CIVIL PROCEDURE

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I. INTRODUCTION

There was no proverbial "landmark" Civil Procedure case in the current *Survey* period;[1] however, a number of the selected cases are notable in that they provide helpful clarification and guidance for practitioners with respect to a number of procedural issues and doctrines. For example, the Michigan Appellate Courts have clarified the applicability of the statutes and court rules pertaining to both case evaluation sanctions and the taxation of litigation costs. Michigan courts have also adopted a subjective standard in the areas of service of process and the statute of limitations in attorney malpractice actions. Moreover, the courts have narrowed the doctrines of judicial estoppel and the law of

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1. This Article includes cases decided from June 1, 2008 through May 31, 2009.

the case doctrine. Noteworthy developments in Civil Procedure from the current *Survey* period are presented alphabetically by subject matter.

II. AMENDMENT OF COMPLAINT

In *Wormsbacher v. Phillip R. Seaver Title Co.*,[2] the plaintiff engaged defendant, a title insurance company, to provide him with title commitments in conjunction with his purchase of four residential lots.[3] Plaintiff brought suit against the defendant, alleging that defendant was liable in tort for its failure to disclose the existence of a permanent injunction which barred commercial use of the lots.[4] Relying upon the federal case of *Mickam v. Joseph Louis Palace Trust*,[5] the trial court held that Michigan law does not recognize tort claims against title insurers.[6] Instead, the trial court found that, under Michigan law, a title insurer may be liable for breach of contract only pursuant to the terms of the parties' title policy .[7]

Plaintiff subsequently sought leave to amend his complaint pursuant to Michigan Court Rule 2.118(A)(2), which provides, "[e]xcept as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires."[8] Plaintiff's proposed amended complaint purported to state a breach of contract claim, yet "pleaded the same elements of duty, reasonable care, and breach found in his existing tort claims."[9] The trial court refused to allow plaintiff to amend his complaint, finding that such amendment would be futile because it "merely restate[d], or slightly elaborate[d] on, allegations already pleaded."[10]

The Michigan Court of Appeals affirmed the trial court and held that the trial court's denial of the plaintiff's motion for leave to amend was proper.[11] The Michigan Court of Appeals not only agreed with the trial court's reasoning that plaintiff's requested amendment would be futile, but also took the analysis a step further. The court held that, in addition

2. 284 Mich. App. 1, 772 N.W.2d 827 (2009).
3. *Id.* at 2, 772 N.W.2d at 828.
4. *Id.*
5. 849 F.Supp. 516 (E.D. Mich. 1993).
6. *Wormsbacher*, 284 Mich. App. at 1, 772 N.W.2d at 828.
7. *Id.*
8. MICH. CT. R. 2.118(A).
9. *Wormsbacher*, 284 Mich. App. at 4, 772 N.W.2d at 832.
10. *Id.* (citing Dowerk v. Oxford Twp., 233 Mich. App. 62, 75, 592 N.W.2d 724, 731 (1988)).
11. *Id.*

to being futile, plaintiff's motion to amend was "both untimely and prejudicial."[12]

Relying on the case of *Amburgey v. Sauder*,[13] the court noted that, in deciding a motion to amend, a trial court should consider "both the prejudice to the defendant and the untimeliness of the requested amendment."[14] In *Amburgey*, the plaintiff did not move to amend his complaint until after the trial court had already granted summary disposition.[15] Although the plaintiff in *Wormsbacher* moved to amend before the trial court granted summary disposition, the court found *Amburgey* instructive, and held that plaintiff's motion to amend was untimely.[16] In issuing its holding, the court emphasized that "the prejudice stems from the fact that the new allegations were offered late, and not from the fact that they might cause the defendant to lose on the merits."[17]

In light of the specific facts of *Wormsbacher*, the Michigan Court of Appeals' holding appears to be the correct one. The *Wormsbacher* plaintiff's proposed amendment was surely futile, as it failed to properly plead the elements of breach of contract under Michigan law, and instead, restated the elements of a tort claim.[18] A broad application of the *Wormsbacher* court's "timeliness" analysis may, however, prove inappropriate.[19] The *Wormsbacher* plaintiff moved to amend his complaint to include a breach of contract claim before the trial court ruled on the defendant's summary disposition motion, and presumably, shortly after he became aware that the defendant intended to assert the argument that Michigan law should not recognize tort claims against title insurers.[20] Defendant's argument was a novel one under Michigan law.[21] Although it would have been prudent for the plaintiff to plead both tort and contract claims, the plaintiff should not necessarily have been required to foresee that defendant would make such an argument when he first drafted his complaint. On the other hand, the untimeliness of

12. *Id.*

13. 238 Mich. App. 228, 605 N.W.2d 84 (1999).

14. *Wormsbacher*, 284 Mich. App. at 4, 772 N.W.2d at 832.

15. *Id.* (citing *Amburgey*, 238 Mich. App. 228, 605 N.W.2d 84 (1999)).

16. *Id.*

17. *Id.* (citing Knauff v. Oscoda County Drain Comm'r, 240 Mich. App. 485, 493, 618 N.W.2d 1, 6 (2000)).

