CIVIL PROCEDURE

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I. INTRODUCTION

Michigan Courts issued a number of noteworthy Civil Procedure cases during the current *Survey* period. [1] For example, the Michigan Supreme Court announced a new and more stringent standard applicable to motions for class certification. The Michigan Court of Appeals also set forth a new method for analyzing motions for summary disposition on the basis of governmental immunity. In addition, two cases from the *Survey* period demonstrate that Michigan courts have departed from the strict application of the statutory procedural requirements in medical malpractice actions. Noteworthy cases from the current *Survey* period are described in greater detail below.

II. CLASS CERTIFICATION

In *Henry v. Dow Chemical Co.*,[2] the Michigan Supreme Court announced a new and more rigorous standard for class certification. In *Henry*, the plaintiffs alleged that defendant negligently released a potentially hazardous chemical into the Tittabawassee River in Midland, Michigan.[3] Plaintiffs moved for class certification, with the proposed class consisting of "persons owning real property within the 100-year

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1. This article includes cases decided from June 1, 2009, through May 31, 2010.

2. 484 Mich. 483 (2009).

3. *Id.* at 488.

flood plain of the Tittabawassee River on February 1, 2002."[4] This proposed class consisted of approximately 2,000 persons.[5] The circuit court certified the proposed class.[6] Defendant appealed, and the Michigan Court of Appeals affirmed in part.[7] Defendant then appealed to the Michigan Supreme Court.[8]

On appeal, the Michigan Supreme Court first outlined the circumstances that must exist for a proposed class to be certified, as set forth in MCR 3.501(A):

> (a) the class is so numerous that joinder of all members is impracticable;
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.[9]

Michigan courts will also consider the following non-exhaustive factors in determining whether a class action is the superior method of adjudication:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

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4. *Id.* at 491.
5. *Id.*
6. *Id.*
7. *Id.* at 492-94.
8. *Henry*, 484 Mich. at 494.
9. *Id.* at 496-97 (citing MICH. CT. R. 3.501(A)(1)).

> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
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> (c) whether the action will be manageable as a class action;
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> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
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> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.[10]

Defendant argued that the Michigan Court Rules should be construed under the "rigorous analysis" standard employed by the Federal district courts.[11] In considering defendant's argument, the court first noted that the Michigan Court Rule governing class actions closely mirrors the federal rule and that "similar purposes, goals, and cautions are applicable to both."[12] The court also "question[ed] whether the purpose of the strictly articulated class certification prerequisites would be defeated if a representative plaintiff's only burden is to simply state that its proposed class does in fact meet the prerequisites."[13]

Despite its concerns, the court found that the Federal "rigorous analysis" requirement standard is not binding on Michigan courts.[14] The court did, however, agree "that a certifying court may not simply 'rubber stamp' a party's allegations that the class certification prerequisites are met."[15] Instead, the court held "that the language of MCR 3.501(A) provides sufficient guidance for class certification decisions in Michigan."[16] Thus, the court held that "a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR

10. *Id.* at 497 (citing MICH. CT. R. 3.501(A)(2)).
11. *Id.* at 498.
12. *Id.*
13. *Id.* at 499.
14. *Henry*, 484 Mich. at 502.
15. *Id.* at 502.
16. *Id.*

3.501(A)(1) is in fact satisfied."[17] A court may not base its decision on the pleadings alone unless "the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met."[18] The court further held that "[i]f the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper."[19] The court found that its analysis struck "the appropriate balance between the need to ensure that the class certification prerequisites are sufficiently satisfied and the need to preserve a trial court's discretion in making class certification decisions."[20]

The court then applied its newly-announced standard to determine whether the circuit court properly applied the MCR 3.501(A)(1) factors. After reviewing the circuit court record, the court found that it had not fully analyzed each of the MCR 3.501(A)(1) factors. Thus, the court remanded the case with the instruction that the circuit court clarify its reasons for finding that class certification was appropriate.[21]

Henry makes clear that Michigan trial courts are not permitted to accept a plaintiff's class certification allegations as true. *Henry* also establishes that a trial court must make specific factual findings with respect to each of the MCR 3.501(A)(1) factors. It is, however, unclear how the new *Henry* standard will affect class-action litigation in the future. Indeed, *Henry* requires only that the circuit court analyze each of the MCR 3.501(A)(1) factors, a task that was already required under the Michigan Court Rules.

