CIVIL PROCEDURE

TRICIA L. ROELOFS[†]

I. INTRODUCTION

Civil Procedure cases issued during the current *Survey* period[1] demonstrate a trend away from judicial interpretation of statutory language. Numerous panels of the Michigan Court of Appeals interpreted Michigan statutes and court rules based on their plain language, even where such interpretation resulted in harsh consequences for litigants. Moreover, the Michigan Court of Appeals issued helpful guidance in analyzing and bringing requests for attorneys fees. Additionally, the courts published interesting opinions in the areas of enforcement of foreign judgments and the finality of judgments following a change in the law. Noteworthy cases from the current *Survey* period are described in greater detail below.

II. OFFER OF JUDGMENT RULES REQUIRES A SUM CERTAIN; APPLIES TO MIXED LAW AND EQUITY ACTIONS

In *McManus v. Toler*,[2] the Michigan Court of Appeals clarified the offer of judgment rule.[3] *McManus* involved an alleged breach of contract.[4] During the proceedings, defendant Toler submitted an offer of judgment to plaintiff McManus.[5] Toler submitted the offer under MCR 2.405(A)(1),[6] which states: "'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."[7]

Toler's offer of judgment was for $25,000 and bore the title: "OFFER OF JUDGMENT."[8] A footnote in the document clarified that the $25,000 was in addition to monthly payments for a separate purchase agreement between McManus and Toler.[9] McManus did not respond to

---

† Ms. Roelofs is a litigation attorney at the Tennessee Valley Authority Office of the General Counsel in Knoxville, Tennessee. B.A., 2004, with high honors, Michigan State University; J.D., 2008, *magna cum laude*, Wayne State University Law School. Ms. Roelofs was elected to the Order of the Coif.

1. This article includes cases decided from June 1, 2010, through May 31, 2011.
2. 289 Mich. App. 283, 810 N.W.2d 38 (2010).
3. *Id.* at 289
4. *Id.* at 285.
5. *Id.*
6. *Id.*
7. *Id.* at 286 (citing MICH. CT. R. 2.405(A)(1)).
8. *McManus*, 289 Mich. App. at 288.
9. *Id.*

the offer of judgment.[10] The trial court ultimately ruled in Toler's favor, and the court assessed costs to McManus under MCR 2.405(D).[11]

McManus objected, arguing that the offer of judgment did not meet the requirements of the rule because it was not for a "sum certain."[12] McManus claimed that *Knue v. Smith*[13] controlled.[14] In *Knue*, the court held that an offer to "pay the defendants $3,000 for a quitclaim deed" was not for a sum certain.[15] Rather, it was for "a quit claim deed in addition to the transfer of $3,000 . . . ."[16] The *Knue* court therefore held the offer did not satisfy the requirements of MCR 2.405(A)(1).[17]

The *McManus* panel distinguished *Knue*. It found that the language of Toler's offer of judgment was not conditional, but was for a sum certain of $25,000.[18] Thus, it complied with MCR 2.405 and the trial court's assessment of costs against Toler was appropriate.[19]

In the alternative, McManus argued that his case was equitable and the offer of judgment rule did not apply.[20] The court disagreed, noting that McManus's complaint sought both monetary and equitable relief.[21] Accordingly, the court held that, at a minimum, the offer of judgment rule applies to mixed law and equity actions.[22]

McManus does not provide a new rule of law with respect to the sum certain requirement applicable to offers of judgment. To avoid prolonged litigation, however, practitioners would be well-advised to make clear in an offer of judgment that the amount offered is a sum certain, and does not include additional amounts. Similarly, it is not surprising that the *McManus* court would apply the offer of judgment rule in actions of mixed law and equity, as a complaint that includes damages is susceptible to settlement for a certain sum of money. In any event, *McManus* is helpful insomuch as it provides clear guidance to litigators concerning the types of actions to which the offer of judgment rule may apply.

---

10. *Id.* at 285.
11. *Id.*
12. *Id.* at 285-86.
13. 478 Mich. 88, 731 N.W.2d 686 (2007).
14. *McManus*, 289 Mich. App. at 286.
15. *Id.* at 286-87.
16. *Id.* at 288.
17. *Id.* at 287 (citing *Knue*, 478 Mich. at 93).
18. *Id.* at 288.
19. *Id.* at 289.
20. *McManus*, 289 Mich. App. at 289.
21. *Id.* at 290.
22. *Id.*

III. DECLARATORY JUDGMENTS FOR DISCOVERY PERMITTED IN INSURANCE DISPUTES

State Farm Mutual Insurance Company v. Broe Rehabilitation Services, Inc.[23] establishes the right of an insurance company to file a "complaint for discovery."[24] In this case, State Farm filed a "complaint for discovery"[25] seeking the medical records of its insured, to whom defendant Broe had provided services.[26] State Farm, however, was not involved in litigation with the insured.[27] Rather, it simply sought the records to ensure Broe had properly billed for its services.[28]

Broe moved for summary disposition on the ground that the court lacked jurisdiction because there was no dispute between the parties.[29] The trial court and the Michigan Court of Appeals disagreed.[30] The court acknowledged that there is no right to a general "complaint for discovery."[31] Notwithstanding, it looked to the substance of State Farm's complaint and construed it as a request for a declaratory judgment under the Michigan No-Fault Act ("the Act").[32] The Act entitles an insurer to medical records concerning its insured from any treating medical institution.[33] Where a dispute arises concerning the insurer's right to discovery, the Act allows the court to enter an order allowing the sought-after discovery.[34]