18. *Id.*

19. This analysis can arguably be characterized as *dicta*, given that the court had already affirmed the trial court on the ground that plaintiff's sought-after amendment was futile.

20. *Wormsbacher*, 284 Mich. App. at 2, 772 N.W.2d at 828.

21. *Id.*

plaintiff's motion would have caused substantial prejudice to the defendant, as the defendant presumably did not have the opportunity to conduct discovery on the plaintiff's proposed breach of contract claim. While the *Wormsbacher* court's holding was not unreasonable given the circumstances, it would have also been appropriate for the court to consider the novelty of the defendant's argument as a factor in weighing whether justice would require granting leave to amend.[22]

III. CASE EVALUATION SANCTIONS

In *Tevis v. Amex Assurance Co.*,[23] the plaintiff suffered serious personal injuries when an automobile struck his motorcycle.[24] The driver of the automobile was covered by an insurance policy issued by defendant Amex Assurance Co. (Amex) in the state of Washington.[25] Plaintiff did not have no-fault insurance coverage; however, his parents had a policy issued through co-defendant Geico Indemnity Co. (Geico).[26] Both Amex and Geico refused to pay personal injury protection (PIP) benefits to plaintiff, and plaintiff instituted a lawsuit against both insurance companies.[27] Amex and Geico each filed motions for summary disposition; both argued that the other was the first priority insurer responsible for paying benefits on plaintiff's behalf.[28] The court granted Geico's motion, and denied Amex's motion.[29]

The plaintiff and Amex participated in case evaluation under MCR 2.403.[30] The case evaluation resulted in an award of $190,000 in favor of the plaintiff and against Amex.[31] Plaintiff accepted the award; Amex rejected it.[32] The case proceeded to trial.[33] The parties stipulated to the amount of damages, and the only issue presented to the jury was liability.[34] The jury ultimately found that Amex was liable to the plaintiff for his PIP benefits.[35] Thus, the trial court entered a judgment in the

22. MICH. CT. R. 2.118(A)(2).
23. 283 Mich. App. 76, 770 N.W.2d 16 (2009).
24. *Id.* at 79, 770 N.W.2d at 18.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Tevis*, 283 Mich. App. at 79, 770 N.W.2d at 18.
30. *Id.* at 86, 770 N.W.2d at 22.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Tevis*, 283 Mich. App. at 86, 770 N.W.2d at 22.

stipulated amount of $326,895.01.[36] Plaintiff thereafter moved for case evaluation sanctions and attorney fees pursuant to MCR 2.403(O).[37] The trial court denied plaintiff's motion, and plaintiff appealed.[38]

On appeal, plaintiff argued that the trial court's denial of case evaluation sanctions was improper under MCR 2.403(O)(1), which provides: "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation."[39] Amex did not dispute that the trial court's damage award was more favorable to the plaintiff than the $190,000 case evaluation award.[40] Nevertheless, Amex asserted that the damages award was not a "verdict" for purposes of MCR 2.403(O), because the parties stipulated as to the amount of damages.[41] The Michigan Court of Appeals disagreed, noting that MCR 2.403(O)(2) states: "For the purpose of this rule '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 case evaluation sanction."[42] The court explained that:

> While the jury in this matter did not determine the precise amount of damages in light of the parties' stipulation, the jury's determination that plaintiff was not the owner of the motorcycle and thus entitled to PIP benefits, a judgment would enter in an amount agreed upon by the parties. The jury verdict, then, was essentially that plaintiff was entitled to PIP benefits in the amount agreed upon by the parties. That the actual amount does not appear on the jury verdict form does not make it any less a part of the verdict. Moreover, MCR 2.403(O)(2) provides that "verdict" *includes* those items listed in subsections a through c. Nothing in the rule indicates that a verdict is limited only to those items.[43]

Because the verdict was indisputably more favorable to plaintiff than to Amex, the court held that the imposition of case evaluation sanctions

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36. *Id.* at 87, 770 N.W.2d at 22.
37. *Id.*
38. *Id.* at 79, 770 N.W.2d at 18.
39. *Id.* at 86, 770 N.W.2d at 22.
40. *Id.* at 86-87, 770 N.W.2d at 22.
41. *Tevis,* 283 Mich. App. at 87, 770 N.W.2d at 22.
42. *Id.*
43. *Id.* at 87-88, 770 N.W.2d at 23.

was mandatory and overturned the trial court's denial of case evaluation sanctions to plaintiff.[44]

The stated purpose of MCR 2.403 is "to shift the financial burden onto the party who demands a trial by rejecting a proposed case evaluation award."[45] The Michigan Court of Appeals' holding in *Tevis* is consistent with this purpose—regardless of whether Amex stipulated to damages in advance, the plaintiff was nonetheless required to bear the expense of proceeding to trial.[46] In light of the *Tevis* holding, practitioners should be aware of the possible consequences of stipulating to a damages award that is more favorable than a previously rejected case evaluation sanction award.