III. SUMMARY DISPOSITION

In *Dextrom v. Wexford County*,[22] the court clarified the standard of review on a motion for summary disposition under MCR 2.116(C)(7). In that case, defendant Wexford County (the County) operated a landfill on state-owned land.[23] Plaintiffs sued the county, asserting claims in nuisance, trespass, and negligence.[24] The County moved for summary disposition under MCR 2.116(C)(10) and (7), on the basis of governmental immunity. Among other things, the plaintiffs argued that the County was not entitled to governmental immunity because it

17. *Id.*
18. *Id.*
19. *Id.* at 503.
20. *Henry*, 484 Mich. at 504.
21. *Id.* at 506-508.
22. Dextrom v. Wexford County, 287 Mich. App. 406 (2010).
23. *Id.* at page 410.
24. *Id.* at 413.

operated the landfill for the purpose of making a profit, and because the landfill was "not of the size or scope normally supported by fees or taxes in a community the size of [the County]."[25] The court denied the county's motion for summary disposition because questions of fact existed regarding (1) the county's purpose in operating the landfill for profit; and (2) "whether units of government like [the county] commonly engage in business activities of this magnitude primarily to meet the garbage disposal needs of their residents, or [whether] landfills of this size and type [are] usually maintained for profit by public or private entities."[26] The County appealed.

The Michigan Court of Appeals upheld the trial court's findings under MCR 2.116(C)(10) because genuine issues of material fact remained with respect to plaintiffs' claims.[27] The court, however, reversed the trial court's holding under MCR 2.116(C)(7), because it failed to properly acknowledge that the analysis under MCR 2.116(C)(10) differs from the (C)(7) analysis.

MCR 2.116(C)(7) provides that a party may move for summary disposition on the basis of "immunity granted by law."[28] "[A] motion under MCR 2.116(C)(7) ultimately presents a question of law for the judge to decide rather than a question of fact within the jury's province."[29] Thus, "[a] trial is not the proper remedial avenue to take in resolving ... factual questions under MCR 2.116 (C)(7) dealing with governmental immunity."[30] The *Dextrom* court clarified that the proper analysis under MCR 2.116(C)(7) is as follows: The court should look to the pleadings. "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question [of] whether the claim is barred is an issue of law for the court."[31] The court may also "consider any affidavits, depositions, admissions, or other documentary evidence that the parties submit to determine whether there is a genuine issue of material fact."[32] "[I]f a question of fact exists so that factual development could provide a basis for recovery . . . dismissal is inappropriate."[33]

The *Dextrom* court found that where a factual question exists under MCR 2.116(C)(7), the procedure diverges from that under MCR

25. *Id.* at 413.
26. *Id.* at 414.
27. *Id.* at 414-28.
28. *Dextrom*, 287 Mich. App. at 428 (citing MICH. CT. R. 2.116(C)(7)).
29. *Id.* at 430.
30. *Id.* at 430 (emphasis omitted).
31. *Id.* at 431.
32. *Id.*
33. *Id.*

2.116(C)(10).[34] When a trial court denies a motion under MCR 2.116(C)(10), all issues of fact are to be resolved by the fact finder at trial. In contrast, where further factual development is required after a MCR 2.116(C)(7) motion, the trial court is required to conduct a full evidentiary hearing to determine whether governmental immunity exists as a matter of law.[35]

Based on its holding, the *Dextrom* court remanded the action to the trial court for an evidentiary hearing. The *Dextrom* court instructed that if the trial court determined that the county was not entitled to governmental immunity, it was to deny the County's motion for summary disposition and proceed to trial on plaintiff's substantive claims. If the trial court found that the county was entitled to governmental immunity as a matter of law, the *Dextrom* court instructed it to grant the county's motion for summary disposition under MCR 2.116(C)(7). *Dextrom* provides litigants and trial courts with helpful clarification regarding the appropriate procedure under MCR 2.116(C)(7).