In light of the Act, the *State Farm* court applied Michigan's three-step test for constitutional standing: (1) injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) a reasonable likelihood that the injury will be redressed by a favorable decision.[35] Under this standard, the court held that an actual dispute existed between the parties concerning the applicability of the Act, and State Farm had standing to bring a complaint for discovery.[36]

---

23. 289 Mich. App. 277, -- N.W.2d -- (2010).
24. *Id.* at 279.
25. *Id.* at 278.
26. *Id.* at 278-79.
27. *Id.* at 279.
28. *Id.*
29. *State Farm*, 289 Mich. App. at 279.
30. *Id.*
31. *Id.*
32. *Id.* at 280.
33. *Id.* at 281 (citing MICH. COMP. LAWS. ANN. § 500.3158(2) (West 2002)).
34. *Id.* (citing MICH. COMP. LAWS. ANN. § 500.3159 (West 2002)).
35. *State Farm*, 289 Mich. App. at 281 (citing Rohde v. Ann Arbor Pub. Sch., 479 Mich. 336, 348, 737 N.W.2d 158 (2007)).
36. *Id.* at 282.

The *State Farm* opinion does not provide for a general right to file a "complaint for discovery." Rather, it is limited in scope, as its reasoning likely only applies to cases where a statute or other law provides a substantive right to discovery for non-litigants.

IV. PLAINTIFFS MUST STRICTLY COMPLY WITH NOTICE REQUIREMENTS WHEN SUING THE STATE

In *McCahan v. Brennan*,[37] the Michigan Court of Appeals held that a plaintiff must strictly follow applicable notice requirements when lodging a claim against the state.[38] There, plaintiff Christina McCahan was injured when a University of Michigan vehicle struck her.[39] Approximately five months later, McCahan's attorney sent a letter to the University indicating its intent to sue.[40] Five months after the letter, and ten months after the accident, McCahan filed a notice of intent to bring an action in the court of claims.[41] She did not, however, comply with MCL section 600.6431(3), which requires filing a notice of intent of a personal injury action against a state institution with the court of claims within six months after the claim accrues.[42] The court therefore granted summary judgment for the University.[43]

McCahan argued that she substantially complied with the statute because she filed an untimely notice of intent.[44] The court rejected her argument. Because MCL section 600.6431(3) states that a plaintiff "shall" file a notice of intent within six months, the court held that the language is mandatory.[45]

In the alternative, McCahan argued that the University was required to show prejudice as a result of her failure to comply with the statutory filing requirement.[46] The court similarly rejected this argument. In support, the court relied on *Rowland v. Washtenaw County Road Commission*,[47] a Michigan Supreme Court case that overturned several cases that had required a showing of actual prejudice for failure to comply with a statutory filing requirement because the statutory

37. 291 Mich. App. 430, 804 N.W.2d 906 (2011).
38. *Id.* at 436.
39. *Id.* at 432.
40. *Id.*
41. *Id.*
42. *Id.*
43. *McCahan*, 291 Mich. App. at 432.
44. *Id.* at 433.
45. *Id.*
46. *Id.* at 434.
47. 477 Mich. 197, 731 N.W.2d 41 (2007).

language did not provide for any judicial construction.[48] Interpreting the plain language of MCL section 600.6431(3), the court affirmed summary disposition for the University.[49]

The holding in *McCahan* is undoubtedly harsh, especially given that McCahan's attorney provided the University with a letter of notice that it intended to file suit before the six month period expired. In fact, the Michigan Supreme Court recently considered McCahan's leave to appeal, granted oral argument, and directed the parties to address "whether [McCahan's] failure to comply with the notice requirement of MCL 600.6431(3) foreclosed her claim against the University . . . ."[50] Notwithstanding this appeal, the *McCahan* holding technically complies with the language of MCL section 600.6431(3) and is binding law as of the date of this publication. Litigators seeking to bring a claim against the state should be aware of the applicable special procedural requirements to ensure compliance.

V. AFFIRMATIVE DEFENSES ARE NOT "PLEADINGS" REQUIRING A RESPONSE

In *McCracken v. City of Detroit*,[51] the Michigan Court of Appeals considered whether affirmative defenses are pleadings that require a response under the Michigan Court Rules.[52] In that case, the plaintiffs filed an employment discrimination lawsuit against the City of Detroit ("the City").[53] The City answered the complaint, asserted numerous affirmative defenses, and demanded an answer to the affirmative defenses.[54] Plaintiffs did not respond to the affirmative defenses.[55] The City thereafter filed a motion for summary disposition on the basis that their affirmative defenses should be deemed admitted.[56] The trial court granted the City's motion.[57] On appeal, the Michigan Court of Appeals reversed.

In reversing, the court relied on the plain language of the Michigan Court Rules. It noted that MCR 2.108(A)(5) provides that a response to a

48. *McCahan*, 291 Mich. App. at 434-35.
49. *Id.* at 436.
50. McCahan v. Brennan, 489 Mich. 985, 985, 800 N.W.2d 62 (2011).
51. 291 Mich. App. 522, 806 N.W.2d 337 (2011).
52. *Id.* at 523.
53. *Id.*
54. *Id.* at 524.
55. *Id.*
56. *Id.*
57. *McCracken*, 291 Mich. App. at 523.

pleading must be filed within twenty-one days after service.[58] A pleading is defined exclusively as a "complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and a reply to an answer."[59] Moreover, the court reasoned, MCR 2.110(B) specifically lists the pleadings which require a response, and does not refer to affirmative defenses.[60] Applying this plain language, the court held that plaintiffs were not required to respond to the City's affirmative defenses. Thus the trial court improperly granted summary disposition in the City's favor.[61]

The *McCracken* court makes clear what was already apparent in the Michigan Court Rules—affirmative defenses do not require a responsive pleading, regardless of whether a defendant demands one. If a litigant seeks an explanation for or a response to an affirmative defense, he or she can properly ask for one during discovery.

