CIVIL PROCEDURE

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I. INTRODUCTION

Michigan appellate courts issued many published opinions addressing civil procedure during the *Survey* period. The cases utilized in this article were selected because they fundamentally expand the law governing various procedural areas and considerably influence how the bar must navigate through the procedural process and how the bench determines the propriety of the navigation.

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II. STATUTE OF LIMITATIONS

A. Medical Malpractice: Defective Affidavit of Merit and Responsive Pleading

The jurisprudence addressing the statute of limitations in medical malpractice actions has created a complex procedural labyrinth where one misstep could prove fatal. As stated in *Braverman v. Garden City Hospital*,[1] "this area of medical malpractice law is fraught with peril for even the most careful practitioner."[2] The case law addressing this perilous area attempts to implement the legislature's intent in enacting the statutory scheme. However, given the nuances and intricacies involved, it is difficult to determine whether this has been achieved. The *Braverman* court stated, "[w]e urge the legislature to consider revisions to the statutory scheme that would provide litigants and the courts with clear guidance to carry out the Legislature's intent in this area of the law."[3]

The statue of limitations for malpractice is two years.[4] A person cannot commence an action alleging medical malpractice against a health professional or health facility unless the person gives written notice not less than 182 days before the action is commenced.[5] In order to commence a medical malpractice action, a plaintiff must file a complaint along with an affidavit of merit pursuant to MCL section 2912d(1).[6] The affidavit must be signed by a health professional who meets the requirements for an expert witness pursuant to MCL section 2169.[7]

In 2005, the court of appeals in *Saffian v. Simmons*[8] addressed whether a defendant had a duty to respond to a complaint when the affidavit of merit did not comply with section 2912d(1). In that case, the plaintiff filed a complaint accompanied by an affidavit of merit alleging that the defendant committed malpractice in performing a root canal.[9] The defendant did not file a timely answer to the complaint.[10] The trial court subsequently granted defendant's motion to set aside the default based on the representation that the defendant's insurance carrier never received defendant's fax containing the summons and complaint.[11]

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1. 272 Mich. App. 72, 88, 724 N.W.2d 285, 295 (2006).
2. *Id.* at 88, 724 N.W.2d at 295.
3. *Id.*
4. MICH. COMP. LAWS ANN. § 600.5805(6) (West 2002 & Supp. 2007).
5. MICH. COMP. LAWS ANN. § 600.2912b (West 2002).
6. MICH. COMP. LAWS ANN. § 600.2912d(1) (West 2002).
7. *Id.*
8. 267 Mich. App. 297, 704 N.W.2d 722 (2005).
9. *Id.* at 299, 704 N.W.2d at 724.
10. *Id.*
11. *Id.* at 300, 704 N.W.2d at 724.

The defendant then filed an answer and "moved for summary disposition pursuant to Michigan Court Rule (MCR) 2.116(C)(10) arguing that the statute of limitations was not tolled because the affidavit of merit did not meet the statutory requirements."[12] The trial court denied the motion and subsequently granted the plaintiff's motion to reinstate the default believing the defendant misled the court concerning the reasons for setting aside the default since phone records indicated that no fax was ever sent and the defendant sought to attack the validity of the affidavit.[13] The court subsequently entered a default judgment.[14]

The court of appeals ruled that the defendant had a duty to answer the complaint even though the affidavit was statutorily deficient[15] and that the trial court did not abuse its discretion in failing to set aside the default.[16] The court distinguished the case from *White v. Busuito*[17] which held that the defendant did not have a duty to answer the complaint because no affidavit was filed.[18] The *Saffian* court found that to hold that "a duty to answer never arose in this case would open the floodgates" to an array of retrospective claims, which would undermine the purpose of default and the finality of judgments.[19] The court further stated that it would also allow a defendant to knowingly ignore a lawsuit and let the limitations period run, and then bypass the default by attacking the affidavit, "depriving [a] Plaintiff of the legitimate opportunity to cure a defect if attacked in an answer or affirmative defense."[20]

In 2007, the Supreme Court affirmed and ruled that there is nothing in MCL section 600.2912e(1)[21] or MCR 2.108(A)(6) that permits a defendant from unilaterally determining that an affidavit of merit satisfies MCL section 600.2912d.[22] The court stated that when the affidavit is filed it is presumed valid and this presumption can only be rebutted in a subsequent judicial proceeding.[23]

The defendant argued that *Scarsella v. Pollak*[24] held that there is no duty to answer a complaint when it is accompanied by a technically deficient affidavit because the action was never commenced.[25]

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12. *Id.*
13. *Id.* at 301, 704 N.W.2d 725.
14. *Saffian*, 267 Mich. App. at 299-301, 704 N.W.2d 724-25.
15. *Id.* at 299, 704 N.W.2d at 724.
16. *Id.* at 307-08, 704 N.W.2d at 728.
17. 230 Mich. App. 71, 583 N.W.2d 499 (1998).
18. *Saffian*, 267 Mich. App. at 306, 704 N.W.2d at 727 (citing *White*, 230 Mich. App. at 76, 583 N.W.2d at 502).
19. *Id.* at 307, 704 N.W.2d at 728.
20. *Id.*
21. MICH. COMP. LAWS ANN. § 600.2912e(1) (West 2000).
22. Saffian v. Simmons, 477 Mich. 8, 13, 727 N.W.2d 132, 136 (2007).
23. *Id.*
24. 461 Mich. 547, 607 N.W.2d 711 (2000).
25. *Saffian*, 477 Mich. at 13, 727 N.W.2d at 136.

Accordingly, the defendant argued the default was void ab initio.[26] The court stated that the defendant's reliance on *Scarsella* was misplaced because *Scarsella* involved a situation where no affidavit accompanied the complaint; it did not involve a defective affidavit filed with the complaint.[27] The court also found that the defendant incorrectly relied on *White* because it was harmonious with *Scarsella*.[28]

Accordingly, the court held that a defendant must answer a complaint when it is accompanied with a defective affidavit.[29] The court stated that the proper procedure is for a defendant to file an answer and then subsequently challenge the affidavit's validity by motion.[30] The court opined that this promotes the presumption of the validity of pleadings and the efficient administration of justice because it reduces the chaotic uncertainty of permitting a defendant to intentionally fail to file an answer and then subsequently attack the validity of a default or default judgment.[31]

The court also affirmed the trial court's decision not to set aside the default and ruled that a remand to the trial court to conduct an evidentiary hearing was unnecessary.[32] The defendant argued that the trial court should have conducted an evidentiary hearing to determine whether the defendant fabricated his excuse for failing to answer the complaint.[33] The court stated that it was the defendant's burden of demonstrating good cause and a meritorious defense to set aside the default and that the defendant did not present the trial court with any evidence or explanation to rebut the inference that no fax was ever sent by the defendant.[34] Consequently, the trial court was not required to hold an evidentiary hearing.[35]

In *Young v. Sellers*[36] the court held that the period of limitations is not tolled unless both a complaint and affidavit of merit are filed. Because *White* and *Scarsella* hold that there is no duty to answer a complaint when it is not accompanied by an affidavit of merit, when no affidavit is filed, a defendant arguably can let the limitations period run without answering and then be entitled to an order of dismissal. *Saffian*, however, states that a defective affidavit is sufficient to commence an action requiring a defendant to timely file an answer.