IV. JUDICIAL ESTOPPEL

In *Morales v. State Farm Mutual Automobile Insurance Co.*,[47] the plaintiff suffered a closed-head injury in an automobile accident, and sought to collect PIP benefits from the defendant, State Farm Mutual Automobile Insurance Co. (State Farm).[48] State Farm paid plaintiff work-loss benefits, and thereafter ceased to pay further no-fault benefits.[49] Approximately one-and-a-half years after his automobile accident, plaintiff applied for benefits from the Veteran's Administration (VA benefits).[50] Plaintiff claimed that his entitlement to VA benefits arose from his exposure to Agent Orange during his service in Vietnam.[51] In support of his benefit application, plaintiff submitted a letter from his doctor, which listed plaintiff's medical conditions as the following: "ischemic heart disease, post myocardial infarction x2 with congestive heart failure"; "motor vehicle accident 6/12/02 with closed head injury, memory impairment and subsequent inability to work"; "chronic vertigo, caused by the auto accident noted above"; "type I, diabetes mellitus"; "CVA (stroke)"; "diabetic neuropathy"; "hypertension"; and "traumatic brain injury."[52] Based on the aforementioned findings, the court awarded plaintiff VA benefits.[53]

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44. *Id.* at 88, 770 N.W.2d at 23.

45. *Id.* at 86, 770 N.W.2d at 22.

46. This was in spite of the fact that the plaintiff was spared the cost of having to argue his damages claim at trial.

47. 279 Mich. App. 720, 761 N.W.2d 454 (2008).

48. *Id.* at 722, 761 N.W.2d at 456.

49. *Id.* at 722, 761 N.W.2d at 457.

50. *Id.* at 723, 761 N.W.2d at 457.

51. *Id.*

52. *Id.* at 724, 761 N.W.2d at 457.

53. *Morales*, 279 Mich. App. 724, 761 N.W.2d at 457-58.

At trial, plaintiff argued that State Farm was required to pay him no-fault benefits because his inability to work was causally related to injuries that he had received in his automobile accident.[54] State Farm asserted that plaintiff had recovered from any auto accident injuries shortly after his accident, and that he became disabled due only to the ailments that gave rise to his application for VA benefits.[55] The jury ultimately found in plaintiff's favor, and the court entered judgment against State Farm.[56]

State Farm appealed the jury's verdict, and argued, among other things, that plaintiff was judicially estopped from asserting a claim for no-fault benefits because he had successfully brought a claim for VA benefits, which was based on causes not related to his automobile accident.[57] The Michigan Court of Appeals rejected State Farm's argument.[58] Under the doctrine of judicial estoppel, "a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding."[59] Michigan follows the "prior success" model, under which "the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true.[60] Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent."[61]

Applying this framework, the court found that "plaintiff did not assert in the present case for no-fault benefits that his closed head injury was the sole factor causing his disability. Rather, he asserted that his pre-existing condition made him more susceptible to the disabling effects of the closed head injury he received in the accident."[62] Thus, the court held that plaintiff was entitled to no-fault benefits despite his assertions in his VA benefits application, because those assertions were not "wholly inconsistent" with plaintiff's position in the litigation against State Farm.[63]

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54. *Id.* at 725, 761 N.W.2d at 458.

55. *Id.*

56. *Id.* at 728, 761 N.W.2d at 459.

57. *Id.* at 736, 716 N.W.2d at 463-64.

58. *Id.* at 740, 716 N.W.2d 466.

59. *Morales,* 279 Mich. App. at 737, 761 N.W.2d at 463-64 (quoting Paschke v. Retool Indus., 445 Mich. 502, 509-510, 519 N.W.2d 441 (1994)).

60. *Id.*

61. *Id.* at 737, 761 N.W.2d at 464 (quoting *Paschke,* 445 Mich. at 510, 519 N.W.2d at 444).

62. *Id.*

63. *Id.*

The Michigan Court of Appeals' holding in *Morales* is consistent with the already-recognized principle of Michigan law that a party's position must be wholly inconsistent with a prior position for judicial estoppel to apply. Although the *Morales* court does not set forth any novel legal principles, it serves as a reminder that Michigan courts will narrowly construe the doctrine of judicial estoppel.

V. LAW OF THE CASE DOCTRINE

In *Manske v. Department of Treasury*,[64] the plaintiff brought an action against the Michigan Department of Treasury (Treasury), alleging that the Treasury wrongfully assessed a tax deficiency against it "when it included the gain on real property transferred in lieu of foreclosure."[65] The plaintiff argued that the transfer was properly characterized as a "casual transaction" and that the gain from the transaction could not be included in its single business tax (SBT) base.[66] The Michigan Court of Appeals concluded that that the transfer qualified as a casual transaction and that the "resulting gain should not have been included in [plaintiff's] SBT base."[67] Accordingly, the court reversed the court of claims' grant of summary disposition in favor of the Treasury and remanded the case.[68]

On remand, the Treasury would not agree to a final judgment; thus, plaintiff moved for summary disposition and requested that the court of claims order that the Treasury pay it a refund.[69] The Treasury acknowledged that the court of appeals had determined that the transfer was a casual transaction, but argued that it should be permitted to recapture the unused "capital acquisition deduction" (CAD) and offset the amount of the total refund.[70] The court of claims disagreed with the Treasury, finding that the law of the case doctrine required it to order "a full refund without any offset for the recapture of any unused CAD."[71] The Treasury appealed.[72]

On appeal, the Michigan Court of Appeals addressed the applicability of the law of the case doctrine, which "generally provides that a question of law decided by an appellate court will not be decided

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64. Manske v. Dep't of Treasury, 282 Mich. App. 464, 766 N.W.2d 300 (2009), *leave to appeal denied,* 484 Mich. 869, 769 N.W.2d 700 (2009).

