Network of Mich, Inc*, 300 Mich App 577, 590 (2013). "[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. Timing and Procedure for Certification

Subject to the parties' stipulation or good cause to extend the time frame, 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. However, the court rule "does not forbid subsequent motions for certification or mandate any particular timing requirements for bringing them." *Hill v City of Warren*, 276 Mich App 299, 306 (2007). 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*, 276 Mich App 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) "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) (alterations in original).[17] Accordingly, a motion for class certification may be filed within 91 days of an amended complaint. *Badeen*, 300 Mich App 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

[17]For more information on the precedential value of an opinion with negative subsequent history, see our note.

the dismissal of the named plaintiff's case. *Hanton*, 306 Mich App at 659-660, 666.

"If the plaintiff fails to file a certification motion within the time allowed by [MCR 3.501(B)(1)], the defendant may file a notice of the failure. On the filing of such a notice, the class action allegations are deemed stricken, and the action continues by or against the named parties alone. The class action allegations may be reinstated only if the plaintiff shows that the failure was due to excusable neglect." MCR 3.501(B)(2).

"Except on motion for good cause, the court shall not proceed with consideration of the motion to certify until service of the summons and complaint on all named defendants or until the expiration of any unserved summons under MCR 2.102(D)." MCR 3.501(B)(3)(a).

In ruling on a motion for certification, the court may:

- certify the class;
- deny the motion; or
- postpone its ruling pending discovery or other preliminary procedures. MCR 3.501(B)(3)(b).

The court must set forth a description of the class if it issues an order certifying a class action. MCR 3.501(B)(3)(c). The court may also order that "the action be maintained as a class action limited to particular issues or forms of relief," or that "a proposed class be divided into separate classes with each treated as a class for purposes of certifying, denying certification, or revoking certification." MCR 3.501(B)(3)(d)(*i*)-(*ii*). The action continues by or against the named parties alone if certification is denied. MCR 3.105(B)(3)(e).

"An action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action." MCR 3.501(A)(5).[18] Additionally, "[a]n action that seeks to recover money from individual members of a defendant class may not be maintained as a class action." MCR 3.501(I)(1).

[18] "In other words, when a statute provides for a minimum penalty irrespective of actual damages, no class action may be maintained on the basis of that statute [under MCR 3.501(A)(5).]" *Rodriguez v Hirshberg Acceptance Corp*, 341 Mich App 349, 358 (2022) (holding that "claims based on violations of statutes that provide minimum damages in lieu of actual damages may not be brought as class actions, absent language in the statute expressly permitting such class actions").

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*, 306 Mich App at 665 (stating that "[p]rior class actions that have been uncertified for a reason that was not substantive should not preclude subsequent actions").

C. Discovery

"Representative parties and intervenors are subject to discovery in the same manner as parties in other civil actions. Other class members are subject to discovery in the same manner as persons who are not parties, and may be required to submit to discovery procedures applicable to parties to the extent ordered by the court." MCR 3.501(G).[19]

D. Dismissal or Compromise

"An action certified as a class action may not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to the class in such manner as the court directs." MCR 3.501(E).

E. Judgment

A judgment involving a class action must specify the parties bound. MCR 3.501(D)(1). If judgment is entered before a class is certified, the judgment only binds the named parties. MCR 3.501(D)(2). A judgment entered after certification binds all members of the class who have not submitted an election to be excluded, or as otherwise directed by the court. MCR 3.501(D)(5).

A motion for judgment or partial judgment pursuant to MCR 2.116 may be brought and determined "before the decision on the question of class certification." MCR 3.501(D)(3).[20] "A judgment entered before certification in favor of a named party does not preclude that party from representing the class in the action if that is otherwise appropriate." *Id*.

"Nothing in [MCR 3.501] is intended to limit the parties to a class action from proposing a settlement, or the court from entering a judgment approving a settlement, that does not create Residual Funds." MCR 3.501(D)(6)(b). "Any judgment approving a proposed settlement of a class action certified under [MCR 3.501] that may

[19]See Chapter 5 for information on discovery.

[20]See Section 4.2 for information on motions for summary disposition.

result in the existence of Residual Funds shall provide for the disbursement of any such Residual Funds upon the stipulation of the parties and subject to the approval of the court. In matters where the claims process has been exhausted and Residual Funds remain, unless the judgment provides otherwise, the Residual Funds shall be disbursed to the Michigan State Bar Foundation to support activities and programs that promote access to the civil justice system for low income residents of Michigan." MCR 3.501(D)(6)(c).

F. Standard of Review

In determining whether to certify a proposed class, a trial court may make both factual findings and discretionary determinations. *Henry v Dow Chem Co*, 484 Mich 483, 495-496 (2009). 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.

9.4 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). "An implied contract must also satisfy the elements of mutual assent and consideration." *Id*.

B. Burden of Proof

"[W]here a party endeavors to prove only that some express condition contained in a written contract actually occurred [or did not occur]," the burden of proof is preponderance of the evidence. *Stein v Home-Owners Ins Co*, 303 Mich App 382, 390-391 (2013). Clear and convincing evidence is required in the following situations:

- to demonstrate a waiver or modification of an existing contract;
- to establish an oral contract when one party has acted in reliance on the contract and the statute of frauds would normally serve to bar the contract;
- to establish a basis for reforming a contract; or
- to establish the contents of a lost contract. *Stein*, 303 Mich App at 390 (citations omitted).

C. 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).[21]

"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." *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 540-541 (1996) (internal citations omitted).

"Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its meaning is obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469 (2003) (quotation marks and citation omitted).

Generally, the language of a contract is to be construed against its drafter. *Petovello v Murray*, 139 Mich App 639, 642 (1984). 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*, 468 Mich at 472.

"[W]here there are definite indications in the law of some contrary public policy, the contract provision must yield to public policy." *Bronner v Detroit*, 507 Mich 158, 166 (2021) (quotation marks and citations omitted).

[21] See Section 9.4(D) for information on parol evidence.

D. Parol Evidence Rule

1. Generally

"Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous."*Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 166 (2006) (alteration, quotation marks, and citation omitted).

2. Exceptions to the Parol Evidence Rule

The parol evidence rule has four exceptions. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 493 (1998). "[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." *Id.*

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 Human Resource Ctr*, 228 Mich App at 502.

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).

A court may consider parol evidence where there is evidence that a latent ambiguity[22] exists in the language of a contract. *Shay v Aldrich*, 487 Mich 648, 676 (2010). "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

[22] "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) (quotation marks and citations omitted).

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.

E. 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, 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 contract to be in writing; "a note or memorandum of the . . . contract" is sufficient if "signed with an authorized signature by the party to be charged with the . . . contract[.]" 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 Indus Prod, 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.'" *Id.*, 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 pursuant to MCL 566.132(2), which provides:

> "A person shall not bring an action 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" than the protection generally afforded under MCL 566.132(1). *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 509 (2014). "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 to present a series of documents—some signed and others 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 511.

A loan modification agreement was unenforceable under MCL 566.132(2) where the plaintiffs attempted to enforce the written agreement by "relying on many documents, including the letters defendant sent to plaintiffs that detail[ed] the modification process and the loan-modification agreement itself," because none of the writings were "'signed with an authorized signature.'" *Rodgers v JPMorgan Chase Bank NA*, 315 Mich App 301, 308 (2016), quoting MCL 566.132(2). Accordingly, "the statute of frauds bar[red] *any* claim, regardless of its label, by plaintiffs to enforce any purported agreement," including the plaintiffs' claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and estoppel. *Rodgers*, 315 Mich App at 309.

Additionally, a note or memorandum of an agreement "to pay a commission for or upon the sale of an interest in real estate" is not sufficient to satisfy the statute of frauds in an action brought "against the owner or purchaser of the real estate[.]" MCL 566.132(3).

F. 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 rescission absent fraud, artifice, or deception, *Moffit v Sederlund*, 145 Mich App 1, 8 (1985), nor is it a defense to enforcement, *Montgomery v Fidelity & Guaranty Life Ins Co*, 269 Mich App 126, 130 (2005).

G. Release Agreements

"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. *Id*.

Where there is evidence that a latent ambiguity[23] exists with respect to the intended scope of a release, a court may consider parol evidence regarding that scope. *Shay v Aldrich*, 487 Mich 648, 676 (2010).[24]

H. 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 . . . has the same right to enforce said promise that he 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 agreement is determined *objectively*. *Shay v Aldrich*, 487 Mich 648, 675 (2010).[25] However, where there is a latent ambiguity[26] 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.

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[23] "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) (quotation marks and citations omitted).

[24] See Section 9.4(D)(2) for information on parol evidence and further discussion of the *Shay* case.

[25] See Section 9.4(G) for information on release agreements.

[26] "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) (quotation marks and citations omitted).

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.*[27]

"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, not incidental, "may sue for a breach of a contractual promise in their favor. *Schmalfeldt,* 469 Mich 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,* 469 Mich at 428. Further, a third-party beneficiary must plead facts demonstrating his or her status as a named beneficiary of a contract in order to recover under the contract. *Maki Estate v Coen*, 318 Mich App 532, 544 (2017) (rejecting the plaintiff's argument that the defendants knew that their services were for the plaintiff's benefit because "mere knowledge of a benefit to a third party is not enough").

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." *Id.* 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.

However, 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).

I. Damages

"The goal in awarding damages for breach of contract is to give the innocent party the benefit of his bargain—to place him in a position

[27] See Section 9.4(C) for information on contract construction.

equivalent to that which he 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 could have avoided by reasonable effort or expenditure. He has a duty to do whatever may reasonably be done to minimize his 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, and the defendant has the burden of proving that the plaintiff failed to do so. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15, 15 n 18 (1994).

J. Equitable Remedies in Contract Actions

The equitable remedies of rescission, promissory estoppel, specific performance, and quantum meruit are discussed in Section 9.6 of this benchbook.

K. Standard of Review

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).

9.5 Declaratory Judgments

A. Court's Power to Enter Declaratory Judgment

Any Michigan court of record with jurisdiction "[i]n a case of actual controversy within its jurisdiction," may entertain a declaratory judgment action in that case, "whether or not other relief is or could be sought or granted." 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). "When there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment." *Mercurio v Huntington Nat'l Bank*, ___ Mich App ___, ___ (2023) (quotation marks and citation omitted). "An

actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Id*. at ___ (quotation marks and citation omitted). "When the injury a plaintiff seeks to prevent is merely hypothetical, a case of actual controversy does not exist." *Id*. at ___.

"[D]eclaratory relief is not mandatory." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 550 (2017). "[T]he language in [MCR 2.605] is permissive, and the decision whether to grant declaratory relief is within the trial court's sound discretion." *Van Buren Charter Twp*, 319 Mich App at 545, 550 (holding that a trial court may still deny declaratory relief even where a party's claims have merit).

A declaratory judgment has "the force and effect of, and are reviewable as, final judgments." MCR 2.605(E).

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); MCR 2.111(B)(2). "An 'actual controversy' under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights. The requirement prevents a court from deciding hypothetical issues. However, by granting declaratory relief in order to guide or direct future conduct, courts are not precluded from reaching issues before actual injuries or losses have occurred. The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (quotation marks and citations omitted).

C. Jury Trial

A jury trial may be demanded in a declaratory action "under the circumstances and in the manner provided in the constitution, statutes, and court rules of the State of Michigan." MCR 2.605(B). See Chapter 7 for more information on jury trials.

D. Expedited Hearing

"The court may order a speedy hearing of an action for declaratory relief and may advance it on the calendar." MCR 2.605(D).

E. Other Relief

Once a declaratory judgment has determined the rights of the parties, additional "necessary or proper relief" may be granted, including monetary damages, following reasonable notice and hearing. MCR 2.605(F); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90 (1995).

F. Standard of Review

Questions of law arising from a declaratory judgment are reviewed de novo; whether to grant or deny declaratory relief is reviewed for an abuse of discretion. *Guardian Environmental Svcs, Inc v Bureau of Const Codes & Fire Safety*, 279 Mich App 1, 5-6 (2008).

9.6 Equity

A. Generally

Equitable relief may be granted if a legal remedy is not available. *Tkachik v Mandeville*, 487 Mich 38, 45 (2010). A complete, ample, and certain remedy at law that is as effectual as equitable relief precludes a suit in equity. *Id*. 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. *Id*. 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).

Generally, the circuit court has jurisdiction over actions in equity. MCL 600.601. However, district courts also have limited jurisdiction over certain actions in equity. MCL 600.8302. See Section 2.4 for more information on circuit court jurisdiction and Section 2.3 on district court jurisdiction.

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). 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) (the complaint contained equitable and nonequitable claims, and the record indicated that plaintiff intended for the court to decide the equitable claims).

"[I]n cases involving both equitable and legal issues, juries may decide factual issues relating to a claim for money damages, while judges retain the authority to determine the facts as they relate to equitable remedies[.]" *ECCO Ltd v Balimoy Mfg Co*, 179 Mich App 748, 751 (1989). "[E]quity jurisdiction is appropriate for all actions based on 'traditionally equitable' doctrines[.]" *Id*. at 750. "However, in addition to the assertion of a traditionally equitable claim, equity jurisdiction also requires that a plaintiff seek traditionally equitable relief." *Id*. (holding the trial court erred in not sending plaintiff's action for promissory estoppel to the jury where money damages were the only relief requested). See Section 9.6(F) for more information on promissory estoppel.