IV. PROCEDURAL ISSUES IN MEDICAL MALPRACTICE ACTIONS

A. Zwiers v. Growney

In *Zwiers v. Growney*,[36] the Michigan Court of Appeals announced less stringent procedural requirements for medical malpractice plaintiffs. In *Zwiers*, the plaintiff brought a medical malpractice action against the defendant. Although MCLA section 600.2912b(1) requires that a plaintiff serve a notice of intent (NOI) 182 days before filing a medical malpractice suit, plaintiff filed suit only 181 days after serving her NOI.[37] The trial court found that the plaintiff's premature complaint was ineffective to commence an action and toll the statute of limitations. Accordingly, it held that the statute of limitations had expired while the lawsuit was pending, and dismissed plaintiff's claim. Plaintiff appealed.[38]

The Michigan Court of Appeals reversed. The court recognized that the Michigan Supreme Court in *Burton v. Reed City Hospital Corporation*[39] explicitly held that a complaint filed before the notice

34. *Dextrom*, 287 Mich. App. at 430-31.
35. *Id.*
36. Zwiers v. Growney, 286 Mich. App. 38 (2009).
37. *Id.* at 39.
38. *Id.* at 401.
39. Burton v. Reed City Hospital Corp., 471 Mich. 745 (2005).

period expires "is ineffective to toll the limitations period."[40] The court further recognized that *Burton*, standing alone, would require it to affirm the trial court.[41] Notwithstanding, the court determined that it was not required to follow *Burton* for two reasons.

First, the court noted that *Burton* did not address M.C.L.A. section 600.2301, which provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.[42]

Second, the court held that it was required to address *Bush v. Shabahang*,[43] a Michigan Supreme Court case decided after *Burton*. In *Bush*, the court determined whether a timely but substantively defective notice of intent (NOI) precludes the tolling of the statute of limitations in a medical malpractice action.[44] The *Bush* Court considered the interplay between MCLA section 600.2301 and MCLA section 600.2912b and found that section 2301 "goes beyond the limited concept of amendment of 'pleadings' and allows for curing of certain defects in any 'process, pleading or proceeding.'"[45] Based on this finding, the *Bush* Court established a two-part test in applying section 2301: "first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed 'on such terms as are just.'"[46]

The *Zwiers* court applied the *Bush* test, and found that (1) defendants were not prejudiced when plaintiff filed her malpractice action one day early because "[t]here was no evidence of interrupted settlement negotiations on the date of filing, and defendants had the time and opportunity to investigate plaintiff's allegations as evidenced by defendants' response to plaintiff's NOI";[47] and (2) it would be in the

40. *Zwiers*, 286 Mich. App. at 45.
41. *Id.* at 46.
42. *Id.* at 43 (quoting MICH. COMP. LAWS ANN. § 600.2301).
43. Bush v. Shabahang, 484 Mich. 156 (2009).
44. *Zwiers*, 286 Mich. App. at 46.
45. *Id.* at 47 (quoting *Bush*, 484 Mich. at 176-78).
46. *Id.* at 48.
47. *Id.* at 50-51.

furtherance of justice to allow plaintiff to proceed with her claim because there was no evidence of bad faith.[48] Thus, the Court of Appeals reversed the trial court's dismissal of plaintiff's claim.[49]