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26. *Id.*
27. *Id.* at 13-14, 727 N.W.2d at 136.
28. *Id.* at 14 n.1, 727 N.W.2d at 136 n.1.
29. *Id.* at 16, 727 N.W.2d at 137.
30. *Id.*
31. *Saffian*, 477 Mich. at 14, 727 N.W.2d. at 136.
32. *Id.* at 15-16, 727 N.W.2d at 137.
33. *Id.* at 15, 727 N.W.2d at 137.
34. *Id.* at 15-16, 727 N.W.2d at 137.
35. *Id.* at 16, 727 N.W.2d at 137.
36. 254 Mich. App. 447, 450, 657 N.W.2d 555, 557 (2002).

Therefore, *Saffian* essentially states that a defective affidavit fulfills the requirements of MCL section 600.2912d to the extent that it requires a defendant to answer within twenty-one days as required in section 600.2912e. However, this section states in pertinent part: "within 21 days after the plaintiff has filed an affidavit *in compliance* with MCL section 2912d, the defendant shall file an answer to the complaint."[37]

Thus, *Saffian* draws a distinction between *White*, *Scarsella*, and *Young* even though the requirements of MCL section 600.2912d are not actually achieved either by the absence of an affidavit, or a defective affidavit that does not meet the specific statutory enumerations.

This calls into question the legislative purpose behind the statutes. Specifically, if and to what extent did the legislature intend to give a plaintiff the opportunity for a "second bite at the apple" to generate an affidavit that actually comports with MCL section 600.2912d before the claim expires? *Saffian* essentially holds that a defective affidavit is better than no affidavit to the extent that it requires a responsive pleading providing for the opportunity to cure the deficiency before the limitations period expires. *White*, *Scarsella*, and *Young*, however, do not require a responsive pleading to allow a plaintiff to produce a proper affidavit before the claim is laid to rest.

Aside from the uncertain legislative intent, the policy behind *Saffian* is pragmatic. When an affidavit is filed, a defendant cannot act in an ad hoc quasi-judicial capacity and be allowed to unilaterally determine the affidavit's viability and whether there is a duty to answer. When no affidavit is filed, this concern is simply not present because there is no affidavit to adjudicate. Thus, *Saffian*, *White*, *Scarsella*, and *Young* clearly delineate a defendant's responsive pleading requirement, which hinges upon the presence of an affidavit.

B. Medical Malpractice: Viability of Amending a Defective Affidavit of Merit

In *Wood v. Bediako,*[38] the court of appeals addressed the viability of amending a defective affidavit of merit before the limitation period expires. In *Wood*, the action arose from a stillbirth that occurred on June 6, 2003.[39] On September 2, 2003, the plaintiff was appointed personal representative.[40] On August 4, 2004, the plaintiff served the complaint that was accompanied by an un-notarized affidavit.[41] The defendants answered the complaint and included the affirmative defense of lack of a

37. *Id.* at 450, 657 N.W.2d at 557. MICH. COMP. LAWS ANN. § 600.2912e(1) (West 2000) (emphasis added).

38. 272 Mich. App. 558, 727 N.W.2d 654 (2006).

39. *Id.* at 558, 727 N.W.2d at 654.

40. *Id.*

41. *Id.*

proper affidavit of merit.[42] On July 11, 2005, Hillsdale Community Health Center (HCHC) moved for summary disposition[43] and plaintiff responded with a notarized affidavit.[44]

On October 14, 2005, Alfred Bediako and Hillsdale Obstetrics & Gynecology P.C. (collectively referred as Bediako) moved for summary disposition under Rules 2.116(C)(7), (C)(8), and (C)(10)[45] stating that the un-notarized affidavit failed to fulfill MCL section 600.2912d and, therefore, the statute of limitations was not tolled.[46] Bediako argued that plaintiff's claim was time-barred because it had been more than two years since she was appointed personal representative.[47] HCHC concurred in the motion and argued that summary disposition was also appropriate under Rules 2.116(C)(1), (C)(4).[48]

The trial court implicitly granted the motion pursuant to MCR 2.116(C)(7) on the ground that the affidavit that was attached was not notarized.[49] In making this ruling, the trial court did not address the effect of plaintiff's subsequent filing of a notarized affidavit in response to HCHC's motion brought within the limitations period.[50] Plaintiff argued the notarized affidavit filed before the expiration of the limitations period "serendipitously" cured the defect and tolled the period[51] and the trial court erred by failing to address the effect of the subsequent filing.[52] The court of appeals agreed.[53]

The court primarily relied on *Vandenberg v. Vandenberg*[54] to determine that plaintiff's case was not time-barred. In *Vandenberg*, the court found that MCL section 600.2912d did not require dismissal when plaintiff did not obtain a valid affidavit until approximately three months after the complaint was filed when a copy of the affidavit was attached to the complaint.[55] *Vandenberg* noted that the defendants were not prejudiced because they had access to the affidavit upon receiving the complaint.[56] The *Wood* court noted that, like *Vandenberg*, the technically deficient affidavit gave defendants notice of plaintiff's theory of the case and otherwise complied with the statute.[57] The plaintiff nevertheless

42. *Id.*
43. The court did not indicate the basis of the motion.
44. *Wood*, 272 Mich. App. At 558, 727 N.W.2d at 654.
45. MICH. CT. R. 2.116(C)(7), (C)(8), (C)(10).
46. *Wood*, 272 Mich. App. at 560-61, 727 N.W.2d at 656.
47. *Id.* at 561, 727 N.W.2d at 656.
48. *Id.* (citing MICH. CT. R. 2.116 (C)(1), (C)(4)).
49. *Id.*
50. *Id.* at 561-62, 727 N.W.2d at 656.
51. *Id.* at 561, 727 N.W.2d at 656.
52. *Wood*, 272 Mich. App. at 562, 727 N.W.2d at 656.
53. *Id.*
54. 231 Mich. App. 497, 586 N.W.2d. 570 (1998).
55. *Id.* at 502-03, 586 N.W.2d at 572-73.
56. *Id.* at 503, 586 N.W.2d at 572-73.
57. *Wood*, 272 Mich. App. at 564, 727 N.W.2d at 658.