VI. NEITHER THE FULL FAITH AND CREDIT CLAUSE NOR COMITY PRINCIPLES REQUIRE MICHIGAN COURTS TO RECOGNIZE EQUITABLE DECREES OF SISTER STATES; MICHIGAN COURTS TO DEFER TO OTHER STATES ON *FORUM NON CONVENIENS* GROUNDS

In *Hare v. Starr Commonwealth Corporation*,[62] the Michigan Court of Appeals addressed the recognition of foreign judgments. Here, plaintiff Hare sued Starr Commonwealth Corporation and its employee, Melvin, after a foster child in their care drowned in the Kalamazoo River.[63] Co-defendant Frontier Insurance Company insured both Starr and the employee.[64] Jointly, Starr and Melvin moved for summary judgment, and the court granted the motion for Starr, but allowed the claims against Melvin to proceed.[65] Subsequently, Melvin informed her defense counsel that she did not intend to appear at trial and she planned to discharge her counsel. The attorneys then filed a motion to withdraw and the court granted the motion.[66] As intended, Melvin did not appear at

58. *Id.* at 526.
59. *Id.* (citing MICH. CT. R. 2.110(A)).
60. *Id.*
61. *Id.* at 530-31.
62. 291 Mich. App. 206, -- N.W.2d -- (2011).
63. *Id.* at 210.
64. *Id.*
65. *Id.*
66. *Id.* at 211.

trial, and the court entered a default judgment against her.[67] Hare then sought to garnish the judgment from Frontier.[68]

Frontier claimed that Hare's garnishment action must be dismissed on the basis of a New York "order of rehabilitation," which barred any legal actions against it.[69] Frontier argued that the Full Faith and Credit Clause compelled the trial court to honor the order of rehabilitation.[70] In response, Hare argued that: (1) the New York order was a foreign antisuit injunction not entitled to recognition in Michigan; (2) the New York order was against Michigan public policy; and (3) the New York order was not entitled to full faith and credit or comity because Hare was not subject to New York's personal jurisdiction.[71] The trial court rejected these arguments, and instead held that the New York order was entitled to full faith and credit.[72] Thus, it dismissed Hare's complaint.[73] Hare appealed.[74]

On appeal, the court held that the New York order was not subject to full faith and credit.[75] The Full Faith and Credit Clause of the United States Constitution provides: "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State."[76] Thus, under Michigan law, a "judgment entered in another state is presumptively valid and subject to recognition in Michigan under the Full Faith and Credit Clause . . . ."[77]

To qualify for full faith and credit, however, "a sister-state judgment must constitute a final judgment on the merits."[78] The court noted that an antisuit injunction generally does not constitute a final judgment on the merits.[79] Moreover, because antisuit injunctions tend to act "upon the parties rather than [the] court, the forum has the power to proceed notwithstanding the sister-state injunction."[80] Applying these principles,

---

67. *Id.*
68. *Hare*, 291 Mich. App. at 211.
69. *Id.*
70. *Id.* at 212.
71. *Id.* at 212-13.
72. *Id.* at 213.
73. *Id.*
74. *Hare*, 291 Mich. App. at 209.
75. *Id.* at 215.
76. *Id.* (citing U.S. CONST. art. IV, § 1).
77. *Id.* at 216 (quoting Poindexter v. Poindexter, 234 Mich. App. 316, 324-25, 594 N.W.2d 76 (1999)).
78. *Id.* at 217 (citing Ala. v. Engler, 85 F.3d 1205, 1209 (6th Cir. 1996); *In re* Forslund, 189 A.2d 537 (Vt. 1963)).
79. *Id.* at 220.
80. *Hare*, 291 Mich. App. at 220 (quoting Abney v. Abney, 374 N.E.2d 264, 267 (Ind. Ct. App. 1978)).

the court found that the portion of the New York order enjoining future suits fell outside the ambit of the Full Faith and Credit Clause[81] because it "effectively operated as an antisuit injunction . . . ."[82] Moreover, the court reasoned that Hare was not subject to the jurisdiction of the New York court and therefore its order could not operate to bar her claim.[83]

Additionally, the court held that principles of interstate comity did not require the trial court to honor the New York order.[84] The court recognized that the discretionary doctrine of comity could, in certain circumstances, provide the court with a basis to recognize a foreign antisuit injunction.[85] In general, comity provides that an order of a sister state should be given effect in Michigan courts, so long as that order does not contravene the rights of a Michigan citizen, or run afoul of Michigan's policies or interests.[86] Because Hare was a Michigan resident who would be harmed by the enforcement of the New York order, the court declined to recognize it on comity grounds.[87]

Ultimately, however, the court affirmed the trial court by virtue of the doctrine of forum non conveniens, which it defined as "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."[88] The court applied this doctrine sua sponte, finding that Frontier was a New York insurance company subject to New York law.[89] It further found that the New York courts were responsible for the "complicated and intricate process" of rehabilitating the company.[90] The court noted that Michigan courts generally do not have experience with New York insurance law, while New York courts have substantial experience with their own process of rehabilitating insolvent companies.[91] Given these factors, the court found that the circuit court should have dismissed the case on forum non conveniens grounds, leaving Hare free to bring suit in New York.[92] Thus, the court upheld the trial court's dismissal of Hare's garnishment action.[93]

---

81. *Id.*
82. *Id.*
83. *Id.* at 220-21.
84. *Id.* at 221.
85. *Id.*
86. *Hare*, 291 Mich. App. at 222.
87. *Id.* at 222-23.
88. *Id.* at 223-24 (quoting Radeljack v. DaimlerChrysler Corp., 475 Mich. 598, 604, 719 N.W.2d 40 (2006)) (internal quotation marks omitted).
89. *Id.* at 224.
90. *Id.* at 224-25.
91. *Id.* at 225.
92. *Hare*, 291 Mich. App. at 225-26.
93. *Id.* at 226.