C. Clean Hands

"The unclean-hands doctrine is 'a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitablenss or bad faith relative to the matter in which he seeks relief, *however improper may have been the behavior of the* [opposing party].'" *New Products Corp v Harbor Shores BHBT Land Dev, LLC*, 331 Mich App 614, 627 (2020) (alteration in original), quoting *Rose v Nat'l Auction Group*, 466 Mich 453, 463 (2002). "Any willful act that transgresses equitable standards of conduct is sufficient to allow a court to deny a party equitable relief." *New Products Corp*, 331 Mich App at 627. In *Rose*, the plaintiffs were attempting to sell a piece of property they owned using the defendant-auction company. *Rose*, 466 Mich 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 plaintiffs' 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). "A party guilty of laches is estopped from asserting a right it could have and should have asserted earlier." *New Products Corp v Harbor Shores BHBT Land Dev, LLC*, 331 Mich App 614, 627 (2020) (quotation marks and citation omitted). "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.

The statutes of limitations apply equally to all legal and equitable actions, and"[t]he equitable doctrine of laches shall also apply in actions where equitable relief is sought." MCL 600.5815. "The doctrine of laches may bar a claim even where the action is brought within the applicable limitations period." *New Products Corp*, 331 Mich App at 627. "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. Equitable Estoppel

"'Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existences of the facts.'" *Wigfall v Detroit*, 322 Mich App 36, 43, 44 (2017) (holding that equitable estoppel did not apply where the plaintiff "relied on information provided by defendant through its law department that was meant to relate solely to informal claims against defendant," and that the plaintiff could not rely on the defendant's "interpretation or misinterpretation" of notice requirements "as a justification or excuse for his failure to act in conformity with [the notice] requirements"), quoting *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399 (2006).

"[E]quitable estoppel is not a cause of action unto itself; it is available only as a defense." *Casey*, 273 Mich App at 399 (affirming the trial court's dismissal of the plaintiffs' equitable estoppel claim where the plaintiffs attempted to assert it as a cause of action). Equitable estoppel is "a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact." *New Products Corp v Harbor Shores*

BHBT Land Dev, LLC, 331 Mich App 614, 627-628 (2020) (quotation marks and citation omitted).

F. Promissory Estoppel

The doctrine of promissory estoppel means:

> "'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*, 442 Mich at 84. "To determine the existence and scope of a promise, [courts should] 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.

G. 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). "[T]here is a two-pronged test for determining whether a contract is unenforceable as unconscionable, which is stated as follows:

> (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?" *Hubscher & Son, Inc*, 228 Mich App at 481 (quotation marks and citations omitted).

In evaluating the unconscionability of a contract, "[r]easonableness is the primary consideration." *Hubscher & Son, Inc*, 228 Mich App at 481.

See Section 9.4 for additional information on contract actions.

H. 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 Pumps*, 273 Mich App at 195.

A quantum meruit claim is not appropriate where an express contract exists between two parties. *Morris Pumps*, 273 Mich App at 199.

"In a tort action, an injured party may seek damages for an injury caused by the breach of a legal duty." *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410, 419 (2019). "As in tort, the remedy for [a breach-of-contract action] may be compensatory damages." *Id*. "Unjust enrichment, by contrast, doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense, [a]nd the correction, or remedy, is therefore not compensatory damages, but restitution." *Id*. "Because unjust enrichment sounds in neither tort nor contract and seeks restitution rather than compensatory damages," "the [Governmental Tort Liability Act, MCL 691.1401 *et seq*.,] does not bar [an unjust enrichment] claim." *Genesee Co Drain Comm'r*, 504 Mich at 423-424.

While a quantum meruit claim is equitable in nature, it is not automatically a purely equitable claim that must be brought in circuit court where the relief sought is money damages in an amount less than $25,000. *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 726-728 (2017). In *Meisner*, "because plaintiff sought only legal relief—money damages—the district court 'ha[d] exclusive jurisdiction' of plaintiff's civil action involving contract and quasi-contract claims because the undisputed evidence show[ed] that 'the amount in controversy [did] not exceed $25,000.00.'" *Id*. at 730, quoting MCL 600.8301. "Although plaintiff's theory of recovery rest[ed] on equitable principals of unjust enrichment," its "complaint [did] not sound primarily in equity or seek equitable relief," and "the relief sought by a plaintiff determines its procedural rights." *The Meisner Law Group, PC*, 321 Mich App at 726, 729.

I. 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). "The granting of specific

performance lies within the discretion of the court and whether or not it should be granted depends upon the particular circumstances of each case." *Derosia v Austin*, 115 Mich App 647, 652 (1982).

Ordinarily, specific performance will not be granted "unless the party seeking the decree has tendered full performance." *Derosia*, 115 Mich App at 652. However, formal 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. *Id*.

J. Rescission

"Rescission abrogates [a] contract completely." *Cushman v Avis*, 28 Mich App 370, 372 (1970). "Rescission is an equitable remedy which is granted only in the sound discretion of the court." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26, 31 (1982).

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). A case-by-case approach must also be employed when determining whether rescission is equitable as to third parties; "'an absolute approach would unduly hamper and constrain the proper functioning of such remedies.'" *Farm Bureau Gen Ins Co v Ace American Ins Co*, 337 Mich App 88, 99 (2021), quoting *Bazzi v Sentinel Ins Co*, 502 Mich 390, 411 (2018). Rescission is an acceptable remedy when there has been a failure to perform a substantial part of 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).

"A contract may be rescinded because of a mutual mistake of the parties[.]" *Dingeman v Reffitt*, 152 Mich App 350, 355 (1986). The determination of whether a party is "entitled to rescission [due to mutual mistake] involves a bifurcated inquiry: (1) was there a mistaken belief entertained by one or both of the parties to a contract? and (2) if so, what is the legal significance of the mistaken belief?" *Id*. "[R]escission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties." *Lenawee Co Bd of Health*, 417 Mich at 29. However, "a party who has assumed the risk of loss in connection with [a] mistake" is not entitled to rescission. *Id*. at 30.

Fraud is a basis for rescission. See *Ball v Sweeney*, 354 Mich 616 (1958). There is a contradiction in the caselaw 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 in part on other grounds 455 Mich 866 (1997).[28] 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*, 218 Mich App 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); *Campbell v Great Lakes Ins Co*, 228 Mich 636, 641 (1924); and *Stein v Home-Owners Ins Co*, 303 Mich App 382 (2013). Cases that indicate a clear and convincing burden of proof include *Flynn v Korneffel*, 451 Mich 186, 201 (1996); and *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 459 (1996).

K. 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, but whether equitable relief is proper under those facts is a question of law that [is] . . . review[ed] de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197 (2008).

9.7 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).

[28]For more information on the precedential value of an opinion with negative subsequent history, see our note.

A. Temporary Restraining Order (TRO)

A TRO may be granted without notice to the adverse party if the following conditions are satisfied:

> "(a) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice or from the risk that notice will itself 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).

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).

A party seeking a preliminary injunction "bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction." *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 34 (2008).

"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 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). The court must issue a decision on the merits within 56 days after completion of the trial. *Id*.

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 rights as alleged. Proof of mere apprehension of injury is insufficient to justify granting injunctive relief.'" *Id*., quoting *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280 (1939).

D. Form of Injunction

Every injunction and restraining order must 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. *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8 (2008).

9.8 Interpleader

"Interpleader actions are equitable in nature" and "save a party from having to defend multiple suits seeking the same property or limited fund." *Secura Ins Co v Stamp*, ___ Mich App ___, ___ (2022). Interpleader actions "are governed by MCR 3.603, which provides that '[p]ersons 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.'" *Id*. at ___ (citing MCR 3.603(A)(1); alteration in original). "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).

The provisions of MCR 3.603 supplement MCR 2.206, and do not limit the permissive joinder of parties. MCR 2.603(C). See Section 3.2 for more information on joinder.

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).

"The court may award actual costs to an interpleader plaintiff." MCR 3.603(E).

9.9 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). A writ of mandamus cannot be sought to "control the exercise or direction of the discretion to be exercised," or "for the purpose of reviewing, revising, or controlling the exercise of discretion reposed in administrative bodies." *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-410 (1984).

B. Issuance

The Court of Appeals or the Court of Claims have jurisdiction over an action for mandamus against a state officer. MCR 3.305(A)(1). "All other actions for mandamus must be brought in the circuit

court unless a statute or rule requires or allows the action to be brought in another court." MCR 3.305(A)(2).

"The general venue statutes and rules apply to actions for mandamus unless a specific statute or rule contains a special venue provision." MCR 3.305(B)(1).[29] "In addition to any other county in which venue is proper, an action for mandamus against a state officer may be brought in Ingham County." MCR 3.305(B)(2).

"To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Citizens for Higgins Lake Legal Levels v Roscommon Co Bd of Comm'rs*, 341 Mich App 161, 178-179 (2022) (quotation marks and citation omitted). "Mandamus is an extraordinary writ and it will not lie to review or control the exercise of discretion vested in a public official or administrative body." *Id*. at 178 (quotation marks and citation omitted). 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).

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 v Parole Board*, 312 Mich App 774, 782 (2015) (quotation marks and citation omitted).

Ministerial Acts. "An act is ministerial in nature if it is prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439 (2006) (quotation marks and citation omitted) (concluding the act of hiring an assistant city attorney was discretionary and thus, not ministerial). Compare with

[29] See Section 2.14 for information on venue.

Coalition for a Safer Detroit v Detroit City Clerk, 295 Mich App 362, 371 (2012), where it was determined that placing an initiative petition (that satisfied signature requirements) on the ballot was a ministerial act. Thus, the city clerk and election commission improperly exercised their discretion and judgment by considering the substance of the initiative when voting to exclude the initiative from the ballot. *Id*. See also *Berdy v Buffa*, 504 Mich 876, 879 (2019) (removing the names of properly challenged contestants from a ballot is a ministerial act).

Other Adequate Remedy. "[The] plaintiff lack[ed] an adequate legal or equitable remedy that might achieve the same result as mandamus" where "[a]lthough a writ of quo warranto might have been an appropriate remedy . . . , before seeking such a writ, plaintiff would have been forced to seek 'special leave of the court.'" *Berry v Garrett*, 316 Mich App 37, 45 (2016) (concluding that, "[g]iven the time constraints and procedural limitations, . . . quo warranto was [not] an adequate remedy to achieve the *same* result that plaintiff could achieve by utilizing mandamus") (citation omitted).

Mootness. "A writ of mandamus is unnecessary when the underlying issue becomes moot." *CB v Livingston Co Community Mental Health*, ___ Mich App ___, ___ (2023). "Mandamus is a remedy of extraordinary power, but narrowly defined usage." *Id*. at ___. Accordingly, "a writ of mandamus will not be issued to compel the doing of a useless thing or if the question is moot and the granting of a writ of mandamus would serve no purpose." *Id*. at ___ (cleaned up). In *CB*, ___ Mich App at ___, the Court of Appeals concluded that "issuing the writ would serve no purpose" because the defendant "eventually began providing at home respite care services during the pendency of [the] appeal"—"[i]n other words, there [was] nothing left to compel." Because neither the Court of Appeals nor the trial court could "fashion a remedy related to the complaint for mandamus, the question of the propriety of the trial court's denial of the writ [was] moot." *Id*. at ___.

C. Standard of Review

The decision to grant or deny a writ of mandamus is reviewed for an abuse of discretion. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518 (2014). 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. *Id*.

D. Damages

MCL 600.4431 "authoriz[es] money damages in mandamus actions," and "[a]lthough damages under MCL 600.4431 are not conditioned on successfully *obtaining* the writ of mandamus, they are tethered to the *merits* of the underlying mandamus action." *CB v Livingston Co Community Mental Health*, ___ Mich App ___, ___ (2023). "In other words, to obtain damages under MCL 600.4431, a plaintiff must have a meritorious claim seeking a writ of mandamus in the first place—even if it is subsequently rendered moot." *CB*, ___ Mich App at ___. "[I]t is immaterial to the question of damages that [defendant] eventually began providing services"—"[h]olding otherwise would allow defendants to evade damages solely by complying with their legal duties after a plaintiff filed suit, but before a trial court decides whether to issue the writ." *Id*. at ___. In *CB*, "[t]he trial court's decision on mandamus did not resolve the issue of damages for past noncompliance, or the noncompliance related to respite services that continued well into th[e] appeal"; "[t]he trial court therefore erred by failing to address [plaintiff's] request for damages under MCL 600.4431." *CB*, ___ Mich App at ___ (remanding "for the trial court to determine whether plaintiff is entitled to damages pursuant to MCL 600.4431 and the extent of those damages if any").

9.10 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 power that may be invoked when the plaintiff demonstrates the defendant's failure to perform a clear legal duty and the absence of an adequate legal 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); MCR 3.302(D)(2). However, superintending control is not precluded if an appeal is available but not adequate. *In re Hague*, 412 Mich 532, 546 (1982).

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 532, 545 (1982).