65. *Id.* at 466, 766 N.W.2d at 301.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Manske,* 282 Mich. App. at 466-67, 766 N.W.2d at 301-02.

71. *Id.* at 467, 766 N.W.2d at 302.

72. *Id.* at 466, 766 N.W.2d at 301.

differently on remand or in a subsequent appeal in the same case."[73] The court pointed out that, in the previous appeal, the court of appeals determined only that the gain in the property was improperly included in the plaintiff's SBT base.[74] The court then remanded the action to the court of claims, without specifically addressing the CAD issue.[75] Because the court did not expressly state that the CAD recapture did not apply to casual transactions, the court of appeals held that "under the law of the case doctrine, the court of claims had to treat the transfer as a casual transaction, but it could still appropriately consider the proper treatment of the CAD recapture provisions."[76]

The *Manske* opinion stands for the proposition that the law of the case doctrine does not apply unless the appellate court expressly addresses an issue. After *Manske*, it appears that a party cannot invoke the doctrine in situations where the appellate court addressed an issue by implication only. Practitioners should note that the *Manske* holding is likely to lead to a narrow interpretation of the law of the case doctrine by Michigan courts.

VI. SERVICE OF PROCESS

In *Sidun v. Wayne County Treasurer*,[77] the Michigan Court of Appeals considered the question of what constitutes proper service in foreclosure proceedings.[78] The plaintiff, along with her mother, owned a home in Hamtramck, Michigan (the property) as a joint tenant with rights of survivorship.[79] Plaintiff's mother received all of the tax bills for the property at her home in Warren, Michigan (the Warren address).[80] In 1998, plaintiff's mother moved to Birmingham to reside with the plaintiff.[81] Plaintiff and her mother failed to pay taxes on the property in 2000 and 2001, and Wayne County instituted foreclosure proceedings.[82] The county treasurer sent notice of tax delinquency to plaintiff's mother at her Warren address, however, the notice was returned as undeliverable.[83] The property was thereafter forfeited to the county

73. *Id.* at 467, 766 N.W.2d at 302.
74. *Id.*
75. *Id.* at 468, 766 N.W.2d at 302.
76. *Manske*, 282 Mich. App. at 468, 766 N.W.2d at 302.
77. 481 Mich. 503, 751 N.W.2d 453 (2008).
78. *Id.* at 505, 751 N.W.2d 456.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 507, 751 N.W.2d at 457.
83. *Sidun*, 481 Mich. at 507, 751 N.W.2d at 457.

treasurer, and the treasurer's office filed a petition for foreclosure on June 14, 2002.[84] The county treasurer sent notice of the foreclosure proceedings to both plaintiff and her mother at her Warren address and, again, this notice was also returned as undeliverable.[85] The county posted notice of foreclosure on the property, and the county treasurer published notification three times in a community newspaper.[86] The treasurer did not send notice to plaintiff at her Birmingham address, which appeared on the recorded deed.[87]

Plaintiff's mother passed away in 2003, and a judgment of foreclosure was entered shortly thereafter.[88] The county treasurer then sold the property at an auction.[89] Plaintiff learned of this sale when a tenant of the property notified her that the new owner had attempted to collect rent.[90] After learning of the sale, the plaintiff brought suit against the county treasurer, claiming that she had been wrongfully deprived of her property without notice in violation of the General Property Tax Act (GPTA),[91] and the Due Process Clause of the Michigan Constitution.[92] The trial court granted summary disposition in favor of the defendant, holding that the county's attempts to notify plaintiff satisfied the GPTA and the Michigan Constitution. The court of appeals upheld the trial court, and the plaintiff appealed to the Michigan Supreme Court.[93] The supreme court vacated the court of appeals' holding, and remanded for reconsideration in light of *Jones v. Flowers*.[94] The court of appeals reached the same result on remand; plaintiff again filed leave to appeal to the Michigan Supreme Court.[95] The Michigan Supreme Court granted plaintiff leave to appeal.[96]

On appeal, the Michigan Supreme Court considered whether the method of service that the county treasurer employed was sufficient to satisfy the due process requirements of the U.S. and Michigan constitutions, which both provide that no person shall be "deprived of life, liberty or property without due process of law."[97] Due process

84. *Id.* at 506-07, 781 N.W.2d at 456-57.
85. *Id.* at 507, 781 N.W.2d at 457.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Sidun*, 481 Mich. at 507, 781 N.W.2d at 457.
90. *Id.*
91. MICH. COMP. LAWS ANN. §§ 211.11-.17 (West 2010).
92. *Sidun*, 481 Mich. at 507-08, 751 N.W.2d at 457.
93. *Id.* at 508, 751 N.W.2d at 457.
94. *Id.*; Jones v. Flowers, 547 U.S. 220 (2006).
95. *Sidun*, 481 Mich. at 508, 751 N.W.2d at 457.
96. *Id.*
97. *Id.* at 508-09, 751 N.W.2d at 457-58.

requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[98] Although actual notice is not required, "the means employed to notify interested parties must be more than a mere gesture; they must be means that one who actually desires to inform the interested parties might reasonably employ to accomplish actual notice."[99] The reasonableness of a particular method of service may vary, depending on the information known to the government at the time of service.[100] While notice by publication may be sufficient in some circumstances, such notice is insufficient when the government knows the defendant's address.[101]

Applying the aforementioned principles, the Michigan Supreme Court held that "the measures taken by the county treasurer to inform plaintiff of the foreclosure proceedings were constitutionally deficient.[102] When there are multiple owners of a piece of property, due process entitles each owner to notice of foreclosure proceedings."[103] The court found that sending notice to the plaintiff at the Warren address did not comply with this standard.[104] Rather, the county treasurer was required to consult the deed to the property and provide notice to the plaintiff at her listed address in Birmingham.[105] In issuing this holding, however, the court expressly noted that it would not "categorically require foreclosing entities to search for and send notice to additional addresses whenever multiple owners are entitled to notice of foreclosure . . . the guiding principle remains that notice must be 'reasonably calculated' to apprise interested parties of the action and provide them with the opportunity to be heard."[106]

The court also found that the county treasurer's follow up measures were equally deficient. When the original notice was returned, the treasurer was on notice that the plaintiff did not live there.[107] While posting and publication typically would be reasonable follow-up measures, such measures were insufficient given that the plaintiff's

98. *Id.* at 509, 751 N.W.2d at 458 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652 (1950)).

99. *Id.* (citing *Mullane,* 339 U.S. at 315; *Jones,* 547 U.S. at 226).

100. *Id.* at 510, 751 N.W.2d at 458.

101. *Sidun,* 481 Mich. at 510, 751 N.W.2d at 458.

102. *Id.* at 515, 715 N.W.2d 461.

103. *Id.* at 512, 751 N.W.2d at 459.

104. *Id.*

105. *Id.*

106. *Id.* at 515, 751 N.W.2d at 461.

107. *Sidun,* 481 Mich. at 515, 751 N.W.2d at 461.

address was known to the county treasurer.[108] The court emphasized that the government is not required to conduct a search for a defendant's address in a phone book, or in the income tax rolls.[109] In this case, however, the burden on the government in locating the plaintiff's address would have been slight—it needed only to consult the recorded deed.[110] Finally, the court noted that "the government's constitutional obligation to provide notice is not excused by an owner's failure to keep his or her address updated in government records."[111] Similarly, "the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property . . . an interested party's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending."[112] Accordingly, the court held that, while plaintiff should have been more diligent in paying the taxes on her property, the government was not entitled to take the property without due process of law.[113]

The *Sidun* court did not provide a bright-line rule for determining the constitutionality of service of process in foreclosure and other proceedings. While the holding is helpful in that it sets forth the proper Due Process standards with regard to service of process, the application of these standards will be subject to judicial interpretation, depending on the facts of each particular case. What can be drawn from the *Sidun* holding is that the Michigan Supreme Court has taken a strict position on the constitutionality of service of process, and plaintiffs should be certain to make all reasonable and available efforts to effect service in a manner consistent with the U.S. and Michigan constitutions.

VII. STATUTE OF LIMITATIONS IN ATTORNEY MALPRACTICE ACTIONS

In *Wright v. Rinaldo*,[114] the Michigan Court of Appeals interpreted M.C.L.A. section 600.5838(1), which states that a claim for attorney malpractice begins to accrue on the date that the attorney "discontinues serving the plaintiff . . . in a professional . . . capacity as to the matters out of which the claim for malpractice arose."[115] The plaintiff in *Wright*

108. *Id.* at 516, 751 N.W.2d at 461.
109. *Id.*
110. *Id.*
111. *Id.* at 517, 751 N.W.2d at 462.
112. *Id.*
113. *Sidun*, 481 Mich. at 517, 751 N.W.2d at 462.
114. 279 Mich. App. 526, 761 N.W.2d 114 (2008).
115. *Id.* at 528, 761 N.W.2d at 115 (quoting MICH. COMP. LAWS ANN. § 600.5838(1) (West 2010)).

hired defendant, an attorney, to prosecute his patent application in August of 2000.[116] Plaintiff became dissatisfied with the defendant's work, and he began to consult with another patent attorney in October of 2003.[117] In December of 2003, plaintiff signed a document with the U.S. Patent and Trademark Office (USPTO) that revoked defendant's power of attorney.[118] Plaintiff also executed a power of attorney for his new attorney, and instructed the USPTO to send all further correspondence to the new attorney.[119] Plaintiff did not inform defendant that he had revoked her power of attorney, apparently because he sought to procure her favorable testimony in a lawsuit against his former business partner.[120] In October of 2005, defendant sent a letter to plaintiff to advise him that the maintenance fee for his patent would soon expire.[121] Defendant testified that she did not represent plaintiff at this time; rather, she had the maintenance fee date flagged on her calendar, and wanted to ensure that she was not blamed if plaintiff allowed his patent to lapse.[122] Plaintiff ultimately instructed his new attorney to pay the maintenance fee.[123] Also in October of 2005, defendant wrote a letter to plaintiff, informing him that the USPTO had disallowed some claims that she filed in 2003. [124] Defendant further noted that she had received notice that plaintiff had revoked her power of attorney, and asked for information about where to send his file.[125]