B. DeCosta v. Gossage

DeCosta v. Gossage[50] is another case where a Michigan court decided not to strictly enforce the NOI requirements. The plaintiff in *DeCosta* sought medical treatment from the defendant at his office on Howell Street in Hillsdale, Michigan (the Howell office).[51] The defendant subsequently moved his office to Carleton Street, also in Hillsdale (the Carleton office). Thereafter, plaintiff began to seek treatment from the defendant at the Carleton office. The defendant later performed cataract surgery on plaintiff's eye on June 3, 2004. Plaintiff experienced vision loss and other complications after the surgery.[52] On June 1, 2006, two days before the statute of limitations expired, plaintiff mailed copies of a NOI to defendant's Howell office.[53] Plaintiff mailed the NOI pursuant to M.C.L.A. section 600.2912b(1), which provides that a medical malpractice plaintiff must provide notice of its intent to file a claim before filing suit.[54] MCLA section 600.2912b(2) provides the procedure for mailing the NOI:

> The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.[55]

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48. *Id.* at 51.
49. *Id.*
50. DeCosta v. Gossage, 486 Mich. 116 (2010).
51. *Id.* at 119.
52. *Id.* at 119-20.
53. The statute of limitations for a medical malpractice claim is two years. MICH. COMP. LAWS ANN. § 600.5805(6). The statute of limitations is tolled when the NOI is sent. MICH. COMP. LAWS ANN. § 600.5856(c).
54. MICH. COMP. LAWS ANN. § 600.2912(b) (West 2010).
55. *DeCosta*, 486 Mich. App. at 120-21 (citing MICH. COMP. LAWS ANN. § 600.2912b(2)).

On June 5, 2006 an unidentified individual at the Howell office signed for the NOI and forwarded it to Defendant's Carleton office. Plaintiff also sent the NOI to the Carleton office on June 7, 2006, four days after the statute of limitations expired.[56] Plaintiff did not file her complaint until November 20, 2006, nearly five months after the statute of limitations expired.[57]

Defendant moved for summary judgment, arguing that the statute of limitations had expired on plaintiff's claim. Although timely sending the NOI tolls the statute of limitations, Defendant argued that plaintiff failed to properly send the NOI to defendant's "last known professional business address" as required by MCLA section 600.2912b(2). The trial court granted the defendant's motion, and the plaintiff appealed. The Michigan Court of Appeals affirmed the trial court. Plaintiff then appealed to the Michigan Supreme Court.[58]

On appeal, the Michigan Supreme Court reversed the trial and appellate courts. It held that the purpose of MCLA section 600.2912b is to "provide advance notice to a defendant medical provider before filing a complaint. The advance-notice requirement encourages settlement of a dispute in lieu of costly litigation, and rigid interpretations of MCLA 600.2912b do not foster or encourage the statute's goal of advancing settlement and reducing litigation costs."[59]

The court further relied on *Bush,*[60] *supra*, and noted that MCLA section 600.2301 allows a court to disregard errors or defects in a medical malpractice proceeding so long as the "substantial rights of the parties" are not affected.[61] The court concluded that plaintiff's failure to mail the NOI to the defendant's current business address was a "minor technical defect" which did not affect the parties' substantial rights because the defendant received the NOI.[62] Thus, the court reversed the Michigan Court of Appeals and held that "[p]laintiff satisfied the notice-of-intent requirements under MCLA 600.2912b(2) when she timely mailed her NOI to defendants' prior address but the defendants did not receive the NOI until after the expiration of the limitations period."[63]

In his dissent, Justice Markman criticized the majority for departing from established precedent, which provides that the court is obligated "to ascertain the legislative intent that may reasonably be inferred from the

56. *Id.*
57. *Id.*
58. *Id.* at 121-22.
59. *Id.* at 122.
60. Bush v. Shabahang, 484 Mich. 156 (2009).
61. *DeCosta*, 486 Mich. App. at 124.
62. *Id* at 125.
63. *Id.* at 127.