remedied the original deficient affidavit by subsequently filing a notarized affidavit within the limitations period.[58] Therefore, the court concluded the defendants were not prejudiced.[59]

Most importantly, *Wood* stated the following procedural rule:

> while the filing of a complaint without an affidavit of merit does not toll the period of limitations, and the subsequent filing of an affidavit after the limitations period has run does not relate back to the original filing . . . the subsequent filing of an affidavit before the limitations period has run will operate to toll the limitations period and commence the suit unless a defendant moves for dismissal or can demonstrate prejudice.[60]

In *Potter v. McLeary*[61] the court affirmed the rule set forth in *Wood* when it addressed the effect of an amended affidavit of merit filed after the limitations period had expired. In that case, the defendants appealed denial of their motions for summary disposition pursuant to MCR 2.116(C)(7). Plaintiff's complaint was filed on November 4, 2003,[62] and the limitations period expired as to all defendants on December 8, 2003.[63] However, the complaint was accompanied by two affidavits of merit that were deficient under MCL section 600.2912d(1) because they were devoid of any statement regarding proximate cause; therefore, the court opined that the affidavit was insufficient to commence a medical malpractice action.[64]

The court stated that there was no evidence showing a conforming affidavit was filed before the limitations period expired on December 8, 2003.[65] Consequently, the court found that summary disposition was appropriate under MCR 2.116(C)(7) because the action was not properly commenced before the limitations period had expired.[66]

The court, relying in part on *Mouradian v. Goldberg*[67] and *Scarsella*, rejected plaintiff's argument that retroactive amendment of the affidavit should be permitted under MCL section 600.2301.[68] The court stated that

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58. *Id.*
59. *Id.*
60. *Id.* at 564-65, 727 N.W.2d at 658.
61. 274 Mich. App. 222, 732 N.W.2d 600 (2007).
62. It is not clear whether an answer was filed.
63. *Potter*, 274 Mich. App. 222, 732 N.W.2d 600.
64. *Id.*
65. *Id.* at 225, 732 N.W.2d 601-02.
66. *Id.* at 225, 732 N.W.2d 602.
67. 256 Mich. App. 566, 664 N.W.2d 805 (2003). Mouradian did not permit the plaintiff to file an affidavit that would relate back to the filing of the initial complaint.
68. *Potter*, 274 Mich. App. at 225, 732 N.W.2d at 602; MICH. COMP. LAWS ANN. § 600.2301 (West 2000) empowers the court to allow amendments of pleadings in the interest of justice at any time before judgment is rendered and requires courts to disregard any error or defect, which does not affect the substantial rights of the parties.

such an amendment would completely subvert the affidavit requirement established by MCL section 600.2912d(1) and render superfluous the legislative remedy in MCL section 600.2912d(2)[69] regarding circumstances where an affidavit cannot accompany the complaint.[70] The court resolved the conflict between MCL section 600.2301 and MCL section 600.2912d(1)(2) in favor of MCL section 600.2912d(1)(2) since it is more specific and governs medical malpractice actions.[71]

Judge Davis's dissent, based on pragmatic policy, framed the issue much differently. He believed the interplay between MCL section 600.2301 and MCL section 600.2912d(1)(2) represented an issue of first impression since, unlike *Scarsella* and its progeny, an affidavit was actually filed as opposed to no affidavit being filed; therefore, Judge Davis opined that there was an affidavit that could actually be amended.[72] He believed MCL section 600.2301 was designed to dispose of cases on the parties' substantial rights, not on technical errors.[73] Relying upon *LaBar v. Cooper*,[74] Judge Davis stated that if the claim's transactional base is pled before the limitations period expires giving the defendant notice of the claim pled against him, then the statute of limitations' policy is satisfied even if amendment is permitted.[75] He believed plaintiff's notices of intent were sufficient, coupled with the parties' on-going litigation, to put the defendants on notice of the claims pled against them thereby permitting the amendment of the affidavit.[76]

Integrating the responsive pleading requirement in *Saffian* with the amendment rules in *Wood* and *Potter* appear to allow a defendant to knowingly allow the limitations period to expire. There is no discernable requirement that a defendant must answer and then file a motion challenging the validity of the affidavit prior to the expiration of the limitations period. This calls into question the extent the legislature intended MCL section 600.2912d(1) and (2) to deny a plaintiff an opportunity to amend an affidavit under MCL section 600.2301 in medical malpractice actions. As stated in *Manley, Bennett & Co. v. Woodhams*:[77] "[w]e have passed the day when the art of pleading was a game of setting traps for the unwary and we do not intend to return to it." Nevertheless, *Wood* and *Potter* make clear that a statutorily compliant affidavit must be timely produced or the claim will be laid to rest.

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69. MICH. COMP. LAWS ANN. § 600.2912d(2) (West 2000). This section allows a twenty-eight day extension in instances where an affidavit is not capable of accompanying the complaint.

70. *Potter*, 274 Mich. App. at 226-27, 732 N.W.2d at 602-03.

71. *Id.* at 227, 732 N.W.2d at 602-03.

72. *Id.* at 228-29, 732 N.W.2d at 603-04 (Davis, J., dissenting).

73. *Id.* at 229, 732 N.W.2d at 604 (Davis, J., dissenting).

74. 376 Mich. 401, 137 N.W.2d 136 (1965).

75. *Potter*, 274 Mich. App. at 229-30, 732 N.W.2d at 604.

76. *Id.* at 230, 732 N.W.2d at 604.

77. 349 Mich. 586, 594, 84 N.W.2d 771, 775 (1957).