On February 16, 2006, plaintiff filed a legal malpractice action against the defendant.[126] Defendant filed a motion for summary disposition, arguing that the two-year statute of limitations set forth in M.C.L.A. section 600.5838(1) had expired.[127] The trial court found that the plaintiff ended the attorney client relationship with defendant in 2003 when he revoked her power of attorney.[128] Accordingly, the court held that the two-year statute of limitations had expired and dismissed plaintiff's claim, and the plaintiff appealed.[129]

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116. *Id.* at 530, 761 N.W.2d at 116.
117. *Id.*
118. *Id.* at 535, 761 N.W.2d at 119.
119. *Id.*
120. *Wright,* 279 Mich. App. at 531, 761 N.W.2d at 117.
121. *Id.* at 532, 761 N.W.2d at 117.
122. *Id.* at 531-32, 761 N.W.2d at 117.
123. *Id.* at 532, 761 N.W.2d at 117.
124. *Id.*
125. *Id.*
126. *Wright,* 279 Mich. App. at 533, 761 N.W.2d at 118.
127. *Id.*
128. *Id.*
129. *Id.*

The Michigan Court of Appeals affirmed the trial court's ruling, also finding that the plaintiff effectively terminated his attorney-client relationship with defendant when he revoked her power of attorney and hired a new lawyer.[130] The court found that the relationship was terminated regardless of the fact that plaintiff had not informed defendant that their relationship had ended.[131]

The subjective standard adopted by the *Wright* court is likely to lead to further litigation in the future, as the opinion does not provide a clear test for determining when the attorney-client relationship terminates for the purpose of the applicable statute of limitations.[132] As the dissent aptly notes, "In MCL 600.5838(1), the Legislature described a purely objective standard for accrual that triggers the running of the two-year period of limitations by a discernible event: the discontinuation of services."[133] According to the dissent, this objective test would require that the attorney-client relationship be ended by one of the following concrete events: (1) the court relieves the attorney of its obligation to represent the client; (2) the client officially fires the attorney; or (3) the attorney provides the client notice that he has terminated representation.[134] The majority rightly noted its concern with the plaintiff's unorthodox attempt to avoid the statute of limitations by purposefully failing to notify the defendant that their relationship had terminated.[135] Notwithstanding, the majority's concern with this factor has the effect of creating a subjective test which may cause unpredictable results in future litigation.

VIII. TAXATION OF LITIGATION COSTS

In *Guerrero v. Smith*,[136] the plaintiff brought an action against the defendant for injuries sustained in an automobile accident.[137] The trial court entered a judgment for the defendant after a jury verdict of "no cause of action."[138] The defendant thereafter moved for costs pursuant to MCR 2.625(A)(1), which provides that "[c]osts 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

130. *Id.* at 534-35, 761 N.W.2d at 118-19.
131. *Id.* at 535, 761 N.W.2d at 119.
132. MICH. COMP. LAWS ANN. § 600.5838(1) (West 2010).
133. *Wright*, 279 Mich. App. at 540, 761 N.W.2d at 121 (Gleicher, J., dissenting).
134. *Id.* at 540, 761 N.W.2d at 122 (citing MICH. R. PROF. CONDUCT 1.16).
135. *Id.* at 532, 761 N.W.2d at 117.
136. 280 Mich. App. 647, 761 N.W.2d 723 (2008).
137. *Id.* at 653, 761 N.W.2d at 730.
138. *Id.* at 651, 761 N.W.2d at 729.

filed in the action."[139] Specifically, the defendant sought to tax the following costs to the plaintiff: (1) case evaluation fees; (2) motion fees; (3) transcript and videotaping costs for various depositions; (4) copying costs of video depositions for trial; (5) a copy of a surveillance video; (6) expert witness fees; (7) investigator costs; (8) statutory attorney fees; (9) costs for "blow up mounts"; (10) witness subpoena fees; (11) mileage charges to and from trial; and (12) general copying charges.[140] The trial court granted the costs to defendant, and plaintiff appealed.[141]

A. Investigator Costs

The court of appeals first addressed whether the fees that defendant paid to a private investigator were taxable.[142] The defendant argued that such fees were taxable because the private investigator qualified as an expert witness.[143] The court rejected defendant's argument for two reasons. First, the court noted that the private investigator had not been qualified as an expert witness at trial.[144] Second, the court pointed out that M.C.L.A. section 600.2164, which allows for the taxation of expert witness fees, states that it is not applicable to "witnesses testifying to the established facts, or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion."[145] Because the defendant hired the private investigator to take surveillance film with the purpose of establishing that plaintiff had not been severely injured in the disputed automobile accident, he was to testify as to a matter of fact, not of opinion.[146] Thus, the court held that, the private investigator was not an "expert witness."[147] Accordingly, the court held that the trial court's taxation of investigator costs was erroneous.[148]