D. Limitations

MCL 600.2963(8), which requires a prisoner to pay outstanding fees and costs before commencing a new civil action or appeal, "cannot constitutionally be applied to bar a complaint for superintending control over an underlying criminal case if the bar is based on outstanding fees owed by an indigent-prisoner plaintiff from an earlier case and the prisoner-plaintiff lacks funds to pay those outstanding fees." *In re Jackson (Douglas) (On Remand)*, 326 Mich App 629, 631-632 (2018). When dealing with "criminal cases," there is a "'flat prohibition' . . . against making access to 'appellate processes' turn on the ability to pay." *Id*. at 635, citing *MLB v SLJ*, 519 US 102, 112 (1996). "[A] complaint for superintending control over an underlying criminal case must reasonably be recognized as an 'appellate process,' . . . even though it is an original civil action, and not formally an appeal[.]" *Jackson (Douglas)*, 326 Mich App at 637 (although the claim for superintending control was "recognized as criminal in nature for purposes of the federal constitutional right of access to the courts," the claim remained classified "as an original civil action subject to the fee-related requirements of MCL 600.2963 (apart from an unconstitutional application of MCL 600.2963(8))").

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." *In re Goehring*, 184 Mich App 360, 366 (1990).

9.11 Medical Malpractice

"[A] medical malpractice claim is one brought against someone who, or an entity that, is capable of malpractice, involving actions that occurred within the course of a professional relationship, and which raise questions involving medical judgment rather than issues that are within the common knowledge and experience of the fact-finder." *Meyers v Rieck*, 509 Mich 460, 469 (2022) (cleaned up). For example, "if a nurse fails to take any action to address a known problem or hazardous condition, then the claim might sound in ordinary negligence." *Id*. at 469. "But a claim that concerns the failure to monitor and assess risks to a patient . . . usually requires specialized medical knowledge and therefore sounds in medical malpractice." *Id. at* 470. However, "a defendant's violation of its own internal rule, even if the rule is designed to protect the public, does not constitute negligence per se." *Id*. at 473. "Accordingly, a claim that defendant committed malpractice merely by violating its own internal rule or regulation, without more, must fail because that rule or regulation does not establish the applicable standard of care." *Id*. at 477.

Generally, a medical malpractice plaintiff has two years from the time his or her claim accrues to commence an action. *Driver v Naini*, 490 Mich 239, 249 (2011). A medical malpractice action begins when "a timely served complaint is filed." *Ottgen v Katranji*, ___ Mich ___, ___ (2023) ("the normal tolling rules apply to medical malpractice actions, and tolling occurs upon the filing of a timely served complaint"). "A medical malpractice action can only be commenced by filing a timely [notice of intent 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." *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94 (2015).

The following subsections discuss the procedural aspects of commencing a medical malpractice action. For information on expert witnesses in medical malpractice actions, see the *Evidence Benchbook*, Chapter 4.

A. Statute of Limitations

Generally, plaintiff has two years from the time his or her claim accrues to commence a medical malpractice action. *Driver v Naini*, 490 Mich 239, 249 (2011); MCL 600.5805(8). 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.'" *Driver*, 490 Mich at 249, quoting MCL 600.5838a(1).

For purposes of the statute of limitations in a medical malpractice case, "the [claim] accrual date depends on the date of the specific act or omission that the plaintiff claims caused his or her injury."

Kincaid v Cardwell, 300 Mich App 513, 525 (2013). However, a plaintiff is not limited "to asserting a single claim for medical malpractice for any given injury." *Id*. "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." *Id*. 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.

A medical malpractice action begins when "a timely served complaint is filed." *Ottgen v Katranji*, ___ Mich ___, ___ (2023). "Filing an [affidavit of merit] under MCL 600.2912d(1) is not required to commence a medical action and toll the statutory limitations period." *Ottgen*, ___ Mich at ___ ("failure to comply with MCL 600.2912d(1) can still be a basis for dismissal of a case—just not on statute-of-limitations grounds").

"The statute of limitations was tolled" while plaintiffs' "motion to amend complaint and add party defendants was pending" because plaintiffs "demonstrated due diligence by seeking a decision on their motion within three weeks." *Charpentier v Young*, 403 Mich 851 (1978). "As long as the plaintiff demonstrate[s] due diligence, the limitations periods [are] tolled as a matter of course." *Steele v Winfield*, ___ Mich App ___, ___ (2022) (quotation marks and citation omitted). In *Steele*, the plaintiff "filed his motion to file an amended complaint within the statutory limitations period and tolled the running of that period until the circuit court made its decision" and "then filed his amended complaint before the statute of limitations expired." *Id*. at ___. The *Steele* Court concluded that "[t]his was due diligence" and the "defendants were not entitled to the dismissal of the claims against them." *Id*. at ___.

The Michigan Supreme Court issued Administrative Order No. 2020-3 "in response to the pandemic with the intent to extend all deadlines pertaining to case initiation and the filing of responsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19." *Linstrom v Trinity*

Health-Mich, ___ Mich App ___, ___ (2023) (quotation marks and citation omitted). "The administrative orders provide that, any day that falls during the state of emergency declared by the Governor related to COVID-19—i.e. March 10, 2020 through June 20, 2020—is not included for purposes of MCR 1.108(1), and the computation of time resumed on June 20, 2020." *Linstrom*, ___ Mich App at ___ (cleaned up). "Applying the plain language of [Amended Administrative Order 2020-3 and Administrative Order 2020-18], plaintiff had the same number of days remaining in the statutory limitations period on June 20, 2020, as she had when the state of emergency began on March 10, 2020." *Linstrom*, ___ Mich App at ___. See also *Hubbard v Stier*, ___ Mich App ___, ___ (2023) ("The NOI waiting period was explicitly excluded from AO 2020-3's tolling when the Supreme Court amended the order" and "AO 2020-18 provides that 'for time periods that started before [AO 2020-3] took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020.'") (cleaned up).

The *Linstrom* Court asserted its conclusion was consistent with *Armijo v Bronson Methodist Hosp*, ___ Mich App ___ (2023), where "it was undisputed that the statute of limitations was set to expire before the emergency was declared and before the emergency-related orders went into effect." *Linstrom*, ___ Mich App at ___.[30] In *Linstrom*, "unlike the situation in *Armijo*, the statute of limitations was set to expire *during* the emergency period." *Linstrom*, ___ Mich App at ___. However, see *Toman v McDaniels*, ___ Mich App ___, ___ (2023), where the Court of Appeals declared "[t]his distinction . . . makes no sense" because "the plaintiff's service of an NOI in *Armijo* extended the statute of limitations (under MCL 600.5856(c)) until a date well after the end of the exclusion period under the AOs." According to the *Toman* Court, "*Armijo* held not only that the AOs did not toll the NOI period, but that they also did not toll the statute of limitations." *Toman*, ___ Mich App at ___. After concluding that "*Linstrom* improperly failed to follow *Armijo*," the *Toman* Court "deem[ed] *Armijo* to be the controlling and binding authority," and held that "AO 2020-3 did not apply to the statute of limitations . . . (which expired after the exclusion period of the AOs)[.]" *Toman*, ___ Mich App at ___.

B. Notice of Intent

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

[30] See Section 9.11(B) for additional discussion of the *Armijo* case.

written notice under [MCL 600.2912b] not less than 182 days before the action is commenced." MCL 600.2912b(1).[31] This notice is commonly referred to as a *notice of intent* or NOI. "[T]he purpose of the NOI is simply to give advance notice of the claim being made by the plaintiff to facilitate potential settlement." *Sanders v McLaren-Macomb*, 323 Mich App 254, 268 (2018).

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 600.2912b(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 [MCL 600.2912b(3)(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 [MCL 600.2912b(3)(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 600.2912b(1)] as a potential party to the action before filing the complaint." MCL 600.2912b(3).

MCL 600.2912b(1) requires that a plaintiff satisfy two conditions:

> "(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).

1. Filing and Serving the NOI (Timeliness)

The statutory requirement that a plaintiff file a timely NOI is "a prerequisite condition to the commencement of a medical malpractice lawsuit," and "the failure to comply with the statutory requirement renders the complaint insufficient to

[31] See the Michigan Judicial Institute's *Period of Notice of Intent Flowchart*.

commence the action."[32] *Driver v Naini*, 490 Mich 239, 257 (2011) (quotation marks and citation omitted).

MCL 600.2912b(2) requires that the NOI "be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim." "Proof of the mailing constitutes prima facie evidence of compliance[.]" If the last known address cannot be reasonably ascertained, "notice may be mailed to the health facility where the care that is the basis of the claim was rendered." *Id*.

"When a defendant *receives* the NOI is irrelevant"; timeliness is based on when the plaintiff *mailed* the NOI. *DeCosta v Gossage*, 486 Mich 116, 126 (2010) (emphasis added) (plurality opinion). In *DeCosta*, the plaintiff mailed the 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.* Based on the specific facts of the case, the Court could not "infer that the [current] office address was defendants' sole business address for purposes of receiving professional business correspondence," thus, the NOI was not defective. *Id.* at 124-125. 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."[33] *DeCosta*, 486 Mich at 125.

Notwithstanding, a court must determine the effect of a plaintiff's NOI that was mailed during the COVID-19 state of emergency (March 10, 2020 to June 20, 2020). *Linstrom*, ___ Mich App at ___. "Because plaintiff had to wait for this NOI waiting period before filing suit, MCL 600.2912b(1), and the statute of limitations otherwise would have expired during that waiting period . . ., the statute of limitations was tolled during the 182 day NOI waiting period[.]" *Linstrom*, ___ Mich App at ___. The *Linstrom* Court asserted its conclusion was consistent with *Armijo v Bronson Methodist Hosp*, ___ Mich App ___ (2023), where "it was undisputed that the statute of limitations was set to expire before the emergency was declared and before the emergency-related orders went into effect." *Linstrom*, ___ Mich App at ___. In *Linstrom*, "unlike the

[32] See Section 9.11(C) for more information on commencing a medical malpractice action.

[33] See Section 9.11(B)(4) for more information on curing defects under MCL 600.2301.

situation in *Armijo*, the statute of limitations was set to expire *during* the emergency period." *Linstrom*, ___ Mich App at ___.

However, see *Toman v McDaniels*, ___ Mich App ___, ___ (2023), where the Court of Appeals declared "[t]his distinction . . . makes no sense" because "the plaintiff's service of an NOI in *Armijo* extended the statute of limitations (under MCL 600.5856(c)) until a date well after the end of the exclusion period under the AOs." According to the *Toman* Court, "*Armijo* held not only that the AOs did not toll the NOI period, but that they also did not toll the statute of limitations." *Toman*, ___ Mich App at ___. After concluding that "*Linstrom* improperly failed to follow *Armijo*," the *Toman* Court "deem[ed] *Armijo* to be the controlling and binding authority," and held that "AO 2020-3 did not apply to the statute of limitations . . . (which expired after the exclusion period of the AOs)[.]" *Toman*, ___ Mich App at ___.

"[T]he NOI requirement of MCL 600.2912b does not apply to an already-existing defendant after a medical malpractice action has commenced." *Kostadinovski v Harrington*, ___ Mich ___, ___ (2023). Put differently, "MCL 600.2912b does not apply where a plaintiff seeks to amend their complaint against an already-named defendant after suit has already been commenced."*Kostadinovski*, ___ Mich at ___. "The plain language of the statute clearly states that the NOI requirement only applies *before* the action is commenced." *Id*. at ___ (quotation marks and citation omitted). In *Kostadinovski*, the "action had already commenced when plaintiffs sought to amend their complaint; accordingly, MCL 600.2912b did not require plaintiffs to also seek to amend their NOI." *Kostadinovski*, ___ Mich at ___ (vacating footnote 6 in *Kostadinovski v Harrington*, 321 Mich App 736 (2017)).

2. Required Contents of NOI[34]

The NOI must state, at least, all of the following:

(a) the factual basis for the claim;

(b) the alleged standard of practice or care;

(c) how the health facility or health professional breached the standard of practice or care;

(d) what should have been done to comply with the standard of practice or care;

[34]See the Michigan Judicial Institute's *Required Contents of Notice of Intent and Response Table*.

> (e) how the breach of the standard of practice or 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 600.2912b. MCL 600.2912b(4).

An NOI is not required to be in any particular format. *Roberts v Mecosta Co Hosp*, 470 Mich 679, 696 (2004). However, an NOI is insufficient unless it provides notice *and* a statement containing all of the information required in MCL 600.2912b(4). *Esselman v Garden City Hosp*, 284 Mich App 209, 220 (2009). A statement is satisfactory if it "reasonably communicate[s] to a medical professional or medical facility . . . the nature of the claim the plaintiff intends to pursue[.]" *Id*.

Additionally, MCL 600.2912b(4) does not require that "the claimant specifically set forth the legal theory of vicarious liability within the NOI, when vicarious liability is the only claim asserted" against the defendant named in the NOI. *Potter v McLeary*, 484 Mich 397, 422-423 (2009).

Factual basis for claim. An NOI generally describing the events that led to the plaintiff's injury properly sets out the factual basis for the plaintiff's claim pursuant to MCL 600.2912b(4)(a). *Roberts*, 470 Mich at 690.