words expressed in the statute."[64] Justice Markman argued that the language of MCLA section 600.2912b(2) clearly provides that a plaintiff "shall" send the NOI to defendant's "last known professional business address" which "means the last address from which the defendant operated as a business."[65] Because the plaintiff did not send her NOI to defendant's "last known professional address" as required by the statute, Justice Markman opined that her claim should have been dismissed.[66] Justice Markman further argued that the plurality wrongly extended the holding in *Bush v. Shabahang*[67] to allow the plaintiff to file her claim after the statute of limitations expired.[68] Finally, Justice Markman found that the plurality opinion lacked "serious analysis" and failed to offer a "legal roadmap."[69]

Zwiers and *DeCosta* represent a departure from the harsh, straightforward application of the statutes governing medical malpractice actions. These recent opinions make clear that Michigan courts will refuse to dismiss a medical malpractice suit on a hyper-technical basis, and will instead honor substance over form.[70] *Zwiers* and *DeCosta* are problematic because they do not provide clear guidance. The court's holdings in *Zwiers* and *DeCosta* leave attorneys and litigants to question whether the statutory requirements applicable to medical-malpractice actions will be enforced in Michigan courts.

V. DEFAULT JUDGMENT

A. Salmons v. Taylor Post 200 American Legion

The court in *Salmons v. Taylor Post 200 American Legion*[71] clarified the applicable standards that a trial court must apply in ruling on a motion to set aside a default judgment. In *Salmons*, the plaintiff filed a complaint against the defendant after she slipped and fell on ice on defendant's property.[72] Plaintiff's counsel sent a copy of the complaint to the defendant's insurance claims adjuster. The trial court subsequently entered a default against the defendant, which apparently was served on

64. *Id.* at 130 (citing Koontz v. Ameritech Services, Inc., 466 Mich. 304, 312 (2002)).
65. *Id.* at 131 (citing MICH. COMP. LAWS ANN. § 600.2912b(2)).
66. *Id.*
67. 484 Mich. 156 (2009).
68. *DeCosta,* 486 Mich. at 140.
69. *Id.* at 139.
70. *See DeCosta,* 486 Mich. at 127; *Zwiers*, 286 Mich. App. at 52.
71. Salmons v. Taylor Post, 2010 WL 986493 (Mich. Ct. App. Mar. 18, 2010) (unpublished).
72. *Id.* at *1.

the defendant's resident agent.[73] Plaintiff later filed a motion for entry of default judgment, but did not file a proof of service.[74] The trial court entered a default judgment, and plaintiff sought to seize defendant's assets in satisfaction of that judgment.[75] Defendant moved to set aside the default judgment.[76] In support of its motion, defendant claimed that it had a meritorious defense because it lacked notice of icy conditions and because those conditions were open and obvious.[77] Defendant further argued that good cause existed to set aside the default judgment because it had forwarded its complaint to its insurance agent, whom it believed was handling the lawsuit.[78] Defendant's insurance company, however, claimed that it had never received notice of the lawsuit.[79] The trial court denied defendant's motion.[80] Defendant appealed.[81]

The Michigan Court of Appeals first laid out the proper standard for setting aside a default judgment: "[a] motion to set aside a default or default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed."[82] The court found that defendant had established a meritorious defense. Thus, the only issue on appeal was whether the defendant showed good cause.[83]

The court held that its opinion in *Shawl v. Spence Bros., Inc.*[84] mandates a detailed analysis of the following factors to determine whether a party has shown good cause:

> (1) whether the party completely failed to respond or simply missed the deadline to file;
> (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;
> (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment
> (4) whether there was defective process or notice;
> (5) the circumstances behind the failure to file or file timely;

73. *Id.*
74. *Id.* at *2.
75. *Id.*
76. *Id.*
77. *Salmons*, 2010 WL 986493, at *2.
78. *Id.*
79. *Id.* at *2.
80. *Id.* at *3.
81. *Id.*
82. *Id.* at * 4 (quoting MICH. CT. R. 2.603(D)(1)).
83. *Salmons*, 2010 WL 986493, at *4.
84. Shawl v. Spence Bros, Inc., 280 Mich. App. 213 (2008).