139. *Id.* at 670, 761 N.W.2d at 738-39 (quoting MICH. CT. R. 2.625(A)(1)).
140. *Id.* at 670, 761 N.W.2d at 739.
141. *Id.* at 651, 761 N.W.2d at 729.
142. *Guerrero*, 280 Mich. App. at 670, 761 N.W.2d at 739.
143. *Id.* at 672, 761 N.W.2d at 739.
144. *Id.*
145. *Id.* (quoting MICH. COMP. LAWS ANN. § 600.2164(3)) (West 2000).
146. *Id.* at 672, 761 N.W.2d at 739.
147. *Id.*
148. *Guerrero*, 280 Mich. App. at 672, 761 N.W.2d at 740.

B. Costs for "Blow-up Mounts"

The court also held that the defendant was not able to tax its costs for "blow-up mounts" because "the expense for exhibit enlargement is not a taxable cost."[149]

C. Mileage Charges

The court then considered whether the defendant was entitled to costs for his mileage to and from trial. The court held that, because "there is no statute or court rule allowing for the taxation of traveling expenses of attorneys or parties," the trial court abused its discretion in awarding such costs to the defendant.[150]

D. Copying Charges

The court further held that the trial court incorrectly awarded copying costs to the defendant, because there is no court rule which would allow the taxation of such costs.[151]

E. Case Evaluation Fees

The court overturned the trial court's decision to award case evaluation fees to the defendant. Again, the Court based its holding on the fact that there exists no statute or court rule which would allow for the taxation of case evaluation fees.[152]

F. Surveillance Video Charges

The court also overturned the trial court's award of surveillance video charges, because there was no statutory authority for the court to do so.[153]

G. Copying Costs of Video Depositions

The court upheld the trial court's award of copying costs for video depositions.[154] The court held that these items were properly taxed

149. *Id.*
150. *Id.* at 672-71, 761 N.W.2d at 740.
151. *Id.* at 673-74, 761 N.W.2d at 740.
152. *Id.* at 674, 761 N.W.2d at 740.
153. *Id.* at 674, 761 N.W.2d at 740-41.
154. *Guerrero*, 280 Mich. App. at 671, 761 N.W.2d at 739.

because "the depositions were filed in the clerk's office and used as evidence at trial."[155]

H. Expert Witness Fees

The plaintiff argued that the trial court abused its discretion when it allowed the defendant to tax the fees of its expert witness at a rate of $500 per hour.[156] The court of appeals rejected the plaintiff's argument and held that the taxation of these fees was reasonable.[157] As a preliminary matter, the court considered the fact that plaintiff's expert witness, a medical doctor board-certified in family medicine only, was paid $375 per hour.[158] Defendant's expert, on the other hand, was a specialist who was board-certified in physical medicine, rehabilitation, and electrodiagnostic medicine.[159] In comparison to the rate of the plaintiff's expert, the court held that the defendant's expert witness fees were not unreasonable.[160] The court then noted that the record indicated that the trial court had reviewed an itemized bill for the defendant's expert, and had properly "considered and weighed the reasonableness of the requested expert witness fees."[161] Based on the aforementioned, the court found that the trial court did not abuse its discretion in awarding expert witness fees to the defendant.[162]

1. Sanctions

Finally, the plaintiff argued that, because the defendant lacked a legal basis for taxing certain costs to the plaintiff, the trial court should have sanctioned the defendants pursuant to MCR 2.114.[163] Under MCR 2.114(D), the signature of an attorney certifies that the document is "well grounded in fact and . . . warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law," and that "the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost

155. *Id.* at 674, 761 N.W.2d at 741 (citing MICH. CT. R. 2.315(I) and MICH. COMP. LAWS ANN. § 600.2549)).
156. *Id.* at 675, 761 N.W.2d at 741.
157. *Id.* at 675, 761 N.W.2d at 741.
158. *Id.*
159. *Id.*
160. *Guerrero*, 280 Mich. App. at 675, 761 N.W.2d at 741.
161. *Id.* at 676-77, 761 N.W.2d at 742.
162. *Id.* at 677, 761 N.W.2d at 742.
163. *Id.*

of litigation."[164] Pursuant to MCR 2.114(D), an attorney who files a document that is not well grounded in fact and law is subject to sanctions.[165]

The court disagreed with the plaintiff, and held that the defendant was not subject to sanctions.[166] The court found that chapter twenty-four of the Revised Judicature Act,[167] which governs the taxation of costs in civil actions, is "written in a cumbersome manner, and several of the statutes refer to other statutes to define which costs may actually be taxed."[168] Accordingly, the court concluded that defendants likely honestly believed that many of the disputed costs were taxable.[169] Thus, the court refused to conclude that defendants' motion was frivolous or without legal merit.[170]

The *Guerrero* court was correct in its observation that chapter twenty-four of the Revised Judicature Act is cumbersome and difficult to navigate.[171] As demonstrated by the facts of the *Guerrero* decision, the taxation of costs, which should arguably be a simple administrative matter, has the possibility of leading to extensive litigation. While the *Guerrero* court provides practitioners with a welcome clarification of a Michigan court's ability to tax certain costs, it is clear that chapter twenty-four of the Revised Judicature Act is due for legislative revision and simplification.