What should have been done to comply with standard of practice or care. A recitation of facts contained in the NOI is insufficient to satisfy the requirement of MCL 600.2912b(4)(d) that the claimant indicate what should have been done to comply with the standard of practice or care. *Roberts*, 470 Mich at 698.

Proximate cause. To satisfy 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 [MCL 600.2912b(4)(e)] 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 n 16.

Names of health professionals/facilities receiving notice. Nothing in MCL 600.2912b(4) requires a plaintiff's NOI to identify the relationship between the parties being sued. *Potter*, 484 Mich at 421. 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.

3. Challenging an NOI

"In a medical malpractice action, unless the court allows a later challenge for good cause, . . . 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[.]" MCR 2.112(L)(2)(a).

Grounds. MCR 2.112(L)(2)(a) applies to challenges "based on the timeliness of the NOI, the plaintiff's compliance with the notice waiting period, a claim that no NOI was received, or the contents of the NOI[.]" *Sanders v McLaren-Macomb*, 323 Mich App 254, 268-269 (2018) (holding that nothing in the court rule indicates its application is limited to content challenges). "[E]ach of these different types of challenges is just one of the possible grounds on which to challenge the sufficiency of the NOI and is essentially a challenge *to* the NOI. *Id*. at 269.

Timing. A motion challenging the NOI must be "filed at the time of [the defendant's] first response to the complaint." *Sanders*, 323 Mich App at 270-271. Accordingly, defendants failed to comply with MCR 2.112(L)(2)(a) by raising their challenge to the NOI in a motion filed after their answers, and there was no good cause to allow a later challenge to the NOI where "the record show[ed] that defendants had the necessary information to comply with the requirements of MCR 2.112(L)(2)(a) before defendants filed their answers." *Sanders*, 323 Mich App at 271-272 (further holding that the court record included a proof of mailing indicating that the NOIs were addressed to the defendants providing prima facie evidence that the plaintiff complied with MCL 600.2912b; accordingly, any challenge to the sufficiency of the notice, including that the NOIs were never received, was required to be made according to the court rule).

4. Defective NOI Established: Dismiss or Allow Cure?[35]

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 allow the plaintiff to cure the defect under MCL 600.2301.[36] *Bush v Shabahang*, 484

[35]See the Michigan Judicial Institute's *Amendment of Defective Notice of Intent Flowchart*.

Mich 156, 177 (2009). 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.*

Substantial right of a party. "[N]o substantial right of a health care provider is implicated" because defective NOIs should be expected at such an early stage in the proceedings when medical records may not have been tendered, 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 NOI." *Bush*, 484 Mich 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." *Id.* at 300.

Cure is in the furtherance of justice. 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.

Types of "cures" for NOI defects include disregarding the defect(s) or allowing the plaintiff to amend the NOI under MCL 600.2301 and MCR 2.118. See *Bush*, 484 Mich at 180-181, 181 n 44 (holding that although the plaintiff's NOI did not adequately address the standard of care applicable to two defendants, "[p]laintiff made a good-faith attempt to address each of the subsections enumerated in [MCL 600.2912b(4)]," and "the vast majority of plaintiff's NOI was in compliance with" that statute; accordingly, because of the good-faith attempt to comply with the statute and the substantial rights of the parties were not affected by the defects, "the alleged facts

[36] MCL 600.2301 provides a mechanism for curing certain defects within any "'process, pleading or proceeding.'" *Bush v Shabahang*, 484 Mich 156, 176 (2009), quoting MCL 600.2301. In *Bush*, the Court concluded that the NOI is part of a medical malpractice proceeding; thus, MCL 600.2301 applies to the NOI. *Bush*, 484 Mich at 176-177. The Court clarified its *Bush* holding in *Driver v Naini*, 490 Mich 239, 254 (2011), 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.

[could] be cured pursuant to [MCL 600.2301]"). See also *Kostadinovski v Harrington*, 321 Mich App 736, 750 (2017). In *Kostadinovski*, the plaintiffs timely served an NOI and timely filed their complaint and affidavit of merit, but determined after discovery and expiration of the limitations period, that the previously-identified negligence and breach-of-care allegations did not apply and that the standard of care had instead been breached by the defendant-physician in a different manner; accordingly, the trial court "was required to assess whether the NOI defect could be disregarded or cured by an amendment of the NOI under MCL 600.2301[.]" *Kostadinovski*, 321 Mich App at 740 (holding that the trial court erred in "automatically disallowing plaintiffs to amend their complaint," and noting that, unlike the circumstances in *Driver v Naini*, 490 Mich 239 (2011), the plaintiffs' "amended NOI would not entail adding a new party,"[37] and directing the trial court on remand "to engage in an analysis under MCL 600.2301 to determine whether amendment of the NOI or disregard of the prospective NOI defect would be appropriate").

"[W]hen an NOI fails to meet all of the *content* requirements under MCL 600.2912b(4), 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.

5. Tolling of the Statute of Limitations During Notice Waiting Period[38]

The statute of limitations is tolled at the time an NOI is timely filed, "if during that period a claim would be barred by the statute of limitations[.]" MCL 600.5856(c). However, "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." *Id*.

An NOI is timely filed, and the medical malpractice limitations period "is tolled when the NOI is filed on the last day of the limitations period, leaving no whole days of the limitations period to toll." *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 307 (2017). Accordingly, "when an NOI is filed on the final day of the limitations period, the next business day after the [182-day] notice period expires is an eligible day to

[37] A plaintiff cannot amend an original NOI to add a nonparty defendant under MCL 600.2957 in an attempt to avoid compliance with the notice waiting period. *Driver*, 490 Mich at 258.

[38] For more information on the statute of limitations in a medical malpractice case, see Section 9.11(A)

file suit." *Id.* at 323. "[T]he law of counting time indicates that the first fractional day–i.e., the day that triggers the running of the time period–is excluded, while the last day is included, based on common-law notions of fairness." *Id.* at 318. The rule of fractional days provides "that once the notice period ends and the time for the plaintiff to bring a claim once again begins to run, it will run for the number of *whole days* remaining in the limitations period when the NOI was filed, *plus* one day to reflect the fractional day remaining when the NOI itself was filed." *Id.* at 322-323.

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(c)[39]] to the initial notice of intent to sue if the tolling provision in [MCL 600.5856(c)] 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*, 290 Mich App 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*, 290 Mich App 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.

Whether defects are present in a party's NOI is irrelevant to determining whether the statute of limitations is tolled. *Bush v Shabahang*, 484 Mich 156, 170 (2009). Rather, MCL 600.5856(c) only requires that the NOI comply with the "applicable notice period under [MCL 600.2912b]" in order to invoke the tolling provision. *Bush*, 484 Mich at 170.

[39] Formerly MCL 600.5856(d).

[Amended AO 2020-3] plainly indicated that a statutory period, such as the 182-day notice period specified in MCL 600.2912b(1) which had to elapse before the commencement of a medical malpractice action, continued to run during the state of emergency." *Armijo v Bronson Methodist Hosp*, ___ Mich App ___, ___ (2023). Thus, the *Armijo* Court held that the 182-day notice period commenced when plaintiff gave defendants notice of her intent to file a medical malpractice action and that "period was not suspended or tolled and continued to run" under Amended AO 2020-3. *Armijo*, ___ Mich App at ___. See also *Toman v McDaniels*, ___ Mich App ___, ___ (2023) (holding that *Armijo* was "the controlling and binding authority," and "AO 2020-3 did not apply to the statute of limitations . . . (which expired after the exclusion period of the AOs)").

Where a medical malpractice claim was properly commenced and the plaintiff filed an amended complaint that did not name new defendants or set forth any new potential causes of injury but "merely set[] forth more specific details" about the claim, a supplemental NOI satisfied the notice requirements of MCL 600.2912b. *Decker v Rochowiak*, 287 Mich App 666, 679, 681 (2010) (the plaintiff was not required to file a new NOI, thus, the plaintiff did not have to comply with a new 182-day waiting period under MCL 600.2912b).

6. Required Access to Records

Both the claimant and the health professional or health facility receiving the notice must allow each other "access to all of the medical records[40] related to the claim" in their control. MCL 600.2912b(5). The claimant must provide access within 56 days of giving notice, and the health professional or health facility must provide access within 56 days of receiving the notice. 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.*

A defendant is not obligated under MCL 600.2912b(5) "to offer a timely explanation for why documents not within the defendant's control are no longer available." *Wade v McCadie*, 499 Mich 895 (2016) (quotation marks and alterations omitted).

[40]The term *medical record*, as used in the Revised Judicature Act, cannot be interpreted by reference to the definition of *medical record* in the Medical Records Access Act, MCL 333.26263, because that definition is limited to its use in the Medical Records Access Act. *Wade v McCadie*, 499 Mich 895 (2016).

7. Required Response by Health Professional or Health Facility[41]

"Within 154 days after receipt of [an NOI], 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).

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). "Reinstatement of a party to the action under this subdivision shall not be barred by any statute of limitations defense that was not valid at the time the action was originally commenced against the affiant." *Id*.

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).

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[41] See the Michigan Judicial Institute's *Required Contents of Notice of Intent and Response Table*.

> "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).

C. Filing the Complaint and Affidavit of Merit

"[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." *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94 (2015).[42] Therefore, where a plaintiff prematurely files a complaint and affidavit of merit, he or she does not commence an action against the defendant, and the statute of limitations is not tolled. *Id*. See also MCL 600.2912d. A medical malpractice action begins when "a timely served complaint is filed." *Ottgen v Katranji*, ___ Mich ___, ___ (2023). "Filing an [affidavit of merit] under MCL 600.2912d(1) is not required to commence a medical action and toll the statutory limitations period." *Ottgen*, ___ Mich at ___ ("failure to comply with MCL 600.2912d(1) can still be a basis for dismissal of a case—just not on statute-of-limitations grounds").

1. Consequences of Premature Filing of Complaint

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 v Naini*, 490 Mich 239, 256-257 (2011), quoting *Burton v Reed City Hosp Corp*, 471 Mich 745, 752 (2005). 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 Med 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 and the plaintiff's "complaint[] must be dismissed with prejudice." See *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94 (2015).

[42] See Section 9.11(B) for information on notice of intent and Section 9.11(C)(3) for information on affidavits of merit.

2. Issues Involving Amended Complaints[43]

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, "[b]ecause 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.

3. Required Contents of the Affidavit of Merit[44]

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]." MCL 600.2912d(1). "[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). To determine whether an attorney's belief was reasonable, the court should "examine the information available to the plaintiff's counsel when he or she was preparing the affidavit of merit. *Bates v Gilbert*, 479 Mich 451, 459, 461 (2007) (holding that "[i]n view of the clear language of relevant statutes, the caselaw existent at the time

[43] This discussion does not discuss the interplay between the filing of an amended complaint and the notice of intent. See 9.11(B)(6) for information on that topic.

[44] See the Michigan Judicial Institute's *Required Contents of Affidavit of Merit and Response Table*.

plaintiff's attorney filed the affidavit of merit, and the evident distinction between ophthalmology and optometry, . . . plaintiff's counsel could not have reasonably believed that an ophthalmologist was qualified under MCL 600.2169 to address the standard of practice or care applicable to an optometrist").

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 shall 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).

Failure to include any of the required information set forth in MCL 600.2912d(1) results in an insufficient affidavit of merit. *Ligons v Crittenton Hosp*, 490 Mich 61, 77 (2011).

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).

MCL 600.2912d(1)(d) requires the affidavit of merit to indicate "*the manner in which* there was a breach [in the standard of care]: The answer to '*How* was the standard of care breached?' is never 'The standard of care was breached.'" *Ligons*, 490 Mich at 77-78 (2011) (simply stating the result of the breach is insufficient) (emphasis added).

"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 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 [MCL 600.2912(d)(1)]." *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. See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4, for additional information on expert witnesses (both in general *and* in the context of medical malpractice actions).

4. Nonconforming Affidavits of Merit

An affidavit that is timely filed is presumed valid, and "toll[s] the period of limitations until the validity of the affidavit is successfully challenged in 'subsequent judicial proceedings.'" *Kirkaldy v Rim*, 478 Mich 581, 586 (2007).[45] "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." *Id*.

The required procedure for challenging an affidavit of merit is set forth by MCR 2.112(L)(2). The court rule provides that "[i]n a medical malpractice action, unless the court allows a later challenge for good cause . . . all challenges to an affidavit of merit . . ., 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 . . . may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301." MCR 2.112(L)(2)(b).

[45] Overruling *Geralds v Munson Healthcare*, 259 Mich App 225 (2003), and *Mouradian v Goldberg*, 256 Mich App 566 (2003). *Kirkaldy,* 478 Mich at 583. See Section 9.11(A) for information on the statute of limitations.

"MCR 2.112(L)(2)(b) does not limit itself to errors in the body of the AOM, but applies also to the 'qualifications of the signer.' Because such a correction will, for all intents and purposes, require that a different health professional sign the affidavit, the text of the rule allows a plaintiff to amend her AOM by submitting one signed by a properly qualified physician." *Legion-London v Surgical Institute of Mich Ambulatory Surgery Ctr, LLC*, 331 Mich App 364, 370, 376 (2020) (the "amendment relates back to the original filing" pursuant to MCR 2.118(D); see Section 3.7(F) for more information on the "relation-back" rule). In *Legion-London*, plaintiff's proposed amendment to substitute a different affiant was within the purview of MCR 2.118(D) where it was "undisputed that [the] proposed amendment arose out of the same conduct as the conduct described in the original AOM." *Legion-London*, 331 Mich App at 369 (noting "[t]here may be instances where seeking to substitute a different affiant implicates one of [the] reasons for denial" but that none of those reasons were present in this case).