> (6) whether the failure was knowing or intentional; (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4); ... and (9) if an insurer is involved, whether internal policies of the company were followed.[85]

Because the trial court did not analyze the relevant *Shawl* factors, the Court of Appeals remanded the case with an instruction that the trial court analyze all relevant factors.[86] Although *Salmons* does not announce a new principle of law, it provides helpful guidance because it makes clear that a trial court is required to analyze all relevant *Shawl* factors.[87]

B. Midwest Business Exchange v. Moore

In *Midwest Business Exchange v. Moore*,[88] the Michigan Court of Appeals issued an unpublished decision that is inconsistent with established Michigan jurisprudence and the Michigan Court Rules. The *Moore* opinion does not fully set forth the facts below.[89] Apparently, however, the circuit court affirmed a district court order granting defendant's motion to set aside a default judgment.[90] The circuit court upheld the district court, despite the fact that the defendant did not submit an affidavit of meritorious defense as required by MCR 2.603(D)(1), which provides: "A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed."[91]

The Michigan Court of Appeals affirmed the circuit court, stating: "[w]e recognize that MCR 2.603(D)(1) provides that an affidavit of meritorious facts must be filed. But that matter is within the trial court's discretion."[92] In support of its holding, the court relied on *Perry v. Perry*[93] and *Sylvania Savings Bank v. Turner*.[94] Neither *Perry* nor *Turner* held that a party is not required to file an affidavit of meritorious defense

85. *Salmons*, 2010 WL 986491, at *4 (quoting *Shawl*, 280 Mich. App. at 238).
86. *Id.* at *4-5.
87. *Id.*
88. Midwest Bus. Exch. v. Moore, 2010 WL 1687766 (Mich. Ct. App., Apr. 27, 2010) (unpublished).
89. *Id.*
90. *Id.* at *1.
91. MICH. CT. R. 2.603(D)(1).
92. *Moore*, 2010 WL 1687766, at *2.
93. Perry v. Perry, 176 Mich. App. 762 (1989).
94. Sylvania Sav. Bank v. Turner, 27 Mich. App. 640 (1971).

in compliance with the Michigan Court Rules.[95] Moreover, the *Moore* court did not acknowledge that MCR 2.603(D)(1) provides that a default or default judgment may be set aside "only" where the defendant files an affidavit of meritorious defense.[96]

The *Moore* decision contravenes established Michigan jurisprudence, which provides that courts must apply the clear language of the Michigan Court Rules as they are written.[97] The clear language of MCR 2.603(D)(1) requires that a defendant file an affidavit of meritorious defense, without exception.[98] Although the *Moore* opinion is not binding precedent,[99] the court's decision is likely to lead to unnecessary confusion in the application of MCR 2.603(D)(1).

VI. OFFER OF JUDGMENT

The court in *Kopf v. Bolser*[100] clarified the applicable time frame in which a party is required to move for offer-of-judgment sanctions. In *Kopf*, the plaintiff brought a personal injury action against the defendant motorist, who struck him while he was walking.[101] A case evaluation resulted in an award of $60,000 in favor of the plaintiff.[102] Plaintiff accepted the award; defendant rejected it.[103] Thereafter, the defendant filed an offer of judgment for $7,500.[104] Plaintiff filed a counteroffer of $70,000.[105] The parties did not reach an agreement, and the case proceeded to trial.[106]

At trial, the jury found in favor of plaintiff. The trial court entered a $20,000 verdict on August 9, 2007.[107] Plaintiff moved for $8,666.16 in costs on August 24, 2007. After defendant filed its objections, the court entered a stipulated order for $8,300.16 in costs on October 10, 2007.[108] On October 17, 2007, defendant filed a motion for offer of judgment sanctions pursuant to MCR 2.405. MCR 2.405(D) states, in pertinent part:

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95. *See Perry*, 176 Mich. App. 762; *see also Turner*, 27 Mich. App. 640.
96. MICH. CT. R. 2.603(D)(1).
97. Braun v. New York Prop., Inc., 230 Mich. App. 138, 150 (1998).
98. MICH CT. R. 2.603(d)(1).
99. *See* MICH. CT. R. 7.215(C)(1).
100. Kopf v. Bolser, 286 Mich. App. 425 (2009).
101. *Id.* at 426.
102. *Id.* at 427.
103. *Id.* at 427.
104. *Id.*
105. *Id.*
106. *Kopf*, 286 Mich. App. at 427.
107. *Id.*
108. *Id.*

> (D) Imposition of Costs Following Rejection of Offer. If an offer [to stipulate to entry of judgment] is rejected, costs are payable as follows:
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> > (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.[109]

The "adjusted verdict" is the "verdict plus interest and costs from the filing of the complaint through the date of the offer."[110] "Average offer" is "the sum of an offer and a counteroffer, divided by two."[111] The parties agreed that the adjusted verdict ($28,300.16) was more favorable to the defendant than the average offer ($38,750). Notwithstanding, the trial court denied defendant's motion for costs as untimely because it was not filed in accordance with MCR 2.405(D) which provides: "[a] request for costs . . . must be filed and served within 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."[112]

On appeal, defendant presented two arguments. First, he argued that the 28-day limit did not apply and that the trial court should have instead applied a "reasonable time" standard.[113] The Michigan Court of Appeals rejected this argument because MCR 2.405(D) "contains an explicit and mandatory time limitation of 28 days."[114]

Second, defendant argued that the August 9, 2007 judgment was not a "judgment" for purposes of MCR 2.405(D).[115] Rather, defendant asserted that the "judgment" was the October 10, 2007 stipulated order regarding the amount of costs due to plaintiff. Defendant claimed that "because the amount of taxable costs and interest was unknown at the time of the judgment, the parties' claims were not yet resolved."[116] The court also rejected this argument, and held that "the *judgment* is the judgment adjudicating the rights and liabilities of particular parties, regardless of whether that judgment is the final judgment from which the parties may appeal."[117] The court reasoned that costs and interest were

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109. MICH. CT. R. 2.405.
110. *Id.*
111. *Id.*
112. *Kopf*, 286 Mich. App. at 429 (citing MICH. CT. R. 2.405(D)).
113. *Id.*
114. *Id.* at 430.
115. *Id.* at 431.
116. *Id.* at 432.
117. *Id.* at 432 (citing Braun v. York Prop., Inc., 230 Mich. App. 138, 150 (1998)).

not part of defendant's cause of action because it did not "adjudicat[e] the rights and liabilities of the parties" with respect to their claims.[118]

Kopf makes clear that a party must move for offer-of-judgment sanctions within 28 days of judgment, regardless of when the court determines the amount of taxable costs and interest. *Kopf* is helpful because it provides litigants with clear guidance on the timing of a motion for sanctions under MCR 2.405(D). The *Kopf* opinion may, however, create uncertainty when a verdict is close to the "average offer." A party will not be able to determine whether the adjusted verdict is more favorable than the "average offer" until the trial court determines costs and interest. In that case, the *Kopf* court found that a motion for sanctions would be considered timely, even if it were followed by an affidavit of costs several weeks later.[119] Thus, where a party is unsure whether the adjusted verdict will be more favorable than the "average offer" under MCR 2.405(D), *Kopf* suggests it would be proper to file a motion for sanctions within 28 days after judgment, followed by an affidavit of costs as soon as they are determined by the court.[120]

118. *Kopf*, 286 Mich. App. at 432-34.

119. *Id.* at 431. The *Kopf* Court relied on *Badiee v. Brighton Area Schools*, 265 Mich. App. 343, 376 (2005), which issued a similar holding with regard to case evaluation sanctions under MCR 2.403(O).

120. *Id.*