IX. TOLLING OF THE STATUTE OF LIMITATIONS FOR SERVICE MEMBERS

In *Walters v. Nadell*,[172] the Michigan Supreme Court addressed the issue of whether a plaintiff may invoke the tolling provisions of the Servicemembers Civil Relief Act (SCRA) after failing to raise the issue in response to a motion for summary judgment.[173] The plaintiff in *Walters* was involved in an automobile accident with the defendant. Plaintiff subsequently sued the defendant, but was unable to effect service because the defendant was serving in the military.[174] The applicable statute of limitations expired before plaintiff was able to serve

164. *Id.* at 677-78, 761 N.W.2d at 742.
165. *Id.* at 678, 761 N.W.2d at 742.
166. *Guerrero*, 280 Mich. App. at 677, 761 N.W.2d at 742.
167. MICH. COMP. LAWS ANN. §§ 600.2401-.2461 (West 2010).
168. *Guerrero*, 280 Mich. App. at 677, 761 N.W.2d at 742-43.
169. *Id.* at 677, 761 N.W.2d at 742.
170. *Id.*, 761 N.W.2d at 743.
171. *Id.*, at 761 N.W.2d at 742-43.
172. 481 Mich. 377, 751 N.W.2d 431 (2008).
173. *Id.* at 380, 751 N.W.2d at 433.
174. *Id.*

the defendant.[175] After the plaintiff served the defendant, the defendant moved to dismiss his complaint on the ground that the statute of limitations had expired.[176] In response, plaintiff argued that the statute of limitations was tolled pursuant to MCLA section 600.5853. The trial court granted summary disposition in favor of the defendant.[177]

On appeal, the plaintiff re-asserted that the statute of limitations was tolled under MCLA section 600.5853.[178] Plaintiff also contended, for the first time, that the statute of limitations had tolled pursuant to the SCRA.[179] The Michigan Court of Appeals affirmed the trial court, and refused to address plaintiff's SCRA argument because he had not raised it in the trial court.[180] Plaintiff sought leave to appeal to the Michigan Supreme Court, arguing that his claims were timely pursuant to the SCRA.[181]

Before the Michigan Supreme Court, the plaintiff contended that the SCRA is mandatory and cannot be waived.[182] The court first focused on the language of the SCRA, which states: "The period of a servicemember's military service *may not* be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court . . . by or against the servicemember."[183] The court held that this language is mandatory, and "clearly provides that the time that a servicemember is in military service is excluded from any period of limitations."[184]

The court next addressed whether the mandatory provisions of the SCRA may be waived. The pertinent language of the statute provides that "[a] servicemember may waive any of the rights and protections provided by this Act."[185] The court considered the purpose of the SCRA, which is to "provide for, strengthen, and expedite the national defense by protecting the civil rights of servicemembers during their military service."[186] Given that the SCRA was enacted to protect the rights of servicemembers, the court found that it would be "incongruent with the

175. *Id.*
176. *Id.*
177. *Id.* at 381, 751 N.W.2d at 433.
178. *Walters*, 481 Mich. at 381, 751 N.W.2d at 433.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 383, 751 N.W.2d at 435.
183. *Id.* at 382, 751 N.W.2d at 434 (citing 50 U.S.C.A. app. § 526(a) (West 2010)) (emphasis added).
184. *Walters*, 481 Mich. at 383, 751 N.W.2d at 435.
185. *Id.* at 384, 751 N.W.2d at 435 (quoting 50 U.S.C.A. app. § 517(a) (West 2010)).
186. *Id.* at 386, 751 N.W.2d at 436 (internal citations omitted).

purpose of the SCRA to permit a servicemember to waive the rights and protections of the act, but bar a nonservicemember from waiving incidental benefits, and thereby provide, without exception, incidental benefits to a nonservicemember."[187] Because Congress enacted the SCRA with the purpose of protecting servicemembers, the court held that the Act was not intended to preclude the possibility of waiver by a nonservicemember.[188]

Finally, the court considered whether the plaintiff waived his right to invoke the SCRA on appeal.[189] The court held that, under Michigan's "raise or waive" rule, the plaintiff waived his right to raise the tolling provisions of the SCRA on appeal when plaintiff did not raise the issue before the trial court.[190] The reasoning of the *Walters* court is consistent with the general principle that a party may waive a claim or defense that it does not timely raise in the trial court,[191] and practitioners should note the Michigan Supreme Court's holding in *Walters* when dealing with litigants who are military servicemembers.

187. *Id.*
188. *Id.*
189. *Id.* at 386, 751 N.W.2d at 436-37.
190. *Walters,* 481 Mich. at 388, 751 N.W.2d at 437.
191. *See id.*