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 in part, vacated in part on other grounds 480 Mich 883 (2007).[46]

"[Q]uestions of law relating to the sufficiency of an affidavit of merit" are reviewed de novo. *Vanslembrouck v Halperin*, 277 Mich App 558, 560-561 (2008). A court's decision to strike an affidavit is reviewed for an abuse of discretion. *Kalaj v Khan*, 295 Mich App 420, 425 (2012).

5. Timing and Statutory Tolling Period for Filing Affidavit of Merit

Within 56 days after giving notice of intent under MCL 600.2912b, "the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall 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," and "[s]ubject to [MCL 600.6013(9)], within 56 days after receipt of [the] notice [of intent], the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of

[46]For more information on the precedential value of an opinion with negative subsequent history, see our note.

the health professional or health facility." MCL 600.2912b(5). "If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in [MCL 600.2912b(5)], the affidavit required under [MCL 600.2912d(1)] may be filed within 91 days after the filing of the complaint." MCL 600.2912d(3). "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).

"Filing an [affidavit of merit] under MCL 600.2912d(1) is not required to commence a medical action and toll the statutory limitations period." *Ottgen v Katranji*, ___ Mich ___, ___ (2023). "Instead, the normal tolling rules apply to medical malpractice actions, and tolling occurs upon the filing of a timely served complaint. Nevertheless, failure to comply with MCL 600.2912d(1) can still be a basis for dismissal of a case—just not on statute-of-limitations grounds." *Ottgen*, ___ Mich at ___.

"[B]ecause plaintiff did not file an AOM within 91 days of filing her complaint, summary dismissal [was] the proper result regardless of whether defendants violated MCL 600.2912b(5)." *Zarzyski v Nigrelli*, 337 Mich App 735, 738 (2021) ("summary disposition to defendants under MCR 2.116(C)(7)" was proper "because the action was barred by the statute of limitations"). Although "the parties were litigating the issue whether MCL 600.2912d(3) was implicated in [the] case, . . . the clock began running on the 91-day period when the complaint was filed[.]" *Zarzyski*, 337 Mich App at 742. "Assuming, without deciding, that defendants failed to allow plaintiff access to all medical records related to her claim that were in their control within 56 days after receiving the NOI under MCL 600.2912b(5), plaintiff nevertheless failed to file an AOM within 91 days of the complaint for purposes of MCL 600.2912d(3)." *Zarzyski*, 337 Mich App at 742. The language of MCL 600.2912d(3) is "plain and unambiguous." *Zarzyski*, 337 Mich App at 742. "MCL 600.2912d(3) simply does not accommodate for time spent litigating its application; there is no tolling language with respect to the 91-day period," and "a medical malpractice plaintiff needs to file an AOM within 91 days—even if a defendant conclusively did not allow any access to medical records, subject, perhaps, to MCL 600.2912d(2)." *Zarzyski*, 337 Mich App at 742-743, 742 n 1 (plaintiff did not invoke MCL 600.2912d(2) and the court took "no position regarding whether the 28-day, good-cause

provision in MCL 600.2912d(2) is available to extend the 91-day period in MCL 600.2912d(3)").

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*, 312 Mich App 1, 6 (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*, 312 Mich App at 7 (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).[47]

Motions under MCL 600.2912d(2) may be granted "for good cause shown[.]" MCL 600.2912d(2). The term *good cause* is "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*, 312 Mich App at 7 (quotation marks and citation omitted). 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. *Id*. at 8-9 (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).

6. Authentication of Out-of-State Affidavits of Merit

"If 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 section 25a of the Michigan law on notarial acts, . . . MCL 55.285a, or be an unsworn declaration executed under [the Uniform Unsworn Foreign Declarations Act, MCL 600.2181 *et seq*.]" MCL 600.2102.

[47]Note that a motion under MCL 600.2912d(d) cannot "resurrect a claim where the complaint itself was untimely." *Castro*, 312 Mich App at 5.

7. Affidavit of Meritorious Defense[48]

Within 21 days of a plaintiff's filing of the affidavit of merit under MCL 600.2912d, a defendant must file an affidavit of meritorious defense. MCL 600.2912e(1). However, this timeframe may be extended to 91 days after filing an answer to the complaint, if the plaintiff "fails to allow access to medical records as required under [MCL 600.2912b(5).]" MCL 600.2912e(2).

"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 on each of the following:

> (a) The factual basis for each defense to the claims made against the defendant in the complaint.[49]
>
> (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." MCL 600.2912e(1).

"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."[50] *Lucas v Awaad*, 299 Mich App 345, 373 (2013). "However, defenses are

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[48]See the Michigan Judicial Institute's *Required Contents of Affidavit of Merit and Response Table*.

[49]"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 v Awaad*, 299 Mich App 345, 373 (2013). "If no factual basis is applicable for a particular defense, then no factual basis needs to be, or could be, provided." *Id*.

[50]To establish a claim of medical malpractice, 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.

not limited to this element. If any element in a malpractice claim is not met, then a plaintiff cannot prevail." *Id*.

The required procedure for challenging an affidavit of meritorious defense is set forth by MCR 2.112(L)(2). The court rule provides that "[i]n a medical malpractice action, unless the court allows a later challenge for good cause . . . all challenges to an . . . 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 . . . meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301." MCR 2.112(L)(2)(b).

D. Actions on Behalf of a Minor

"[A] minor is the real party in interest in a claim for damages arising from alleged medical malpractice[.] *Olin v Mercy Health Hackley Campus*, 328 Mich App 337, 352 (2019). Nothing in the governing court rules or caselaw require the "appointment of a next friend prior to or simultaneous with the filing of the complaint on behalf of the minor[.]" *Id*. at 352 ("the formal appointment of a next friend is [not] a meaningful date for statute of limitation purposes," and the trial court erred in dismissing plaintiff's medical malpractice action where the next friend was not appointed until after the expiration of the statute of limitations period).[51]

E. Statute of Repose

1. Generally

"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 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

[51] See Section 2.15 for more information on standing and real party in interest requirements.

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 [MCL 600.5838a(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." MCL 600.5838a(2).

"The only exceptions to the running of [the] six-year statute of repose 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").

2. No Period of Repose in Certain Circumstances

"An action involving a claim based on medical malpractice under circumstances described in [MCL 600.5838a(2)(a)-(b)] 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 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." MCL 600.5838a(3).

3. Six-Month Discovery Rule

"'[T]he discovery rule period begins to run when, *on the basis of objective facts*, the plaintiff should have known of a possible cause of action." *Hutchinson v Ingham Co Health Dep't*, 328 Mich App 108, 137 (2019), quoting *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222 (1997). The proper inquiry for determining whether a plaintiff "*should have* discovered the existence of the claim" under MCL 600.5838a is "whether it was *probable* that a reasonable lay person would have discovered the existence of the claim." *Jendrusina v Mishra*, 316 Mich App 621, 624, 626 (2016) (noting that "the inquiry is not whether it was *possible* for a reasonable lay person to have discovered the existence of the claim").

"When . . . the facts compel an inference of an injury's possible cause, diligence has little role to play in evaluating whether a plaintiff should have discovered a possible cause of action. When the facts don't compel an inference of a possible cause but do arouse suspicion," diligence is required. *Bowman v St. John Hosp & Med Ctr*, 508 Mich 320, 341 (2021). "[F]acts arouse suspicion when they make a plaintiff wonder whether the defendant is responsible," "[b]ut the facts that arouse a plaintiff's suspicions will vary from case to case," underscoring "the importance of the record and its development." *Id*. at 342 (quotation marks and citation omitted). The Michigan Supreme Court "will not impute to a plaintiff knowledge of cancer's progression without a record basis to do so." *Id*. at 345. In *Bowman*, plaintiff "was advised in 2013, based on an interpretation of a mammogram, that a growth in her breast was benign. For the next two years, she felt the lump grow and sought follow-up care. In 2015, she was diagnosed with metastatic breast cancer. In August 2016, . . . she sought a second opinion from a specialist and learned that the 2013 mammogram might have been misread." *Id*. at 327. Plaintiff initiated proceedings in December 2016, and defendants moved for summary disposition arguing plaintiff should have discovered the existence of her claim in 2015 upon being diagnosed with metastatic breast cancer. *Id*. at 327-329. The Court affirmed the trial court's denial of summary disposition finding "the record [did] not reveal that [plaintiff] should have known before June 2016 that her delayed diagnosis might have been caused by a misreading of the 2013 mammogram." *Id*. at 327. "[T]he available facts didn't allow her to infer that causal relationship, and the defendants have not shown that [plaintiff] wasn't diligent"; rather, the record allowed the Court "to conclude, as a matter of law, that [plaintiff] sued over six months after she discovered or should have

discovered the existence of her claim." *Id*. at 327-328, 347 (noting "[i]t would be procedurally inappropriate for us to conclude that [plaintiff] was diligent, but [the] facts aren't enough to conclude that she wasn't").

"[A] flexible approach must be employed in applying the 'possible cause of action' standard, and . . . 'courts should consider the totality of information available to the plaintiff, including [plaintiff's] own observations of physical discomfort and appearance, [plaintiff's] familiarity with the condition through past experience or otherwise, and [plaintiff's] physician's explanations of possible causes or diagnoses of [their] condition.'" *Hutchinson*, 328 Mich App at 129, quoting *Solowy*, 454 Mich at 227. In *Hutchinson*, although the plaintiff was "aware that she had a [growing] calcified lump in her breast," her "subjective concerns as a layperson" that the lump "could have been something more serious, such as cancer," was not an "objective fact[] that would have led [her] to conclude that the lump was in fact cancer," when medical providers "continued to tell plaintiff that the calcified lump was benign," and plaintiff "did not have any familiarity with breast cancer 'through past experience or otherwise.'" *Hutchinson*, 328 Mich App at 137-138. Thus, the trial court erred in concluding plaintiff should have been "aware of an injury in the form of breast cancer, and any possible causation relating to the alleged medical malpractice of defendants, before her definitive diagnosis of breast cancer," and in dismissing her claim as untimely. *Id*. at 140.

In *Jendrusina*, the trial court erred in determining that the plaintiff's medical malpractice claim against his primary care physician was not timely where the plaintiff knew he was diagnosed with kidney failure but had never seen any of his relevant lab reports or been informed about the abnormalities the reports showed. *Id.* at 630-632. The Court explained that a reasonable lay person does not have specialized medical knowledge about "the anatomy, physiology, or pathophysiology of kidneys," nor would a reasonable lay person know "what creatinine is or what an abnormal creatinine level means, in addition to knowing how kidneys fail, why they fail, and how quickly they can fail." *Id.* at 631-632. Accordingly, it was not probable that a reasonable lay person in the plaintiff's position would have discovered the existence of the possible malpractice claim before being told by a medical specialist that earlier action could have prevented dialysis. *Id.* at 635.

F. Loss-of-Opportunity

The second sentence of MCL 600.2912a(2) provides that a plaintiff in an action alleging medical malpractice "cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." "[T]he spirit of the lost-opportunity doctrine under MCL 600.2912a(2)" is "to allow for the recovery of the loss of an opportunity to survive and not merely the initial opportunity to survive." *Benigni v Alsawah*, ___ Mich App ___, ___ (2022). The "loss-of-opportunity doctrine" applies "to cases where the plaintiff suffers a loss of an opportunity to survive or achieve a better result." *Id*. at ___. However, "the second sentence of [MCL 600.2912a(2)] applies only to medical malpractice cases that plead loss of opportunity and not to those that plead traditional medical malpractice[.]"*O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 506 (2010). Thus, "whether the second sentence of MCL 600.2912a(2) applies in a given case depends on the nature of the claims." *Benigni*, ___ Mich App at ___.

In *Benigni*, the Estate of Patricia Benigni ("Estate") alleged that defendants "failed to timely diagnose Patricia's recurrence of colorectal cancer, causing [her] to suffer adverse sequela, including death." *Benigni*, ___ Mich App at ___. The Estate claimed that "[c]atching the recurrence earlier would have given Patricia a better prognosis, including survival and a cure." *Id*. at ___. On appeal, the *Benigni* Court held that because "Patricia actually suffered an adverse result (in this case death), this [was] a traditional medical malpractice case, not one for lost opportunity." *Id*. at ___.

G. Death of a Plaintiff

"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." MCL 600.5852(1). However, no action under MCL 600.5852 may 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[52] contained in MCL 600.5838a(2)." *Burton v Macha*, 303 Mich App 750, 757 (2014).

"[T]he 2-year period under [MCL 600.5852(1)] runs from the date letters of authority are issued to the first personal representative of

[52] See Section 9.11(E) for more information on the statute of repose.

an estate." MCL 600.5852(2). "[L]etters of authority establishing an estate are 'issued' on the date they are signed by the register or the probate judge." *Jesse Estate v Lakeland Specialty Hosp*, 328 Mich App 142, 150 (2019). "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).