C. Medical Malpractice and Notice of Intent

Braverman involved alleged medical malpractice resulting in death. On October 29, 2002, the original personal representative was appointed.[78] On July 8, 2004, a notice of intent was filed.[79] On August 18, 2004, plaintiff was appointed as successor personal representative.[80] On January 25, 2005, plaintiff filed the complaint.[81]

Relying on *Eggleston v. Bio-Medical Applications of Detroit Inc.*[82] and *Verbrugghe v. Select Specialty Hosp-Macomb Co. Inc.*[83], the court found plaintiff's complaint timely filed pursuant the wrongful death saving provision codified at MCL section 600.5852[84].[85] However, the court declared a conflict with *Verbrugghe* pursuant to MCR 7.215(J)(2)[86] regarding whether the notice of intent was proper pursuant to MCL section 600.2912b(1).[87] *Braverman* interpreted *Verbrugghe* as creating a rule that the same human being who files the notice of intent must also file the complaint pursuant to MCL section 600.2912b(1).[88] *Braverman* reluctantly ruled that MCL section 600.2912b(1) was not satisfied since plaintiff did not file the notice of intent and opined that *Verbrugghe* was inherently flawed.[89]

The court convened a special panel to resolve the conflict and in *Braverman v. Garden City Hospital (Braverman II)* held that a notice of intent filed by the original representative supports a complaint filed by a successor representative.[90] The court, agreeing with the *Braverman* majority, found that *Verbrugghe* improperly relied on *Halton v. Fawcett*[91] to require the same person file both the notice of intent and the complaint.[92] In *Halton*, the court held that the statutory notice of intent requirement was met despite the fact that the personal representative filed the notice of intent before she was actually appointed the personal representative because she was nevertheless the same person who filed the complaint.[93] The court explained: "it is clear that the statute requires

78. *Braverman*, 272 Mich. App. 72, 75, 724 N.W.2d 285, 287-88 (2006).
79. *Id.* at 75, 724 N.W.2d at 288.
80. *Id.*
81. *Id.* at 75, 724 N.W.2d at 287.
82. 468 Mich. 29, 658 N.W.2d 139 (2003).
83. 270 Mich. App. 383, 715 N.W.2d 72 (2006).
84. MICH. COMP. LAWS ANN. § 600.5852 (West 2000).
85. *Braverman*, 272 Mich. App. at 76, 724 N.W.2d at 288 (citing MICH. COMP. LAWS ANN. § 600.5852).
86. MICH. CT. R. 7.215(J)(2).
87. *Braverman*, 272 Mich. App. at 77, 724 N.W.2d at 289.
88. *Id.* at 74-75, 724 N.W.2d at 287.
89. *Id.* at 83-84, 724 N.W.2d at 292-93. The court also found that defendant Garden City Hospital failed to preserve the notice of intent issue for appeal.
90. 275 Mich. App. 705, 740 N.W.2d 744 (2007) [hereinafter *Braverman II*].
91. 259 Mich. App. 699, 675 N.W.2d 880 (2003).
92. *Braverman II*, 275 Mich. App. at 714-15, 740 N.W.2d at 749-50.
93. *Halton*, 259 Mich. App. at 704, 675 N.W.2d at 883.

the person commencing a medical malpractice action be the person who previously served a notice of intent on the defendant."[94] In *Verbrugghe*, the successor personal representative was appointed after the initial personal representative filed a notice of intent and complaint.[95] The successor personal representative filed a second complaint without filing a notice of intent.[96] *Verbrugghe*, relying on *Halton*, held that the successor personal representative herself was required to file the notice of intent before filing her suit and dismissed the case without prejudice.[97]

Braverman II stated that the issue of whether a notice of intent filed by a predecessor personal representative can support a complaint filed by a successor personal representative was not addressed in *Halton*.[98] Thus, the panel concluded that *Halton* does not preclude a successor personal representative's reliance on the predecessor's notice of intent.[99] The panel held that the term "person" in section 600.2912b(1) includes, "a person acting in a representative capacity, and includes the duly appointed personal representative of an estate, whoever that person may be at any given time."[100]

In *Neal v. Oakwood Hosp. Corp.*[101] the court stated: "[t]he purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs."[102] Curiously, the *Braverman* courts did not explicitly address this policy declaration. If the statutory purpose is to achieve settlement as stated in *Neal*, then it is irrelevant which personal representative files the notice of intent so long as the statutory period has run before the complaint is filed.

Nevertheless, the requirement that there be a factual nexus between a notice of intent and a complaint militates against reading *Braverman II* as creating an inviolate rule always permitting a successor personal representative to rely upon his predecessor's notice of intent. In *Boodt v. Borgess Medical Center*[103] the court concluded that "the specificity required of a notice of intent as it addresses each of the subsections under [MCL section 600.2912b] is indistinguishable from the specificity required of a medical malpractice complaint." Therefore, *Boodt* requires factual parity between the notice of intent and the complaint.

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94. *Id.* at 702, 675 N.W.2d at 882.
95. *Verbrugghe*, 270 Mich. App. at 386, 715 N.W.2d at 75.
96. *Id.*
97. *Id.* at 397, 715 N.W.2d at 80-81.
98. *Braverman II*, 27 Mich. App. at 714-15, 740 N.W.2d at 749-50.
99. *Id.* at 715, 740 N.W.2d at 750.
100. *Id.*
101. 226 Mich. App. 701, 575 N.W.2d 68 (1997).
102. *Id.* at 705, 575 N.W.2d at 71.
103. 272 Mich. App. 621, 728.N.W.2d 471 (2006).

MCL section 600.2912b(4) provides a list of criteria that must be contained in the notice of intent. Thus, if the complaint filed by a successor personal representative deviates from the assertions in the predecessor's notice of intent, the purpose of MCL section 600.2912b would not be fulfilled; the notice of intent cannot properly function as a vehicle for settlement because the complaint contains different facts and allegations rendering the predecessor's notice of intent a nullity. Thus, the utility of *Braverman II* is governed by the specific facts of an individual case.

D. Class Actions and Tolling of Claims

In *Cowles v. Bank West*[104] the Supreme Court, in a matter of first impression, decided whether the filing of a class-action complaint tolls the period of limitations for a class member's claim that was not pled in the complaint but arose from the same legal and factual nexus.