The result in *Hare* appears very result-driven. Indeed, the *Hare* court arguably did not correctly apply the doctrine of forum non conveniens. The purpose of that doctrine is to determine "where trial will best serve the convenience of the parties and the end of justice."[94] In applying forum non conveniens, a trial court is to balance the private interest of the litigant with matters of public interest.[95] The litigant's interests include: (1) availability of witnesses in the forum, and the cost of obtaining witness attendance; (2) access to sources of proof; (3) distance from the location of the incident giving rise to the litigation; (4) enforceability of any judgment obtained; (5) possible harassment of any party; (6) practical problems that contribute to the ease, expense, and expedition of the trial; and (7) likelihood of viewing the premises.[96] The following considerations are relevant in analyzing the public interest: (1) administrative difficulties; (2) the governing state law; and (3) people concerned by the proceedings.[97] The *Hare* court, it appears, considered the interest of Michigan courts in determining a difficult dispute, but did not analyze the factors applicable to balancing the litigant's interest with that of the general public.

Moreover, although the *Hare* panel found that it could not apply principles of comity because any such order could hamper Hare's ability to collect a judgment, it did just that when it required Hare to bring her suit in New York, where it would almost certainly be barred. Because the court's reasoning is not clear, the *Hare* opinion is likely to cause confusion and does not provide particularly helpful guidance for practitioners.

VII. PARTY DISPUTING AMOUNT OF ATTORNEY FEES PERMITTED TO DISCOVER LITIGATION FILE; DETAILED FACTUAL FINDINGS MUST SUPPORT AWARD FOR ATTORNEY FEES; ATTORNEY LETTERS IN SUPPORT OF FEE CALCULATION IS INADMISSIBLE HEARSAY

In *Shirley Augustine v. Allstate Insurance Company*,[98] the Michigan Court of Appeals clarified that the inquiry into an award for attorneys' fees is rigorous and requires ample evidentiary support.[99] In that case, Allstate claimed numerous errors during a circuit court evidentiary

94. *Radeljack*, 475 Mich. at 618 (quoting Cray v. Gen. Motors Corp., 389 Mich. 382, 391, 207 N.W.2d 292 (1973)) (internal quotation marks omitted).

95. *Id.* at 605.

96. *Id.*

97. *Id.* at 605-06.

98. 292 Mich. App. 408, 807 N.W.2d 77 (2011).

99. *Id.* at 438.

hearing on the reasonableness of the attorneys' fees awarded to Augustine under MCL section 500.3148(1), which provides for attorneys' fees where an insurer unreasonably delays in making benefit payments.[100] At the evidentiary hearing, the trial court admitted Augustine's attorneys' billing summaries, a list of dates and description of services provided, a list of the four lawyers who worked on the file, and time entries to support 625.25 billable hours.[101] Augustine also produced, and the trial court admitted over defendant's objections, letters from four local attorneys outlining the fees that they charged in similar cases.[102]

In response, Allstate submitted evidence to refute Augustine's claimed fees.[103] The trial court admitted testimony from defense counsel that he only spent 252.8 hours on the case, as well as expert testimony that Augustine's attorneys' billing summaries were excessive.[104] Allstate further claimed that it was unable to fully assess the reasonableness of the attorneys' fees because Augustine's attorneys refused to produce their litigation file.[105] After considering the evidence, the trial court awarded Augustine $250,000 in attorneys' fees.[106] Allstate appealed on several grounds.[107]

Allstate first argued that the trial court erred when it denied a request for Augustine's entire litigation file.[108] The appellate court recognized that this request raised privilege and work-product concerns.[109] Balancing these concerns with the need for discovery, however, the court found that the litigation file was discoverable.[110] The court observed that "the reasonableness of an attorney-fee claim cannot be assessed in a vacuum."[111] It also noted that Augustine's counsel did not maintain contemporaneous time entries and that their billing summaries were a "retrospective exercise based on memory and possibly some office notes or Excel spreadsheets."[112] Without discovery of the litigation file, Allstate was unable to meaningfully oppose the billing summaries.[113]

100. *Id.* at 414.
101. *Id.* at 417.
102. *Id.*
103. *Id.*
104. *Augustine*, 292 Mich. App. at 417.
105. *Id.* at 418.
106. *Id.*
107. *Id.*
108. *Id.* at 419.
109. *Id.* at 421.
110. *Augustine*, 292 Mich. App. at 423.
111. *Id.* at 421.
112. *Id.* at 421-22.
113. *Id.* at 423.

Accordingly, the court found that Allstate was entitled to view a redacted litigation file to corroborate Augustine's claimed attorney hours.[114]

Allstate next argued, and the court agreed, that the trial court erred in determining reasonable attorneys' fees because it did not apply the controlling factor test set forth in *Smith v. Khouri*.[115] This test first requires a trial court to determine the "fee customarily charged in the locality for similar legal services . . . ."[116] Specifically, the trial court abused its discretion when it failed to credit the *Michigan Bar Journal* in its calculus of an appropriate hourly rate.[117] The court emphasized that the appropriate focus is whether the hourly rate reflects the "fee customarily charged in the locality for similar legal services."[118] Thus, the trial court erred when it summarily concluded that $500 per hour is "reasonable" without taking the customary fee into account, and without considering the additional factors set forth in *Smith*.[119] Further, the court found that the trial court abused its discretion when it failed to make

---

114. *Id.*

115. 481 Mich. 519, 530; 751 N.W.2d 472 (2008).