Notwithstanding MCL 600.5852(1) and MCL 600.5852(3), an action may not be commenced under MCL 600.5852 "later than 3 years after the period of limitations has run." MCL 600.5852(4).[53]

H. Medical Malpractice Trial

See Chapter 7 for general information on conducting civil jury and bench trials.

See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4, regarding the admission of expert testimony at a medical malpractice trial. See also the Michigan Judicial Institute's *Criteria for Admission of Expert Testimony Flowchart*.

I. Judgment

Generally, MCR 2.601 *et seq*.[54] governs any issues regarding a judgment in a medical malpractice action. However, MCL 600.6306a[55] specifically provides that "[a]fter 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. Subject to [MCL 600.2959[56]], the order of judgment shall be entered against each defendant, including a third-party defendant, in the . . . order and in the following amounts [as set forth in MCL 600.6306a(1)]. See MCL 600.6306a(2)-(3), for information on reducing a judgment

[53] See Section 9.11(A) for information on statute of limitations.

[54] See Section 8.1 for more information on judgments in civil cases.

[55] MCL 600.6306a is only applicable to actions in which the cause of action arose on or after March 28, 2013. 2012 PA 608.

[56] MCL 600.2959 requires the court to reduce damages by the percentage of comparative fault of the person who died or was injured.

when a plaintiff is assigned a percentage of fault or on judgments involving joint and several liability.

9.12 Appointment of Interim Administrator[57]

Subchapter 9.300 of the Michigan Court Rules imposes obligations on private practice attorneys and the State Bar of Michigan with regard to identifying, designating, and serving as Interim Administrators when an attorney becomes unable to practice. This may require the court to rule on an ex parte petition for the appointment of an interim administrator. See MCR 9.305.

A. Commencement of Proceedings[58]

"A proceeding for the appointment of an Interim Administrator is commenced by the filing of an ex parte petition by the Interim Administrator in the circuit court for the county in which the Affected Attorney lives, last lived, or maintains or last maintained an office for the practice of law." MCR 9.305(A). "If an Interim Administrator is unable to serve, he or she must promptly notify the State Bar, and the State Bar must promptly identify a replacement Interim Administrator using the list maintained by the State Bar under Rule 21(C) of the Rules Concerning the State Bar of Michigan or its own staff under attorney supervision as a measure of last resort." MCR 9.305(A).

Petition Requirements. "The petition must set forth facts proving that the attorney is an Affected Attorney[.]" MCR 9.305(A)(1)(a). The petition must also set forth facts proving that "the appointment of an Interim Administrator is necessary to protect the interests of the Affected Attorney's Clients or the interests of the Affected Attorney" and that "the attorney proposed to be appointed as Interim Administrator is qualified under [MCR 9.305]." MCR 9.305(A)(1)(b)-(c). Finally, the petition "must be verified or accompanied by an affidavit or declaration under penalty of perjury of a person having personal knowledge of the facts." MCR 9.305(A)(2).

Service of Process. "The petition and any supporting documents must be served upon the Affected Attorney if the whereabouts of the Affected Attorney are known, the Affected Attorney's estate if the Affected Attorney has died, and on the fiduciary for the Affected Attorney, if one has been appointed. See MCR 2.103 –

[57]See the Michigan Judicial Institute's *Appointment of Interim Administrator Checklist*.

[58]See SCAO Form CC 529, *Ex Parte Petition for Appointment of Interim Administrator*.

2.108. If the petition is filed by the Designated Interim Administrator, it must also be served upon the State Bar of Michigan by email at an address designated by the State Bar of Michigan pursuant to MCR 2.107(C)(4) or by electronic service pursuant to MCR 1.109(G)(6)." MCR 9.305(A)(3).

B. Order of Appointment[59]

The court must appoint one or more Interim Administrators if it determines that the petitioner has proven by a preponderance of the evidence that the attorney is an Affected Attorney and the appointment of an Interim Administrator is necessary to protect the interests of the Affected Attorney's Clients or the interests of the Affected Attorney. MCR 9.305(B).

Unless good cause exists to appoint a different Interim Administrator, the court must appoint the Designated Interim Administrator or the Interim Administrator proposed by the State Bar under MCR 9.305(A). MCR 9.305(B)(1). The circuit court may appoint additional Interim Administrators upon a finding of good cause. MCR 9.305(B)(2).

An order appointing an Interim Administrator must specifically authorize the Interim Administrator to:

> "(a) take custody of and act as signatory on any bank or investment accounts, safe deposit boxes, and other depositories maintained by the Affected Attorney in connection with the Law Firm, including all lawyer trust accounts, escrow accounts, payroll accounts, operating accounts, and special accounts;
>
> (b) disburse funds to clients of the Affected Attorney or others entitled thereto; and
>
> (c) take all appropriate actions with respect to the accounts." MCR 9.305(B)(3).

An order appointing an Interim Administrator is effective immediately upon entry unless the court orders otherwise. MCR 9.305(B)(4). The order may require the Interim Administrator to submit interim and final accountings and reports and may allow or direct portions of any accounting relating to the funds and confidential information of the clients of the Affected Attorney to be filed under seal. MCR 9.305(B)(5).

[59] See SCAO Form CC 530, *Order Appointing Interim Administrator*.

C. Service of Notice of Interim Administrator's Appointment[60]

"Upon receipt of an order of appointment of an Interim Administrator, the petitioner must serve the Notice of Appointment of an Interim Administrator's appointment, including the name and address of the Affected Attorney, and the name, business address, business telephone number, business email address, and P number of the Interim Administrator on the Affected Attorney, the Affected Attorney's estate if the Affected Attorney has died, and the Affected Attorney's fiduciary. If the petitioner is the Designated Interim Administrator, service must also be made on the State Bar of Michigan. If the petitioner is the State Bar of Michigan, service must also be made on the Interim Administrator. The State Bar of Michigan must publish the notice in the Michigan Bar Journal and on the State Bar of Michigan website." MCR 9.305(C).

D. Objection to Appointment[61]

"Within 14 days after service of the Notice of Appointment, any interested person may file objections to the order of appointment of an Interim Administrator specifying the grounds upon which the objection is based. Although the filing of one or more objections does not automatically stay the order appointing Interim Administrator, the court may order that the appointment be stayed pending resolution of the objection(s)." MCR 9.305(D).

E. Duties of Interim Administrator

An Interim Administrator must:

- take custody of the files and records;
- take control of accounts, including lawyer trust accounts and operating accounts;
- review the files and other papers to identify any pending matters;
- promptly notify all clients represented by the Affected Attorney in pending matters of the appointment of the Interim Administrator, in writing, where practicable;
- promptly notify, in writing, where practicable, all courts and counsel involved in any pending matters, to the extent

[60]See SCAO Form CC 531, *Notice of Appointment of Interim Administrator*.

[61]See SCAO Form CC 532, *Objection to the Appointment of an Interim Administrator*.

they can be reasonably identified, of the appointment of an Interim Administrator for the Affected Attorney;

- deliver the files, funds, and other property belonging to the Affected Attorney's Clients pursuant to the clients' directions, subject to the right to retain copies of such files or assert a retaining or charging lien against such files, money, or other property to the extent permitted by law;

- take steps to protect the interests of the clients, the public, and, to the extent possible and not inconsistent with the protection of the Affected Attorney's Clients, to protect the interests of the Affected Attorney; and

- comply with the terms of the agreement between the Affected Attorney and the Interim Administrator. MCR 9.307(B)(1)-(8).

An Interim Administrator is not required to expend his or her own resources when exercising the duties and powers identified in MCR 9.307 but may request reimbursement under MCR 9.313 if they do.[62] MCR 9.307(A).

An Interim Administrator may assist and cooperate with the Affected Attorney and/or the Affected Attorney's fiduciary in the continuance, transition, sale, or winding up of the Law Firm, but may purchase the Law Firm only upon the court's approval of the sale. MCR 9.307(E)-(F).

All Interim Administrators must obtain and retain professional liability insurance that covers conduct performed as an Interim Administrator. MCR 9.315. Absent informed, written consent, an Interim Administrator cannot represent an Affected Client in a pending matter in which the client was represented by the Affected Attorney, other than to temporarily protect the interests of the client, unless and until the Interim Administrator has concluded the purchase of the Law Firm. MCR 9.317. Written consent by the Affected Client must include an acknowledgment that the client is not obligated to retain the Interim Administrator. *Id*.

F. Inventory, Accounting, and Reporting[63]

The Interim Administrator must "file with the court an inventory of the Affected Attorney's interest-bearing trust accounts for deposit of client and third-party funds within 35 days after entry of the order

[62]See Section 9.12(I) for additional information on compensation.

[63]See SCAO Form CC 533, *Inventory of Interim Administrator*.

of appointment, unless an inventory has already been filed with the court." MCR 9.307(C)(1).

The Interim Administrator also must "account for all receipts, disbursements, and distributions of money and property for the Affected Attorney, including its interest-bearing trust accounts for deposit of client and third-party funds." MCR 9.307(C)(2).

The Interim Administrator is required to "file with the court a final written report and final accounting of the administration of the Affected Attorney and serve a copy of each on the State Bar of Michigan." MCR 9.307(C)(3). "The State Bar of Michigan may petition the court for an interim accounting if it has reason to believe the Affected Attorney's affairs are being mismanaged." MCR 9.307(C)(4).

G. Conflict of Interest

"If the Interim Administrator determines that there is a conflict of interest between the Interim Administrator and an Affected Attorney's Client, the Interim Administrator must notify the client, the State Bar of Michigan, and the circuit court that made the appointment and take all appropriate action under the Michigan Rules of Professional Conduct." MCR 9.307(D).

H. Protection of Client Information, Privilege, Files, and Property

"The circuit court has jurisdiction over all of the files, records, and property of clients of the Affected Attorney[.]" MCR 9.311. The court "may make any appropriate orders to protect the interests of the clients of the Affected Attorney and, to the extent possible and not inconsistent with the protection of clients, the interests of the Affected Attorney[.]" *Id*. This includes, but is not limited to, "orders relating to the delivery, storage, or destruction of the client files of the Affected Attorney." *Id*. "The Interim Administrator may maintain client documents in paper or electronic format," or "destroy any client document pursuant to the law office file retention policy or as necessary to meet ethical obligations, whichever is shorter, without returning to the court for permission to do so." *Id*.

I. Compensation[64]

1. Compensation and Reimbursement Available

Except as otherwise provided for by an agreement with the Affected Attorney, an Interim Administrator is entitled to reasonable compensation and reimbursement for actual and reasonable costs incurred in connection with the performance of their duties. MCR 9.313(A).

Reimbursable expenses include, but are not limited to:

- the costs incurred in connection with maintaining the staff, offices, and operation of the Law Firm; and
- the employment of attorneys, accountants, and others retained by the Interim Administrator in connection with carrying out the Interim Administrator's duties. MCR 9.313(A).

2. Request for Compensation or Reimbursement.

The Interim Administrator may file a motion with the court that ordered the appointment seeking compensation or reimbursement. MCR 9.313(B)(1). "Unless the Interim Administrator and the Affected Attorney or the Affected Attorney's estate have reached an agreement otherwise, the Interim Administrator will be paid from the Law Firm if funds are available; if funds are not available from the practice, the attorney may file a claim against the estate in a probate court." *Id*. "The claim must include an accounting of all receipts, disbursements, and distributions of money and property of the Law Firm." *Id*.

If the Interim Administrator was matched to an Affected Attorney through the list maintained by the State Bar of Michigan and subsequently appointed by the court, they may seek payment or reimbursement from the State Bar of Michigan for expenses identified in MCR 9.313(A). MCR 9.313(B)(2).

3. Award of Compensation or Reimbursement.[65]

The court may enter a judgment awarding compensation and expenses to the Interim Administrator against:

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[64]See SCAO Form CC 534, *Motion for Compensation/Reimbursement of Interim Administrator*.

[65]See SCAO Form CC 535, *Judgment Regarding Compensation/Reimbursement of Interim Administrator.*

- the Law Firm;
- the Affected Attorney, or;
- any other available sources. MCR 9.313(C).

A judgment serves as "a lien upon all property of any applicable Law Firm or Affected Attorney retroactive to the date of filing of the petition for the appointment of an Interim Administrator under [MCR 9.305]" but "is subordinate to possessory liens and to non-possessory liens and security interests created prior to it taking effect[.]" MCR 9.313(C). A judgment lien "may be foreclosed upon in the manner prescribed by law." MCR 9.313(C).

Glossary

A

Actual costs

- For purposes of MCR 2.405, *actual costs* "means the costs and fees taxable in a civil action and a reasonable attorney fee, dating to the rejection of the prevailing party's last offer or counteroffer, for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6).

- For purposes of MCR 3.603, *actual costs* "are those costs taxable in any civil action, and a reasonable attorney fee as determined by the trial court." MCR 3.603(E).

Adjusted verdict

- For purposes of MCR 2.405, a*djusted verdict* "means the verdict plus interest and costs from the filing of the complaint through the date of the offer." MCR 2.405(A)(5).