In that case, the trial court dismissed intervening plaintiff Karen Paxson's (Paxson) claim against the defendant under the Truth In Lending Act (TILA)[105] on the basis it was barred by the statute of limitations.[106] The court of appeals reversed holding that the limitations period was tolled under MCR 3.501(F) and that the claim was subject to the relation back of amendments doctrine under MCR 2.118(D). The court then held summary disposition was improper because a question of fact existed regarding whether the defendant's documentation preparation fee was proper under federal law.[107]

The case has a convoluted factual and procedural history. On February 7, 1997, plaintiff Kristine Cowles (Cowles) obtained a mortgage from the defendant wherein the defendant charged a $250 documentation preparation fee.[108] On February 9, 1998, Paxson obtained a refinancing loan from the defendant and was similarly charged a $250 documentation preparation fee.[109]

On July 1, 1998, Cowles filed a class-action complaint regarding the documentation preparation fee that included all consumers who obtained real estate loans in the six-year period before the filing of the complaint.[110] The complaint alleged that the fee constituted the unauthorized practice of law and violated the Michigan Consumer Protection Act.[111] The complaint also asserted claims of replevin, unjust

104. 476 Mich. 1, 719 N.W.2d 94 (2006).
105. 15 U.S.C. § 1601 (2007).
106. *Cowles*, 476 Mich. at 4, 719 N.W.2d at 96.
107. *Id.* at 4, 719 N.W.2d at 96.
108. *Id.* at 5, 719 N.W.2d at 97.
109. *Id.*
110. *Id.*
111. MICH. COMP. LAWS ANN. § 445.901 (West 2002); *Cowles*, 476 Mich. at 5-6, 719 N.W.2d at 97.

enrichment, innocent misrepresentation, and negligent misrepresentation.[112]

On August 20, 1998, Cowles amended the complaint adding that the documentation preparation fee also violated TILA section 1638[113] because it was improperly identified on the TILA disclosure form as a fee "paid to others on your behalf."[114] Cowles claimed that the defendant actually retained the fee and did not pay it to others.[115] The amended complaint also alleged the fee exceeded the cost associated with the actual preparation of the final papers.[116] The defendant filed a motion for summary disposition on the TILA section 1638 claim, which was granted by the trial court and not appealed.[117]

On February 16, 1999, Cowles filed a second amended complaint alleging that the defendant's failure to disclose the fee violated section 1605(a) and Regulation Z[118] because the fee, as a finance charge, was not included in the loan's annual percentage rate and did not actually relate to document preparation.[119] The trial court certified the class as described in the second amended complaint and notice was sent to class members.[120] Notice was subsequently served and Paxson did not opt of the class.[121]

The defendant moved for reconsideration of the court's decision to certify the class arguing the TILA section 1605 claim was barred by the statute of limitations codified at section 1640(e) because it was pled more than one year after Cowles closed on her loan.[122] The defendant maintained that Cowles could not represent the class and moved for summary disposition regarding all claims in the second amended complaint.[123]

After Defendant filed its motion for reconsideration, Paxson successfully moved to intervene as the class representative for the TILA section 1605 claim and filed a complaint as intervening plaintiff.[124] The trial court granted defendant's summary disposition motion on Cowles's TILA section 1605 claim, and all others in the second amended complaint, except Paxson's TILA section 1605 claim.[125] Paxson and

112. *Cowles*, 476 Mich. at 6, 719 N.W.2d at 97.
113. 15 U.S.C. § 1638 (2007).
114. 15 U.S.C. § 1605(a) (2008).
115. Cowles, 476 Mich. at 6, 719 N.W.2d at 97.
116. *Id.*
117. *Id.*
118. 12 C.F.R. § 226.4(C)(7) (2008).
119. *Cowles*, 476 Mich. at 6-8, 719 N.W.2d at 98.
120. *Id.* at 8, 719 N.W. 2d at 98.
121. *Id.*
122. *Id.* at 8-9, 719 N.W.2d at 99.
123. *Id.* at 9, 719 N.W.2d at 99.
124. *Id.*
125. *Cowles*, 476 Mich. at 9, 719 N.W.2d at 99.

defendant then filed cross-motions for summary disposition.[126] The trial court ruled that Paxson's claim was untimely under TILA section 1640(e)[127] because it was pled more than one year after she closed on her loan.[128]

The trial court stated Paxson's claim was not tolled from the time Cowles filed the initial complaint and that the second amended complaint did not relate back to the initial complaint.[129]

The court of appeals affirmed the grant of summary disposition regarding the Michigan Consumer Protection Act claims, holding that residential mortgage loan transactions were exempt under the statute, and it also dismissed the unauthorized practice of law claim.[130] However, the court held that the trial court improperly dismissed Paxson's TILA claim.[131] The court held that under MCR 3.501(F), the filing of the initial complaint tolled the limitations period for Paxson's claim.[132] The court opined that tolling was proper because Paxson was a member of the class described in the initial complaint, the class was certified, and none of the circumstances outlined in MCR 3.501(F)(2) occurred that would allow the limitations period to run against Paxson.[133] The court stated that amendments arising out of the same transaction or occurrence alleged in the initial complaint relate back to the date of the initial filing as provided in MCR 2.118(D).[134] Moreover, the court believed there was a genuine issue of fact regarding whether the fee was bona fide.[135]

The first issue addressed by the Supreme Court was whether Cowles's initial complaint that was devoid of a TILA claim, and outside the TILA limitations period for Cowles's claim but within the TILA limitations period for Paxson's claim, nevertheless tolled the limitations period for Paxon's TILA claim under MCR 3.501(F)(2).[136] The court stated that MCR 3.501(F) was modeled after the United States Supreme Court's decision in *American Pipe & Constr. Co. v. Utah.*[137] *American Pipe* established the class-action tolling doctrine, which states that the filing of a class action tolls the limitations period for all class members who timely intervene after a court denies class certification.[138] The court believed the doctrine was necessary to balance a class member's right to

126. *Id.*
127. 15 U.S.C. § 1640(e) (2007).
128. *Cowles*, 476 Mich. at 9, 719 N.W.2d at 99.
129. *Id.*
130. *Id.* at 10, 719 N.W.2d at 99.
131. *Id.*
132. *Id.*
133. *Id.* at 10, 719 N.W.2d at 99.
134. *Cowles*, 476 Mich. at 10, 719 N.W.2d at 100 (citing MICH. CT. R. 2.118(D)).
135. *Id.* at 12, 719 N.W.2d at 101.
136. *Id.* at 14, 719 N.W.2d at 101-02.
137. *Id.* at 15-17, 719 N.W.2d at 103 (citing American Pipe v. Utah, 414 U.S. 538 (1974)).
138. *Id.* (citing *American Pipe*, 414 U.S. at 553-54).

pursue his claim if the class was not certified with a defendant's right to be free from stale claims.[139]

The doctrine is also designed to prevent individual plaintiffs from intervening or filing duplicative actions just in case the class was not certified or the action was dismissed on procedural grounds.[140] Notably, the *Cowles* court opined that *American Pipe* held that class members who do not file suit while the class action is pending are not guilty of sleeping on their rights because the class-action rule encourages class members to rely on named plaintiffs to prosecute their claims, and that not until a class is certified does a class member have a duty to recognize the suit or exercise any responsibility to it.[141]