116. *Augustine*, 292 Mich. App. at 426 (citing *Smith*, 481 Mich. at 530-31).

117. *Id.* at 427.

118. *Id.* at 427-28.

119. *Id.* (citing *Smith*, 481 Mich. at 529 (identifying the six factors listed in *Wood v. Detroit Automobile Inter-Ins. Exch.*, 413 Mich. 573, 588, 321 N.W.2d 653 (1982): "(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 (6) the nature and length of the professional relationship with the client.")). The court also identified the eight factors listed in MICH. RULES OF PROF'L CONDUCT 1.5(a):

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Id. (citing *Smith*, 481 Mich. at 530). *Smith* fine-tuned the multi-factor approach, holding that a trial court should (1) first "begin its analysis by determining the fee customarily charged in the locailty for similar legal services" using "reliable surveys or other credible evidence;" (2) multiply this number by the reasonable number of hours worked on the case; (3) consider the remaining *Wood* and MRPC factors "to determine whether an up or down adjustment is appropriate;" and (4) lastly, in order to aid appellate review, the trial court must include a discussion of those factors as applied in each instant case. *Smith*, 481 Mich. at 530-31, 537.

findings consistent with *Smith* for every attorney who worked on the file.[120]

The court made this finding over Augustine's arguments that the trial court was not required to apply *Smith*.[121] The court found these claims unconvincing because it had previously remanded the case and specifically directed the trial court to apply *Smith* on remand.[122] As a result, *Smith* applied by virtue of the law of the case doctrine.[123] Moreover, the court held that even if the law of the case doctrine did not apply, *Smith* remained the applicable standard where a party seeks attorneys' fees under MCL section 500.3148(1).[124]

Allstate further asserted that the trial court abused its discretion when it admitted into evidence the letters from four other attorneys outlining their hourly fees.[125] The appellate court agreed that the letters were hearsay and, thus, the trial court improperly considered them.[126] The court found that the letters were out-of-court statements that were not "business records," subject to the hearsay exception of MCR 803(6).[127] Furthermore, the letters were not sufficiently trustworthy to fit within the catch-all exception[128] because they "were prepared exclusively for litigation, they were all favorable to plaintiff, the attorneys who wrote the letters had reason to exaggerate because it might benefit their attorney-fee awards in the future, and there was no independent evidence presented to support the attorneys' claims that their rates were $500 an hour."[129]

Finally, Allstate claimed that the trial court erred when it did not carefully assess whether Augustine's claimed attorney hours were reasonable.[130] On appeal, the court found that the trial court did not make sufficient factual findings with respect to the attorney hours, and reversed.[131] In particular, it held that Augustine did not meet her burden to support the claim for fees, because she did not present any documents, testimony, or examples to support the claim that her attorneys spent 595

120. *Augustine*, 292 Mich. App. at 428.
121. *Id.*
122. *Id.*
123. *Id.* at 429.
124. *Id.*
125. *Id.* at 430.
126. *Augustine*, 292 Mich. App. at 431.
127. *Id.*
128. MICH. R. EVID. 803(24).
129. *Augustine*, 292 Mich. App. at 431-32.
130. *Id.* at 432.
131. *Id.* at 433.

hours on her case.[132] The court found it "inconceivable" that Augustine's attorneys "would be unaware of the requirements of *Smith* and would not keep adequate records in support of their claims for attorney fees, especially considering the amount of time and talent exepended on [the] case."[133] "Because so many areas went unexplored and remained undocumented," the court remanded the case for an extensive evidentiary hearing before the trial court.[134]

Given these numerous errors, the court found that the trial court had not properly applied *Smith*.[135] On remand, the court made clear that a mere recitation of the *Smith* factors does not constitute a meaningful analysis.[136] Rather, it required the trial court to make a detailed finding as to each factor, as well as carefully evaluate the record evidence.[137]

Augustine makes clear that a plaintiff bears the burden of showing the reasonableness of claimed attorneys' fees,[138] and that a trial court must conduct a thorough and rigorous analysis of such claims.[139] In light of this requirement, where a practitioner expects to seek an award for attorney fees, he or she should keep detailed billing records. Moreover, a practitioner seeking fees must be prepared to offer substantial admissible evidence to support the reasonableness of those fees.

VIII. APEX DEPOSITION RULE APPLIES TO HIGH-RANKING CORPORATE OFFICERS IN THE PRIVATE SECTOR, AS WELL AS TO HIGH-RANKING GOVERNMENT OFFICIALS IN THE PUBLIC SECTOR

In *Alberto v. Toyota Motor Corporation*,[140] the Michigan Court of Appeals held for the first time that the apex-deposition rule applies in Michigan to preclude the deposition of high-ranking corporate officers in the private sector.[141] In *Alberto*, the plaintiff sued Toyota, claiming that her decedent was killed as a result of an alleged vehicle defect.[142] During discovery, Alberto sought the depositions of Toyota's chairman and chief executive officer, as well as its chief operating officer.[143] Toyota

132. *Id.* at 432.
133. *Id.* at 433.
134. *Id.* at 434.
135. *Augustine*, 292 Mich. App. at 438-39.
136. *Id.* at 436.
137. *Id.* at 438.
138. *Id.* at 432.
139. *Id.* at 438.
140. 289 Mich. App. 328, 796 N.W.2d 490 (2010).
141. *Id.* at 336.
142. *Id.* at 331.
143. *Id.* at 331-32.