Affected attorney

- For purposes of Subchapter 9.300 of the Michigan Court Rules, *affected attorney* "means an attorney who is either temporarily or permanently unable to practice law because the attorney has:

  (1) resigned;

  (2) been disbarred or suspended;

  (3) disappeared;

  (4) been imprisoned;

  (5) abandoned the practice of law;

(6) become temporarily or permanently disabled or incapacitated;

(7) been transferred to disability inactive status pursuant to MCR 9.121; or

(8) died." MCR 9.301(A).

Affected attorney's clients

- For purposes of Subchapter 9.300 of the Michigan Court Rules, *affected attorney's clients* "are clients to whom the Affected Attorney is the attorney of record, regardless of whether the retainer agreement is with the Affected Attorney or the Affected Attorney's Law Firm." MCR 9.301(B).

Agency

- For purposes of Subchapter 7.100 of the Michigan Court Rules, *agency* "means any governmental entity other than a trial court, the decisions of which are subject to appellate review in the circuit court[.]" MCR 7.102(1) (quotation marks omitted).

Alternative dispute resolution

- 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; child protection mediation under MCR 3.970; and other procedures provided by local court rule or ordered on stipulation of the parties." MCR 2.410(A)(2).

Appeal

- For purposes of Subchapter 7.100 of the Michigan Court Rules, *appeal* "means judicial review by the circuit court of a judgment, order or decision of a trial court or agency, even if the statute or constitutional provision authorizing circuit court appellate review uses a term other than *appeal*." MCR 7.102(2) (quotation marks omitted, italics added). *Appeal* does not include actions commenced under the Freedom of Information Act, MCL 15.231 *et seq.*, proceedings described in MCR 3.302 through MCR 3.306, and motions filed under MCR 6.110(H)[.]" MCR 7.102(2) (quotation marks omitted, italics added).

Appointed interim administrator

- For purposes of Subchapter 9.300 of the Michigan Court Rules, *appointed interim administrator* means "an Interim Administrator who is appointed by the circuit court pursuant to MCR 9.305 to serve on behalf of the Affected Attorney." MCR 9.301(C).

Appointing authority

- For purposes of the Deaf Persons' Interpreters Act, *appointing authority* means "a court or a department, board, commission, agency, or licensing authority of this state or a political subdivision of this state or an entity that is required to provide a qualified interpreter in circumstances described under [MCL 393.503a]." MCL 393.502(a). MCL 393.503a provides that "[i]f an interpreter is required as an accommodation for a deaf or deaf-blind person under state or federal law, the interpreter shall be a qualified interpreter."

Arbitration organization

- For purposes of the Uniform Arbitration Act, *arbitration organization* "means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator." MCL 691.1681(2)(a).

Arbitrator

- For purposes of the Uniform Arbitration Act, *arbitrator* "means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate." MCL 691.1681(2)(b).

Authorized court

- For purposes of Chapter 19A of the Revised Judicature Act of 1961, *authorized court* "means a court accepted by the state court administrative office under [MCL 600.1991] for access to the electronic filing system." MCL 600.1985(a).

Authorized user

- For purposes of MCR 1.109(G), *authorized user* "means a user of the e-filing system who is registered to file, serve, and receive documents and related data through approved electronic means. A court may revoke user authorization for good cause

as determined by the court, including but not limited to a security breach." MCR 1.109(G)(1)(a).

Automated payment

- For purposes of Chapter 19A of the Revised Judicature Act of 1961, *automated payment* means "an electronic payment method authorized by the state court administrative office at the direction of the supreme court, including, but not limited to, payments made with credit and debit cards." MCL 600.1985(b).

Average offer

- For purposes of MCR 2.405, *average offer* "means the sum of an offer and a counteroffer, divided by two. If no counteroffer is made, the offer shall be used as the average offer." MCR 2.405(A)(3).

B

Business court

- For purposes of MCL 600.8031 to MCL 600.8047, *business court* means a court that "has jurisdiction over business and commercial disputes in which equitable or declaratory relief is sought or in which the matter otherwise meets circuit court jurisdictional requirements." MCL 600.8035(1).

Business or commercial dispute

- For purposes of MCL 600.8031 to MCL 600.8047, *business or commercial dispute* means "any of the following:

  (*i*) An action in which all of the parties are business enterprises, unless the only claims asserted are expressly excluded under [MCL 600.8031(3)].

  (*ii*) An action in which 1 or more of the parties is a business enterprise and the other parties are its or their present or former owners, managers, shareholders, members of a limited liability company or a similar business organization, directors, officers, agents, employees, suppliers, guarantors of a commercial loan, or competitors, and the claims arise out of those relationships.

  (*iii*) An action in which 1 of the parties is a nonprofit organization, and the claims arise out of that party's

organizational structure, governance, or finances." MCL 600.8031(1)(c).

C

Case or court proceeding

- For purposes of MCR 1.111, *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).

Certified foreign language interpreter

- For purposes of MCR 1.111, *certified foreign language interpreter* "means 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).

Certified nurse midwife

- For purposes of MCL 600.1307a, *certified nurse midwife* "means an individual licensed as a registered professional nurse under . . . MCL 333.16101 to [MCL] 333.18838, who has been issued a specialty certification in the practice of nurse midwifery by the board of nursing under . . . MCL 333.17210." MCL 600.1307a(8)(a).

Civil action

- For purposes of Chapter 19A of the Revised Judicature Act of 1961, *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

- For purposes of Chapter 19A of the Revised Judicature Act of 1961, *clerk* means "the clerk of the court referenced in the rules of the supreme court, chief clerk of the court of appeals, county clerk, probate register, district court clerk, or clerk of the court of claims where the civil action is commenced, as applicable." MCL 600.1985(d).

Communication equipment

- For purposes of MCR 2.402, *communication equipment* "means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other. It does not include use of a remote video platform through an audio-only option." MCR 2.402(A).

Confidential

- For purposes of MCR 1.109, *confidential* "means that a case record is nonpublic and accessible only to those individuals or entities specified in statute or court rule. A confidential record is accessible to parties only in the manner specified in statute or court rule." MCR 1.109(H)(1).

Costs and fees

- For purposes of Chapter 24 of the Revised Judicature Act of 1961, *costs and fees* "means the normal costs incurred in being a party in a civil action after an action has been filed with the court, those provided by law or court rule, and include all of the following:

  (a) The reasonable and necessary expenses of expert witnesses as determined by the court.

  (b) The reasonable costs of any study, analysis, engineering report, test, or project which is determined by the court to have been necessary for the preparation of a party's case.

  (c) Reasonable and necessary attorney fees including those for purposes of appeal." MCL 600.2421b(1).

Counteroffer

- For purposes of MCR 2.405, *counteroffer* "means a written reply to an offer, served within 21 days after service of the offer, in which a party rejects an offer of the adverse party and makes his or her own offer." MCR 2.405(A)(2).[1]

Court

- For purposes of Chapter XIIA of the Probate Code, *court* "means the family division of circuit court." MCL 712A.1(1)(e).

- For purposes of the Uniform Arbitration Act, *court* "means the circuit court." MCL 691.1681(2)(c).

Court funding unit

- For purposes of Chapter 19A of the Revised Judicature Act of 1961, *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 supreme court, court of appeals, or court of claims, the state." MCL 600.1985(e).

Court records

- For purposes of the Michigan Court Rules, *court records*:

> "(1) . . . are defined by MCR 8.119 and this subrule. Court 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. Court records may be created using any means and may be maintained in any medium authorized by these court rules proved those records comply with other provisions of law and these court rules.
>
> (a) Court 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.
>
> (b) For purposes of [MCR 1.109(A)]:
>
> (*i*) Documents include, but are not limited to, pleadings, orders, and judgments.

[1] 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).

(*ii*) Recordings refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records.

(*iii*) Data refers to any information entered in the case management system that is not ordinarily reduced to a document but that is still recorded information, and any data entered into or created by the statewide electronic-filing system.

(*iv*) Other recorded information includes, but is not limited to, notices, bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image.

(2) 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 during the pendency of a proceeding are not court records." MCR 1.109(A).

D

Data

- For purposes of MCR 1.109(A)(1), in which the term court records is defined, *data* "refers to any information entered in the case management system that is not ordinarily reduced to a document but that is still recorded information, and any data entered into or created by the statewide electronic-filing system." MCR 1.109(A)(1)(b)(*iii*).

Date for the completion of discovery

- For purposes of MCR 2.301(B)(4), unless ordered otherwise, *date for the completion of discovery* "means the serving party shall initiate the discovery by a time that provides for a response or appearance, per [the Michigan Court Rules], before the completion date." MCR 2.301(B)(4).

Deaf person

- For purposes of the Deaf Persons' Interpreters Act, *deaf person* means "a person whose hearing is totally impaired or whose hearing, with or without amplification, is so seriously impaired that the primary means of receiving spoken language is

through other sensory input; including, but not limited to, lip reading, sign language, finger spelling, or reading." MCL 393.502(b).

Deaf-blind person

- For purposes of the Deaf Persons' Interpreters Act, *deaf-blind person* means "a person who has a combination of hearing loss and vision loss, such that the combination necessitates specialized interpretation of spoken and written information in a manner appropriate to that person's dual sensory loss." MCL 393.502(c).

Deaf interpreter

- For purposes of the Deaf Persons' Interpreters Act, *deaf interpreter* or *intermediary interpreter* means "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter." MCL 393.502(e).

Designated interim administrator

- For purposes of Subchapter 9.300 of the Michigan Court Rules, *designated interim administrator* "means an Interim Administrator that a Private Practice Attorney has designated to serve and who has accepted the designation in the event the Private Practice Attorney should become an Affected Attorney." MCR 9.301(D).

Disclosure material

- For purposes of MCR 2.316, *disclosure material* "means disclosures under MCR 2.302(A)[.]" MCR 2.316(A).

Discovery material

- For purposes of MCR 2.316, *discovery material* "means deposition transcripts, audio or video recordings of depositions, interrogatories, documents produced during discovery and made a part of the court file, and answers to interrogatories and requests to admit." MCR 2.316(A).

Division

- For purposes of the Deaf Persons' Interpreters Act, *division* means "the division on deaf and hard of hearing of the department of labor and economic growth." MCL 393.502(d).

Document

- For purposes of the Michigan Court Rules, *document* means "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 8 $^{1/2}$ x 11 inch paper without manipulation." MCR 1.109(B).

- For purposes of MCR 1.109(A)(1), in which the term court records is defined, *documents* "include, but are not limited to, pleadings, orders, and judgments." MCR 1.109(A)(1)(b)(*i*).

- For purposes of Subchapter 2.300 of the Michigan Court Rules, *document* "includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium, including ESI." MCR 2.310(A)(1).

E

Electronic filing or e-filing

- For purposes of MCR 1.109(G), *electronic filing* or *e-filing* "means the electronic transmission of data and documents to the court through the electronic-filing system." MCR 1.109(G)(1)(b).

Electronic filing system

- For purposes of Chapter 19A of the Revised Judicature Act of 1961, *electronic filing system* means "a system authorized after [January 1, 2016[2]] by the supreme court for the electronic filing of documents using a portal contracted for by the state court administrative office for the filing of documents in the supreme court, court of appeals, circuit court, probate court, district court, and court of claims." MCL 600.1985(f)

Electronic-filing system

- For purposes of MCR 1.109(G), *electronic-filing system* "means a system proved by the State Court Administrative Office that permits electronic transmission of data and documents." MCR 1.109(G)(1)(c).

[2] 2015 PA 230.

Electronic filing system fee

- For purposes of Chapter 19A of the Revised Judicature Act of 1961, *electronic filing system fee* "means the fee described in [MCL 600.1986]." MCL 600.1985(g).

Electronic notification

- For purposes of MCR 1.109(G), *electronic notification* "means the electronic transmission of information from the court to authorized users through the electronic-filing system. This does not apply to service of documents. See [MCR 1.109(G)(1)(f)]." MCR 1.109(G)(1)(d).

Electronic service or e-service

- For purposes of MCR 1.109(G), *electronic service* or *e-service* "means the electronic service of information by means of the electronic-filing system under [MCR 1.109]. It does not include service by alternative electronic service under MCR 2.107(C)(4)." MCR 1.109(G)(1)(e).

Electronic signature

- For purposes of the Michigan Court Rules, *electronic signature* "means an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. The following form is acceptable: /s/ John L. Smith." MCR 1.109(E)(4)(a).

Employee

- For purposes of the Bullard-Plawecki Employee Right to Know Act, *employee* "means a person currently employed or formerly employed by an employer." MCL 423.501(2)(a).

Employer

- For purposes of the Bullard-Plawecki Employee Right to Know Act, *employer* "means an individual, corporation, partnership, labor organization, unincorporated association, the state, or an agency or a political subdivision of the state, or any other legal, business, or commercial entity which has 4 or more employees and includes an agent of the employer." MCL 423.501(2)(b).

Entry on land

- For purposes of Subchapter 2.300 of the Michigan Court Rules, *entry on land* "means entry upon designated land or other property in the possession or control of the person on whom

the request is served for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or a designated object or operation on the property, within the scope of MCR 2.302(B)." MCR 2.310(A)(3).

ESI

- For purposes of Subchapter 2.300 of the Michigan Court Rules, *ESI* "means electronically stored information, regardless of format, system, or properties." MCR 2.310(A)(2).