Crown, Cork & Seal Co. Inc. v. Parker[142] expanded the doctrine to class members who file individual actions after the class certification is denied. In a concurring opinion, Justice Powell opined that the doctrine would not toll the limitations period for claims that were unrelated to the claims asserted in the initial complaint.[143] Relying upon Justice Powell's opinion, courts around the country are split regarding the application of the doctrine. Some courts have held that tolling only applies to claims that are identical to those raised, or those that could have been raised, in the initial class action complaint; others have held that subsequent claims need only a factual and legal nexus that would allow the defendant to rely on the same evidence in mounting a defense.[144] *Cowles* adopted the latter view and explicitly rejected the requirement that subsequent claims must be identical for tolling to occur under MCR 3.501(F).[145] The *Cowles* court held that MCR 3.501(F) tolls the limitations period for a class member's claim arising out of the same factual and legal nexus provided the defendant has notice of the claim and the number and generic identities of potential plaintiffs.[146]

The court held that the purpose of the statute of limitations was met with the filing of Cowles's initial complaint because the factual bases for Paxson's claim are the same as those raised in Cowles's initial complaint.[147] Thus, the court opined that the complaint notified defendant of the number and generic identities of potential plaintiffs.[148] The court noted that to hold otherwise would undermine the purpose of

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139. *Id.* (citing *American Pipe*, 414 U.S. at 553-54).

140. *Cowles*, 476 Mich. at 18, 719 N.W.2d at 104. (citing *American Pipe*, 414 U.S. at 554-55).

141. *Id.*

142. 462 U.S. 345 (1983).

143. *Cowles*, 476 Mich. at 19, 719 N.W.2d at 104 (citing *Crown*, 462 U.S. at 354-55 (Powell, J., concurring)).

144. *Id.* at 19-20, 719 N.W.2d at 104-05.

145. *Id.* at 20, 719 N.W.2d at 105.

146. *Id.* at 20-21, 719 N.W.2d at 105.

147. *Id.* at 22, 719 N.W.2d at 106.

148. *Id.*

MCR 3.501[149] of achieving judicial economy by forcing similarly situated plaintiffs to file separate protective lawsuits.[150]

Judge Corrigan's dissent is logically compelling but appears to be undercut by *American Pipe*. She opined that there was simply no claim for MCR 3.501(F) to toll because the limitations period expired for Cowles before the filing of the initial complaint.[151] Moreover, she believed Paxson had no claim to toll because the limitations period expired on her claim before she intervened.[152] However, as noted by the *Cowles* majority, *American Pipe* held that a class member does not have a duty to take note of the suit or exercise any responsibility to it until the class is certified. The class was certified after the limitations period on Paxson's claim expired. Thus, *American Pipe* appears to allow Paxson's claim because it would be inequitable to bar the claim when she did not have a duty to act until after it expired.

Moreover, and notwithstanding that Cowles could not personally assert a TILA claim, the first amended complaint alleged a TILA violation (albeit under a different section) and was filed within the limitations period for Paxson's claim. *American Pipe* stated that statutes of limitations: "are important to the administration of justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[153] Given the first amended complaint, it is difficult to envision how defendant would be surprised by Paxson's TILA claim or unfairly prejudiced by allowing the claim to proceed.

III. SANCTIONS

A. Judicial Protection of the Administration of Justice

In *Maldonado v. Ford Motor Co.*,[154] the Supreme Court addressed the punitive authority of Michigan trial courts. In that case, plaintiff filed suit against defendant alleging Daniel Bennett, a Ford supervisor, sexually harassed her in violation of the Michigan Civil Rights Act.[155] Judge Kathleen MacDonald granted defendant's motion in limine to

149. *Crowles*, 476 Mich. at 25, 719 N.W.2d at 108. The Court also vacated the court of appeals finding that Paxson's claims were preserved by the relation back doctrine since the court found that Paxson's claims were not time-barred. The Court affirmed the court of appeals holding that a genuine issue of material fact existed regarding whether the document preparation fee was "bona fide." *Id.*

150. *Id.* at 31-37, 719 N.W.2d at 111-14.

151. *Id.* at 50 n.6, 719 N.W.2d at 121 n.6.

152. *Id.*

153. *American Pipe*, 414 U.S. at 554.

154. 476 Mich. 372, 719 N.W.2d 809 (2006).

155. MICH. COMP. LAWS ANN. § 37.2101 (West 2001); *Maldonado*, 476 Mich. at 377, 719 N.W.2d at 811.

exclude from evidence Bennett's 1995 indecent exposure conviction.[156] Plaintiff's application for leave to appeal was denied.[157]

Shortly before a settlement conference was scheduled to take place, plaintiff's counsel issued a press release regarding Judge MacDonald's order excluding the evidence and informing the public of the upcoming trial.[158] After the press release, Bennett's indecent exposure conviction was expunged and a trial date was set for July 8, 2002.[159]

In February 2002, the case was re-assigned to Judge Giovan who met with the attorneys regarding plaintiff's counsel's public references to Bennett's prior conviction despite Judge MacDonald's order excluding the conviction from evidence and the fact that the conviction was expunged.[160] Plaintiff's counsel stated, "'it was worth the risk'" to continue publicizing Bennett's expunged conviction even though M.C.L.A section 780.623(5)[161] criminalizes the divulgence of an expunged conviction.[162] Plaintiff's counsel continued to meet with the media and refer to the expunged conviction.[163]

Judge Giovan subsequently denied plaintiff's motion to dissolve Judge MacDonald's prior order.[164] During the hearing, Judge Giovan cautioned the attorneys that he would dismiss the case with prejudice, or enter a default judgment, if he determined that public comments were being made in order to affect the jury pool.[165] A few days later, plaintiff was deposed and admitted that she disclosed facts concerning the expunged conviction in violation of the trial court's order disallowing the evidence;[166] she also admitted that she would continue to publicly discuss the expunged conviction.[167]

A couple of days after the deposition, plaintiff and her counsel participated in a demonstration that referenced the expunged conviction and accused Judge Giovan of being a puppet for Ford Motor Company.[168] Plaintiff also gave a television interview indicating that she would continue talking about the expunged record even though she had been warned that it could result in dismissal of her case with prejudice.[169]

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156. *Maldonado*, 476 Mich. at 377, 719 N.W.2d at 811. This order also pertained to another case where Bennett was being sued for sexual harassment.

157. *Id.* at 377-78, 719 N.W.2d at 811-12.

158. *Id.* at 378, 719 N.W.2d at 812.

159. *Id.*

160. *Id.* at 380, 719 N.W.2d at 813.

161. MICH. COMP. LAWS ANN. § 780.623(5) (West 1998).

162. *Maldonado*, 476 Mich. at 380, 719 N.W.2d at 813.