objected to these depositions, asserting that the executives did not participate in the "design, testing, manufacture, warnings, sale, or distribution of the [vehicle] . . . ."[144] Therefore, Toyota claimed, Alberto could more properly seek the testimony of lower-ranking employees who had worked directly with the vehicle.[145] Toyota argued that the apex-deposition rule, which generally prohibits the deposition of high-ranking government officials, should be extended to apply to high-ranking corporate officials in the private sector.[146] The trial court sided with Alberto and held that Michigan law did not preclude the depositions.[147] Toyota appealed.[148]

On appeal, the court overturned the trial court, formally adopting the apex-deposition rule in the corporate context. The court reasoned that the rule was consistent with MCR 2.302(D), which allows a trial court to control the sequence and timing of discovery "for the convenience of parties and witnesses and in the interests of justice . . . ."[149] The court then noted that other state and federal courts have applied the apex-deposition rule to corporate executives to "promote efficiency in the discovery process by requiring that before an apex officer is deposed it must be demonstrated that the officer has superior or unique personal knowledge of facts relevant to the litigation" and to "prevent the use of depositions to annoy, harass, or unduly burden the parties."[150] Because the policies behind the apex-deposition rule are consistent with the Michigan Court Rules, the *Alberto* court adopted the rule, as applied to corporate officers in the private sector.[151] In adopting this rule, however, the court made clear that the apex-deposition rule does not prevent depositions of corporate officers in all circumstances.[152] Rather, it requires the party opposing the deposition to demonstrate that "the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims in issue . . . ."[153] Then, the party seeking the deposition must show that the relevant information cannot be

144. *Id.* at 332.
145. *Id.*
146. *Alberto*, 289 Mich. App. at 332.
147. *Id.* at 333.
148. *Id.*
149. *Id.* at 337 (quoting MICH. CT. R. 2.302(D)).
150. *Id.* at 338 (citing Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979); Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 218 (6th Cir. 1989)).
151. *Id.* at 337.
152. *Alberto*, 289 Mich. App. at 338.
153. *Id.* at 339.

obtained by other means, such as by deposing a lower-ranking employee.[154]

Applying this newly-adopted principle to the facts, the court held that the trial court erred when it compelled the depositions of Toyota's executive officers.[155] Although the Toyota executives made general public comments about the accident, the plaintiff failed to show that they had any "unique or superior knowledge" concerning the design or manufacture of the vehicle at issue.[156] Thus, the court vacated the trial court order allowing the depositions.[157]

The *Alberto* panel provides helpful clarification to litigators representing corporate clients. Although it does not uniformly prevent discovery from high-ranking corporate officers, it does establish precedent to limit the ability of parties to engage in such discovery. Indeed, in practice, it will be difficult for the party seeking discovery to show that a high-ranking officer has "superior" personal knowledge of the facts, or that a lower-ranking employee does not have the sought-after information.

IX. MICHIGAN COURTS NOT PERMITTED TO SEAL COURT ORDERS AND OPINIONS

In *Jenson v. Puste*,[158] the Michigan Court of Appeals held that a trial court has no discretion to seal its orders and opinions.[159] The underlying case involved a divorce and personal protection order ("PPO") proceeding.[160] The defendant-husband, Puste, moved to seal the entire record, including the court's orders and opinions because the existence of the PPO made it difficult for him to obtain employment.[161]

The trial court rejected Puste's arguments and the appellate court affirmed.[162] The court found support in the plain language of the Michigan Court Rules.[163] In particular, MCR 8.119(F)(5) states: "[a] court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record."[164] Puste argued that the

154. *Id.*
155. *Id.* at 343.
156. *Id.*
157. *Id.*
158. 290 Mich. App. 338, 801 N.W.2d 639 (2010).
159. *Id.*
160. *Id.* at 339.
161. *Id.* at 340.
162. *Id.* at 339.
163. *Id.* at 342-47.
164. *Jenson*, 290 Mich. App. at 344.

word "may not" in this provision affords the trial court discretion in determining whether to seal an order or opinion.[165] The court of appeals disagreed, and held that "the word 'not' negates the permissive authority alluded to by the word 'may.'"[166] Moreover, MCR 8.119(F)(1) explicitly provides the court with discretion to seal certain types of defined records, which do not include orders or opinions.[167] Because the legislature drafted a separate provision addressing court orders and opinions,[168] the court reasoned that it intended to except these records from the court's discretionary authority to seal certain records.[169] As a result, the court held that the trial court properly refused to seal the record of Puste's PPO proceeding.[170]

Even before *Puste*, the Michigan Court Rules were fairly clear that a trial court cannot seal its orders and opinions. The opinion is also in line with Michigan's general policy of providing public access to court records.[171] The *Puste* panel makes concrete that a trial court has absolutely no discretion to seal such records, thus effectively precluding practitioners from making this argument in the future.