F

Felony

- For purposes of MCL 600.1307a, *felony* "means a violation of a penal law of this state, another state, or the United States for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 600.1307a(8)(b).

Final judgment or final order

- For purposes of Subchapter 7.200 of the Michigan Court Rules, *final judgment* or *final order* means:

  "(a) In a civil case,

  (*i*) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order;

  (*ii*) an order designated as final under MCR 2.604(B);

  (*iii*) in a domestic relations action, a postjudgment order affecting the custody of a minor;[3]

  (*iv*) a postjudgment order awarding or denying attorney fees and costs under court rule or other law;

  (*v*) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order

[3]The term *custody* in MCR 7.202(6)(a)(*iii*) includes legal custody. *Marik v Marik*, 501 Mich 918, 919 (2017).

denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity; or

(*vi*) in a foreclosure action involving a claim for remaining proceeds under MCL 211.78t, a postjudgment order deciding the claim.

(b) In a criminal case,

(*i*) an order dismissing the case;

(*ii*) the original sentence imposed following conviction;

(*iii*) a sentence imposed following the granting of a motion for resentencing;

(*iv*) a sentence imposed, or order entered, by the trial court following a remand from an appellate court in a prior appeal of right; or

(*v*) a sentence imposed following revocation of probation." MCR 7.202(6).

Financial institution

- For purposes of MCL 566.132, *financial institution* "means a state or national chartered bank, a state or federal chartered savings bank or savings and loan association, a state or federal chartered credit union, a person licensed or registered under the mortgage brokers, lenders, and servicers licensing act, [MCL 445.1651–MCL 445.1684] or the secondary mortgage loan act, [MCL 493.51–MCL 493.81], or an affiliate or subsidiary thereof." MCL 566.132(4).

Financially able to pay for interpretation costs

- For purposes of MCR 1.111, concerning foreign language interpreters, 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; 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).

Foreign jurisdiction

- For purposes of the Uniform Interstate Depositions and Discovery Act, *foreign jurisdiction* "means a state other than this state." MCL 600.2202(a).

Foreign subpoena

- For purposes of the Uniform Interstate Depositions and Discovery Act, *foreign subpoena* "means a subpoena issued under authority of a court of record of a foreign jurisdiction." MCL 600.2202(b).

Frivolous

- For purposes of MCR 2.403, an action or defense is *frivolous* "if, as to all of a plaintiff's claims or all of a defendant's defenses to liability, at least 1 of the following conditions is met:

  (a) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party.

  (b) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

  (c) The party's legal position was devoid of arguable legal merit." MCR 2.403(K)(4).

- For purposes of MCL 600.2591, *frivolous* "means that at least 1 of the following conditions is met:

  (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

  (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

  (*iii*) The party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a).

G

Gross present cash value

- For purposes of MCL 600.6306a, *gross present cash value* "means the total amount of future damages reduced to present value at a rate of 5% per year, compounded annually, for each year in which the damages will accrue, as found by the trier of fact under [MCL 600.6305(1)(b)]." MCL 600.6306a(4).

I

Interim administrator

- For purposes of Subchapter 9.300 of the Michigan Court Rules, *interim administrator* "means a general term for an active Michigan attorney in good standing who serves on behalf of a Private Practice Attorney who becomes an Affected Attorney. It also means a law firm with at least one other active Michigan attorney that is designated to serve on behalf of a Private Practice Attorney who becomes an Affected Attorney." MCR 9.301(E).

Intermediary interpreter

- For purposes of the Deaf Persons' Interpreters Act, *intermediary interpreter* or *deaf interpreter* means "any person, including any deaf or deaf-blind person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language by acting as an intermediary between a deaf or deaf-blind person and a qualified interpreter." MCL 393.502(e).

Interpret/Interpretation

- For purposes of MCR 1.111, *interpret* and *interpretation* "mean the oral rendering of spoken communication from one language to another without change in meaning." MCR 1.111(A)(5).

J

Judge

- For purposes of MCR 2.003, *judge* "includes a justice of the Michigan Supreme Court." MCR 2.003(A).

Juvenile

- For purposes of Chapter XIIA of the Probate Code, until September 30, 2021, *juvenile* "means a person who is less than 17 years of age who is the subject of a delinquency petition." MCL 712A.1(1)(i). Beginning October 1, 2021, *juvenile* "means a person who is less than 18 years of age who is the subject of a delinquency petition." *Id*.

K

Knowledge

- For purposes of the Uniform Arbitration Act, *knowledge* "means actual knowledge." MCL 691.1681(2)(d).

L

Law firm

- For purposes of Subchapter 9.300 of the Michigan Court Rules, *law firm* "means the entity in which the Affected Attorney carries out the profession of being a lawyer." MCR 9.301(F).

Lactation consultant

- For purposes of MCL 600.1307a, *lactation consultant* "means a lactation consultant certified by the International Board of Lactation Consultant Examiners." MCL 600.1307a(8)(c).

Limited English proficient person

- *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.

M

Mediation communications

- For purposes of MCR 2.411 (mediation) and MCR 3.216 (domestic relations mediation), see MCR 2.412(A), *mediation communications* "include statements whether oral or in a record, verbal or nonverbal, that occur during the mediation process or are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation." MCR 2.412(B)(2).

Mediation participant

- For purposes of MCR 2.411 (mediation) and MCR 3.216 (domestic relations mediation), see MCR 2.412(A), *mediation participant* "means a mediation party, a nonparty, an attorney for a party, or a mediator who participates in or is present at a mediation." MCR 2.412(B)(4).

Mediation party

- MCR 2.411 (mediation) and MCR 3.216 (domestic relations mediation), see MCR 2.412(A), *mediation party* "means a person who or entity that participates in a mediation and whose agreement is necessary to resolve the dispute." MCR 2.412(B)(3).

Mediator

- For purposes of MCR 2.411 (mediation) and MCR 3.216 (domestic relations mediation), see MCR 2.412(A), *mediator* "means an individual who conducts mediation." MCR 2.412(B)(1).

N

Nonpublic

- For purposes of MCR 1.109, *nonpublic* "means that a case record is not accessible to the public. A nonpublic case record is

accessible to parties and only those other individuals or entities specified in statute or court rule. A record may be made nonpublic only pursuant to statute or court rule. A court may not make a record nonpublic by court order." MCR 1.109(H)(2).

Notice of electronic filing or service

- For purposes of MCR 1.109(G), *notice of electronic filing or service* "means a notice automatically generated by the e-filing system at the time a document is filed or served." MCR 1.109(G)(1)(f).

O

Offer

- For purposes of MCR 2.405, *offer* "means a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued. If a party has made more than one offer, the most recent offer controls for the purposes of this rule." MCR 2.405(A)(1).

Other recorded information

- For purposes of MCR 1.109(A)(1), in which the term court records is defined, *other recorded information* "includes, but is not limited to, notices, bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image." MCR 1.109(A)(1)(b)(*iv*).

Out-of-state attorney

- For purposes of MCR 8.126, an *out-of-state attorney* is "[a]ny person who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, and who is not disbarred or suspended in any jurisdiction, and who is eligible to practice in at least one jurisdiction[.]" MCR 8.126(A).

P

Participant

- For purposes of subchapter 2.400 of the Michigan Court Rules, *participants* "include, but are not limited to, parties, counsel,

and subpoenaed witnesses, but do not include the general public." MCR 2.407(A)(1).

- For purposes of MCR 4.101(F)(4), *participant* is defined in MCR 2.407(A)(1).

Party

- For purposes of MCR 1.111, *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).

- For purposes of Chapter 19A of the Revised Judicature Act of 1961, *party* means "the person or entity commencing a civil action." MCL 600.1985(h).

Party A

- For purposes of MCR 3.223, *Party A* "is the equivalent of a plaintiff and means the party responsible for filing and service requirements." MCR 3.223(B)(1).

Party B

- For purposes of MCR 3.223, *Party B* "is the equivalent of a defendant and means the non-filing party." MCR 3.223(B)(2).

Person

- For purposes of the Uniform Interstate Depositions and Discovery Act, *person* "means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity." MCL 600.2202(c).

- For purposes of the Uniform Arbitration Act, *person* "means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentally; or any other legal or commercial entity." MCL 691.1681(2)(e).

Personnel record

- For purposes of the Bullard-Plawecki Employee Right to Know Act, *personnel record* "means 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:

(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 [MCL 423.509].

(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 USC 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).

Physician

- For purposes of MCL 600.1307a, *physician* "means an individual licensed by the state to engage in the practice of medicine or osteopathic medicine and surgery under . . . MCL 333.16101 to [MCL] 333.18838." MCL 600.1307a(8)(d).

Prevailing party

- For purposes of Chapter 24 of the Revised Judicature Act of 1961, *prevailing party* means:

  "(a) In an action involving several remedies, or issues or counts which state different causes of actions or defenses, the party prevailing as to each remedy, issue, or count.

  (b) In an action involving only 1 issue or count stating only 1 cause of action or defense, the party prevailing on the entire record." MCL 600.2421b(3).

- For purposes of MCL 600.2591, *prevailing party* "means a party who wins on the entire record." MCL 600.2591(3)(b).

Private practice attorney

- For purposes of Subchapter 9.300 of the Michigan Court Rules, *private practice attorney* "means an attorney who is an active Michigan attorney in good standing and who is subject to Rule 21 of the Rules Concerning the State Bar of Michigan, Mandatory Interim Administrator Planning." MCR 9.301(G).

Promise

- For purposes of MCL 600.1405, a *promise* "shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person." MCL 600.1405(1).

Q

Qualified foreign language interpreter

- For purposes of MCR 1.111, *qualified foreign language interpreter* "means:

  (a) A person who provides interpretation services, provided that the person has:

(*i*) registered with the State Court Administrative Office; and

(*ii*) passed the consecutive portion of 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 (if testing exists for the language), and is actively engaged in becoming certified; and

(*iii*) met the requirements established by the state court administrator for this interpreter classification; and

(*iv*) been determined by the court after voir dire to be competent to prove 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

(*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).

Qualified interpreter

- For purposes of the Deaf Persons' Interpreters Act, *qualified interpreter* means "a person who is certified through the national registry of interpreters for the deaf or certified through the state by the division." MCL 393.502(f).

Qualified oral interpreter

- For purposes of the Deaf Persons' Interpreters Act, *qualified oral interpreter* "means a qualified interpreter who is able to convey information through facial and lip movement." MCL 393.502(g).

Qualified sign language interpreter

- For purposes of the Deaf Persons' Interpreters Act, *qualified sign language interpreter* "means a qualified interpreter who uses sign language to convey information." MCL 393.502(h).

Qualified vendor

- For purposes of Chapter 19A of the Revised Judicature Act, *qualified vendor* means "a private vendor selected by the state court administrative office by a competitive bidding process to effectuate the purpose of [MCL 600.1991(3)]." MCL 600.1985(i).

R

Record

- For purposes of MCL 600.1428, *record* 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).

- For purposes of the Uniform Arbitration Act, *record* "means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." MCL 691.1681(2)(f).

Recordings

- For purposes of MCR 1.109(A)(1), in which the term court records is defined, *recordings* "refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records." MCR 1.109(A)(1)(b)(*ii*).

Redact

- For purposes of MCR 1.109, *redact* "means to obscure individual items of information within an otherwise publicly accessible document." MCR 1.109(H)(3).

Residual funds

- For purposes of MCR 3.501, *residual funds* "are funds that remain after the payment of approved class member claims, expenses, litigation costs, attorney's fees, and other court-approved disbursements made to implement the relief granted in the judgment approving a proposed settlement of a class action." MCR 3.501(D)(6)(a).

S

Sealed

- For purposes of MCR 1.109, *sealed* "means that a document or portion of a document is sealed by court order pursuant to MCR 8.119(I). Except as required by statute, an entire case may not be sealed." MCR 1.109(H)(5).

Signature

- For purposes of the Michigan Court Rules, *signature* "means a written signature as defined by MCL 8.3q or an electronic signature as defined by [MCR 1.109(E)(4)(a)]." MCR 1.109(E)(1).

State

- For purposes of the Uniform Interstate Depositions and Discovery Act, *state* means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States." MCL 600.2202(d).

Subpoena

- For purposes of the Uniform Interstate Depositions and Discovery Act, *subpoena* "means 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).

T

The state or any of its departments or officers

- For purposes of MCL 600.6419, *the state or any of its departments or officers* "means this state [(Michigan)] or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties." MCL 600.6419(7).

Trial court

- For purposes of Subchapter 7.100 of the Michigan Court Rules, *trial court* "means the district or municipal court from which the appeal is taken." MCR 7.102(9) (quotation marks omitted).

V

Verdict

- For purposes of MCR 2.405, *verdict* "includes,

  (a) a jury verdict,

  (b) a judgment by the court after a nonjury trial,

  (c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment, including a motion entering judgment on an arbitration award." MCR 2.405(A)(4).

Videoconferencing

- For purposes of Subchapter 2.400 of the Michigan Court Rules, *videoconferencing* "means the use of an interactive technology, including a remote digital platform, that sends video, voice, and/or 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. It includes use of a remote video platform through an audio-only option." MCR 2.407(A)(2).

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