163. *Id.* at 381, 719 N.W.2d at 813. This case received mass media attention prior to the scheduled trial.

164. *Id.* at 383, 719 N.W.2d at 814.

165. *Id.*

166. *Id.*

167. *Id.* at 383, 719 N.W.2d at 815.

168. *Maldonado*, 476 Mich. at 384, 719 N.W.2d at 815.

169. *Id.*

The defendants moved to dismiss plaintiff's suit alleging plaintiff and her counsel engaged in illicit pretrial publicity aimed at tainting the jury pool.[170] Judge Giovan agreed and dismissed the case with prejudice.[171] The court of appeals acknowledged the trial court's authority to dismiss the action, but remanded to have the trial court conduct an evidentiary hearing to determine whether the public comments actually prejudiced the jury pool.[172]

The Supreme Court affirmed the trial court's dismissal with prejudice by utilizing a confluence of inherent and express judicial authority. The Court noted that trial courts are vested with the inherent authority to sanction litigants and that any punitive action is reviewed under an abuse of discretion standard.[173] The court adopted the test set forth in *People v. Babcock.*[174] *Babcock* stated that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome."[175] The *Maldonado* Court ruled that as long as the trial court selects one of the principled outcomes, it has not abused its discretion.[176]

The Court stated that MCL section 600.611[177] and MCR 2.504(B)(1) give express authority to a trial court to sanction a party.[178] Section 600.611 provides circuit courts with the power to make any order to effectuate its jurisdiction and judgments. MCR 2.504(B)(1) states that if a plaintiff fails to comply with a court order, a defendant may move for dismissal.

The Court also found express authority in the Model Rules of Professional Conduct.[179] Rule 3.5[180] prohibits a lawyer from, among other things, seeking to influence a prospective juror by means prohibited by law; Rule 3.6[181] prohibits a lawyer from making a statement that has a substantial likelihood of prejudicing an adjudicative proceeding.

The Court opined that Judge Giovan chose a principled outcome in protecting the administration of justice by dismissing the case given plaintiff's and her counsel's conduct.[182] The court stated that plaintiff and her counsel received adequate warning that their actions would result

170. *Id.* at 385, 719 N.W.2d at 815.
171. *Id.* at 386, 719 N.W.2d at 816.
172. *Id.* at 387, 719 N.W.2d at 817.
173. *Id.* at 388, 719 N.W.2d at 817.
174. 469 Mich. 247, 666 N.W.2d 231 (2003).
175. *Id.* at 269, 666 N.W.2d at 244.
176. *Maldonado*, 476 Mich. at 388, 719 N.W.2d at 817.
177. MICH. COMP. LAWS ANN. § 600.611 (West 1996).
178. *Maldonado*, 476 Mich. at 391, 719 N.W.2d at 819.
179. *Id.*
180. MODEL RULES OF PROF'L CONDUCT R. 3.5. (West 2008).
181. MODEL RULES OF PROF'L CONDUCT R. 3.6. (West 2008)
182. *Maldonado*, 476 Mich. at 395, 719 N.W.2d at 821.

in dismissal but nevertheless chose to engage in the prohibited conduct.[183] Thus, the court agreed with Judge Giovan's assessment that nothing would deter plaintiff or her counsel from continuing to publicize information about Bennett's expunged conviction.[184]

Nevertheless, Judge Giovan's basis for dismissal was that plaintiff's counsel violated MCR 3.6.[185] Plaintiff argued that the dismissal was based solely upon plaintiff's comments and that the Model Rules of Professional Conduct do not apply to non-lawyers.[186] The court found that the dismissal was based upon the comments made by both plaintiff's counsel and plaintiff and that MCR 2.504(B)(1), although not expressly utilized by Judge Giovan, applies to plaintiff and expressly permits dismissal for party misconduct.[187]

In affirming the dismissal, the court also held that it did not violate the First Amendment to the U.S. Constitution addressing free speech.[188] The court also reversed the court of appeals order requiring an evidentiary hearing to determine whether there has been actual prejudice by describing it as a "fool's errand."[189] The court believed the actual prejudice standard was impractical and that it would nevertheless be impossible to prove three years after the occurrence.[190]

Justice Cavanagh's dissent raised a procedural argument that is at variance with the majority's adoption of *Babcock* and its "reasonable and principled outcome" standard of review.[191] Relying on *Landmark Communications Inc. v. Virginia,*[192] Justice Cavanagh opined that the trial court was required to consider and utilize less extreme measures before dismissing the case. He believed the trial court could have required a continuance, changed the venue, conducted a sequestered voir dire, issued an order forbidding any future disclosure of Bennett's conviction, or continued forward with voir dire and a larger pool of jurors.[193] The majority categorized this argument as "irrelevant" because dismissal was within the range of reasoned and principled outcomes set forth in *Babcock.*[194]

Although dismissed by the majority, the conceptual basis for Judge Cavanagh's argument is found in Michigan Court of Appeals jurisprudence addressing sanctions for a party's failure to preserve

183. *Id.* at 394, 719 N.W.2d at 820.
184. *Id.* at 395, 719 N.W.2d at 821.
185. *Id.* at 396, 719 N.W.2d at 821.
186. *Id.*
187. *Id.*
188. *Maldonado*, 476 Mich. at 402, 719 N.W.2d at 824.
189. *Id.* at 402, 719 N.W.2d at 825.
190. *Id.*
191. *Babcock*, 469 Mich. at 269, 666 N.W.2d at 244.
192. 435 U.S. 829 (1978).
193. *Maldonado*, 476 Mich. at 419, 719 N.W.2d at 833.
194. *Id.* at 395 n.24, 719 N.W.2d at 821 n.24.

evidence. In *Bloemendaal v. Town & Country Sports Center Inc.*[195] the court of appeals ruled that a trial court has the inherent authority to sanction a party for failing to preserve evidence that it knows or should know is relevant to actual or impending litigation. Relying on *Brenner v. Kolk*,[196] *Bloemendaal* ruled that a trial court's exercise of its inherent power may only be disturbed upon a finding that there has been a clear abuse of discretion.[197] *Brenner* stated that the trial courts have the inherent power to sanction a party and that: "dismissal is a drastic step that should be taken cautiously. Before imposing such a sanction, the trial court is *required* to carefully evaluate *all available options on the record* and conclude that the sanction of dismissal is just and proper . . . Before dismissing the case, the trial court should have considered *lesser sanctions* . . . ."[198]

Sanctions addressing public statements that may improperly influence a jury as seen in *Maldonado*, and those addressing a party's discovery abuses as seen in *Brenner*, fall within the ambit of judicial protection of the administration of justice. However, these cases mandate different requirements upon trial courts before they fashion a sanction. The reasonable and principled outcome standard adopted in *Maldonado* yields extreme deference to the trial courts and tolerates a sanction chosen from a field of unarticulated options; the option chosen only needs to be reasonable. *Brenner*, on the other hand, requires a concrete showing on the record that the trial court considered lesser sanctions before dismissing the action. Thus, *Brenner* favors sanctions that are not only reasonable, but are the least severe measures that cure the prejudice.