X. SUBSEQUENT CHANGE IN LAW DOES NOT WARRANT REINSTATEMENT OF CASE

In *King v. McPherson Hospital II*[172] the Michigan Court of Appeals addressed whether a case may be reinstated after a final judgment where there is a subsequent change in the law.[173] In this case, plaintiff King's underlying medical malpractice action was dismissed on statute of limitations grounds.[174] King "litigated the statute-of-limitations issue up and down the judicial system . . . ."[175] His case was ultimately dismissed, and a final judgment was entered in favor of the defendant McPherson Hospital.[176] Thereafter, the Michigan Supreme Court decided *Mullins v. St. Joseph Mercy Hospital*, which potentially altered the statute of

165. *Id.* at 345.
166. *Id.* at 346.
167. *Id.*
168. MICH. CT. R. 8.119(F)(5).
169. *Jenson*, 290 Mich. App. at 346.
170. *Id.* at 347.
171. *Id.*
172. 290 Mich. App. 299, -- N.W.2d -- (2010).
173. *Id.* at 302.
174. *Id.* at 303-04.
175. *Id.* at 304.
176. *Id.*

limitations applicable to the plaintiff's case.[177] King moved for relief from judgment pursuant to MCR 2.612(C)(1)(f), which provides that a court may relieve a party from final judgment for any "reason justifying relief from the operation of the judgment."[178] For this provision to apply, King was required to show three things: (1) that "the reason for setting aside the judgment" did not fall under MCR 2.612(C)(1)(a)-(e) (listing specific grounds for setting aside a judgment); (2) that defendant's substantial rights would not be affected if the judgment were set aside; and (3) extraordinary circumstances mandated that the judgment be set aside.[179]

The court held that King failed to make these required showings because a subsequent change in the law is not an "extraordinary" circumstance.[180] Rather, the court noted that Michigan law is well established that "new legal principles, even when applied retroactively, do not apply to cases already closed."[181] Moreover, the court held, vacating the judgment would detrimentally affect the Hospital's rights because a final judgment had already been entered and it would require the hospital to re-litigate a case that had already been through the appellate process.[182] Additionally, the court found no suggestion that the Hospital acted inappropriately in obtaining the judgment.[183] In the interest of finality, therefore, the court refused to re-open plaintiff's case and vacate the judgment of the trial court.[184]

The result of *King* may seem harsh when applied individually to this plaintiff. Notwithstanding, the case re-affirms the sound policy of finality of judgments. Had the court decided otherwise, a flood of litigation would result each time a Michigan court announces a new rule of law. Such result would be unfair to litigants generally, as they would not be able to obtain definite judgments, disposing of their respective disputes.

177. *Id.* at 303 (citing Mullins v. St. Joseph Mercy Hosp., 480 Mich. 948, 741 N.W.2d 300 (2007)).

178. MICH. CT. R. 2.612(C)(1)(f).

179. *King*, 288 Mich. App. at 304 (quoting Heugal v. Heugal, 237 Mich. App. 471, 478-79, 603 N.W.2d 121 (1999)).

180. *Id.* at 305.

181. *Id.* (quoting People v. Maxson, 482 Mich. 385, 387; 759 N.W.2d 817 (2008)).

182. *Id.* at 308.

183. *Id.*

184. *Id.* at 311.

XI. MOTION FOR RECONSIDERATION EXTENDS TIME TO FILE MOTION FOR CASE EVALUATION SANCTIONS

In *Meemic Insurance Company v. DTE Energy Company*,[185] the Michigan Court of Appeals determined that where a party files a motion for reconsideration, the twenty-eight-day period in which a party may file and serve a motion for case evaluation sanctions does not commence until the trial court rules on the motion for reconsideration.[186] *Meemic* was a negligence case arising out of a home fire.[187] The trial court dismissed plaintiff Meemic's claims on summary disposition on October 13, 2009.[188] On November 3, 2009, Meemic filed a motion for reconsideration.[189] The trial court denied Meemic's motion the next day.[190]

Defendant DTE filed a motion for case evaluation sanctions on November 19, 2009, thirty-seven days after entry of summary disposition, but sixteen days after the trial court denied the motion for reconsideration.[191] MCR 2.403(O)(8) provides that a party must file and serve a motion for case evaluation "28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment."[192] Meemic argued that DTE's motion was untimely, because a motion for reconsideration is different from a motion for a new trial or to set aside a judgment.[193] The court disagreed, noting that "all three [motions] have the same purpose: to rescind a dispositive ruling or judgment issued by the trial court."[194] Thus, the court held that "when a trial court has entered a summary disposition order that fully adjudicates the entire action, MCR 2.403(O)(8) requires a party to file and serve a motion for case evaluation sanctions within 28 days after entry of a ruling on a motion for reconsideration of the order."[195]

The ruling in *Meemic* makes sense and promotes judicial economy. In this case, DTE could not have known whether it was entitled to case evaluation sanctions until the trial court ruled on Meemic's motion for reconsideration. Had the court granted the motion for reconsideration,

185. 292 Mich. App. 278, 807 N.W.2d 407 (2011).
186. *Id.* at 285.
187. *Id.* at 279.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Meemic*, 292 Mich. App. at 284.
192. *Id.* (citing MICH. CT. R. 2.403(O)(8)).
193. *Id.* at 284-85.
194. *Id.* at 285.
195. *Id.*

DTE would no longer be the prevailing party and would lose its right to move for sanctions. If DTE were required to file its motion for case evaluation sanctions before the court finally determined its rights, there is a chance that it would use judicial and client resources to draft a motion that would later become moot. Now, after *Meemic*, litigators can wait to move for case evaluation sanctions until a court rules on a pending motion for reconsideration, and can do so with confidence that their clients' rights will not be affected.

XII. CIRCUIT COURT LACKS JURISDICTION OVER CLAIMS FOR MONEY DAMAGES ARISING FROM TAX FORECLOSURE; PROPER FORUM IS COURT OF CLAIMS

The Michigan Court of Appeals in *River Investment Group, L.L.C. v. Casab*[196] held that the court of claims, and not the circuit court, has exclusive jurisdiction over certain damages claims arising from foreclosure actions.[197] In that case, the Wayne County Treasurer foreclosed on plaintiff River Investment Group's property and sold it to Casab, the defendant.[198] River Investment apparently did not receive notice of the foreclosure and continued to make improvements to the property after the sale.[199] River Investment filed an action in the circuit court to recover damages for the cost of the improvements.[200] The circuit court found that MCL section 211.781 provided the court of claims with exclusive jurisdiction over River Investment's claims, and therefore dismissed the action.[201] MCL section 211.781 provides:

> (1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

196. 289 Mich. App. 353, 797 N.W.2d 1 (2010).
197. *Id.* at 355-56.
198. *Id.* at 355.
199. *Id.* at 356.
200. *Id.*
201. *Id.*

> (2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.[202]

Analyzing this section, the court found that River Investment's action fell squarely within the statute.[203] The court held that River Investments was a party claiming lack of notice and seeking money damages under MCL section 211.781(1).[204] Thus, the court of claims retained exclusive jurisdiction over the lawsuit.[205]

The court found unavailing River Investment's argument that the court of claims did not have jurisdiction over Casab because Casab was not a governmental entity.[206] Although MCL section 600.6437 and MCL section 600.6419 provide that the court of claims has jurisdiction over claims against governmental entities, nothing in the statute says that the court of claims lacks jurisdiction over private parties.[207] As a result, the court of appeals affirmed the circuit court's dismissal of River Investment's claims.[208]

The holding in *River Investment* results from the court's application of clear statutory language. The court's opinion, coupled with that language, show that the court of claims may have jurisdiction over private parties if the legislature so provides. Although *River Investments* likely applies only in the limited context of an action for money damages arising from a foreclosure judgment, practitioners should become aware of any similar jurisdictional requirements in their respective fields.

XIII. PERFECT NOTICE NOT REQUIRED IN FILING NOTICE OF INTENT IN MEDICAL MALPRACTICE ACTION

In *Hoffman v. Boonsiri*,[209] the Michigan Court of Appeals addressed the interplay between the timing of a notice of intent filing and the filing of a complaint in medical malpractice actions.[210] In this case, plaintiff Hoffman claimed injuries as the result of medical treatment from the defendant Dr. Boonsiri.[211] The alleged malpractice occurred between

---

202. MICH. COMP. LAWS ANN. § 211.781 (West 2005).
203. *River Investment*, 289 Mich. App. at 358.
204. *Id.*
205. *Id.*
206. *Id.* at 358.
207. *Id.*
208. *Id.*
209. 290 Mich. App. 34, 801 N.W.2d 385 (2010).
210. *Id.* at 36.
211. *Id.*

February 24th and 27th, 2006.[212] Hoffman sent Dr. Boonsiri a notice of intent (NOI) to sue on August 9, 2007.[213] Hoffman served an amended NOI on February 21, 2008.[214] One hundred and twenty three days after filing the amended NOI, Hoffman filed her complaint on June 23, 2008.[215]

Dr. Boonsiri moved for summary disposition, pointing out that MCL section 600.2912b(1) provides that a person shall not commence a medical malpractice lawsuit unless the person sends the NOI at least 182 days before filing suit.[216] Thus, Dr. Boonsiri argued, Hoffman's complaint was deficient and did not serve to commence a cause of action.[217] Dr. Boonsiri further claimed that because Hoffman never commenced a cause of action, the statute of limitations had run and her claim was time-barred.[218]

Hoffman countered that the 182-day period began when she filed her original NOI, 319 days before she sued Dr. Boonsiri.[219] Therefore, her complaint was sufficient to commence the lawsuit within the limitations period.[220] The trial court disagreed and granted Dr. Boonsiri's motion. [221] Hoffman appealed.[222]

The Michigan Court of Appeals overturned the trial court. Beginning its analysis, the court recognized that the statute of limitations for a medical malpractice action is two years.[223] That time is tolled when a plaintiff files a NOI.[224] MCL section 600.2912b(6) further provides that, after initial notice, "tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim . . . ."[225]

But the tolling provision only applies where the limitations period would otherwise expire during the notice period.[226] Therefore, the court held that Hoffman's first NOI did not toll the limitations period because the 182-day period expired on February 5, 2008, which was before the

212. *Id.*
213. *Id.*
214. *Id.*
215. *Hoffman*, 290 Mich. App. at 36.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 38.
220. *Id.*
221. *Hoffman*, 290 Mich. App. at 39.
222. *Id.*
223. *Id.* at 40 (citing MICH. COMP. LAW. ANN. § 600.5805(1), (6) (West 2000)).
224. *Id.*
225. *Id.* at 43 (quoting MICH. COMP. LAWS ANN. § 600.2912b(6)).
226. *Id.*

statute of limitations would have expired on February 24 to 27, 2008.[227] As a result, the court held that the amended NOI was the only NOI that triggered the tolling period and did not violate the "no-tacking" provision.[228]

The court also rejected Dr. Boonsiri's argument that Hoffman filed her complaint prematurely, before the 182-day period expired.[229] Instead, the court found that the 182-day notice period began when Hoffman filed her original NOI.[230] The court reasoned that the intent of the notice period is to encourage settlement without formal litigation, and that "the original NOI and the complaint afforded the parties ample opportunity to examine and settle the claim without formal litigation."[231] In addition, the court pointed to controlling Michigan case law, which establishes that even a deficient NOI serves to toll the statute of limitations.[232] In that same vein, the court found, perfect notice is not required to begin the 182-day waiting period.[233] As a result, the court remanded the case to the trial court.[234]

227. *Hoffman*, 290 Mich. App. at 43.
228. *Id.*
229. *Id.* at 44.
230. *Id.* at 45.
231. *Id.*
232. *Id.* at 47 (citing Bush v. Shabahang, 484 Mich. 156, 161, 772 N.W.2d 272 (2009)).
233. *Hoffman*, 290 Mich. App. at 47.
234. *Id.* at 51.