However, *Maldonado* casts doubt on the continued viability of *Brenner*. Before adopting the *Babcock* abuse of discretion standard, *Maldonado* cites *Brenner* for the general proposition that a trial court's exercise of its inherent power is reviewed for a clear abuse of discretion.[199] *Maldonado* then adopted the *Babcock* standard and failed to address the particularized requirements of *Brenner*. Thus, *Maldonado* can be viewed as supplementing the standard set forth in *Brenner*. Regardless of how *Maldonado* and *Brenner* are construed, it is apparent that the appellate courts will afford trial courts with great deferential latitude in devising sanctions to protect the administration of justice.

B. Contractual Attorney's Fees

In *Fleet Business Credit, LLC* v. *Krapohl Ford Lincoln Mercury Co.*[200] the court of appeals addressed whether contractually based

195. 255 Mich. App. 207, 211, 659 N.W.2d 684, 686 (2002).
196. 226 Mich. App. 149, 573 N.W.2d 65 (1997).
197. *Bloemendaal*, 255 Mich. App. at 211, 659 N.W.2d at 686.
198. *Brenner*, 226 Mich. App. at 163, 573 N.W.2d at 71 (emphasis added).
199. *Maldonado*, 476 Mich. at 388, 719 N.W.2d at 817.
200. 274 Mich. App. 584, 590, 735 N.W.2d 644, 647 (2007).

attorney's fees must be pled as special damages pursuant to MCR 2.112(I).

Krapohl Ford Lincoln Mercury Co. (Krapohl) is an automotive dealership that entered into a software lease agreement with Market Scan Information Services, Inc. (Market Scan).[201] The contract entitled the prevailing party in a lawsuit to recover its costs and reasonable attorney's fees.[202] Krapohl also entered into a lease contract with Fleet Business Credit LLC (Fleet) for hardware to operate Market Scan's software.[203] Krapohl became dissatisfied with Market Scan's software and discontinued payments to Fleet.[204]

Fleet sued Krapohl, which in turn filed a third-party complaint against Market Scan alleging breach of the license agreement and breach of warranty.[205] Market Scan answered and requested, "all reasonable court costs and attorney's fee[s] so unjustly incurred in defense of this matter."[206] Fleet settled the case with Krapohl; however, the case between Krapohl and Market Scan was tried to a jury.[207]

In an unpublished opinion, the court of appeals reversed the trial court's denial of Market Scan's motions for directed verdict and JNOV stating that the trial court erred in allowing Krapohl to present extrinsic evidence regarding its allegation of fraud in the inducement.[208] The court stated that "the type of fraud alleged by Krapohl is not the type of fraud that can invalidate a contract with a valid merger clause," and remanded to have the circuit court enter judgment in favor of Market Scan.[209]

Market Scan then moved for costs and attorney fees as provided by the contract.[210] The Circuit court denied the request stating that attorney fees are special damages, even when contractually based, and that the general reference to attorney fees in Market Scan's pleadings were not pled with specificity as required by MCR 2.112(I).[211]

The court of appeals found that, under the facts of the case, the contractually based attorney fees were not special damages.[212] Specifically, the court held that, "there could be no surprise to Krapohl that Market Scan would seek attorney's fees because they are allowed by the contract"[213] and that, "[they] are generally recoverable by the prevailing party even if there was no specific prayer for the recovery of

201. *Id.* at 585-86, 735 N.W.2d at 645-46.
202. *Id.* at 585-86, 735 N.W.2d at 646.
203. *Id.* at 586, 735 N.W.2d at 646.
204. *Id.*
205. *Id.*
206. *Fleet Business Credit*, LLC, 274 Mich. App. at 586, 735 N.W.2d at 646.
207. *Id.*
208. *Id.* at 587, 735 N.W.2d at 646.
209. *Id.*
210. *Id.* at 588, 735 N.W.2d at 646.
211. *Id.*
212. Fleet Business Credit, LLC, 274 Mich. App. at 591, 735 N.W.2d at 649.
213. *Id.* at 592, 735 N.W.2d at 649.

attorney fees in the complaint."[214] Thus, *Fleet's* procedural holding rests upon a well-established tenet of substantive contract law: "The stability of written instruments demands that a person who executes one shall know its contents or be chargeable with such knowledge."[215]

C. Validity of Offer of Judgment

In *Knue v. Smith*[216] the trial court and court of appeals held that plaintiff's offer of $3,000.00 to defendants in exchange for a quitclaim deed resulting in dismissal was an offer for a "sum certain" under MCR 2.405(A).[217] Defendants unsuccessfully argued that the offer was not for a sum certain because the case was an equitable proceeding involving real property and that sanctions should not be granted pursuant to the "interest of justice" exception under MCR 2.405(D)(3).[218]

The Supreme Court held that the offer was not for a sum certain.[219] The Court stated that the rule does not authorize offers that culminate in something other than a judgment for a sum certain.[220] Accordingly, the court found the offer was improper because it required "a reciprocal exchange of cash for the execution of a" quitclaim deed that resulted in a dismissal with prejudice.[221]

Although the offer was found improper, the Supreme Court did not resolve the overarching question of whether offers of judgment are permissible in equitable proceedings generally. Justices Taylor, Cavanagh, and Corrigan held that: "no consideration of the distinctions between law and equity is required to resolve this matter."[222] In effect, they decided not to decide. Justices Young and Weaver followed suit and expressed no opinion on this issue.[223] Justice Markman opined that the rule is applicable in equitable proceedings.[224] Justice Kelly opined that the rule is inapplicable in equitable actions.[225]

Since *Knue* passed on the opportunity to decide the legal/equitable issue, the applicability of Rule 2.405 must be viewed as governed by the offer itself. In this sense, *Knue* provides guidance: offers are outside the scope of Rule 2.405 if they require each party to exchange something of value before a dismissal with prejudice is entered.[226] If this hurdle is

214. *Id.*
215. Sponseller v. Kimball, 246 Mich. 255, 260, 224 N.W. 359, 360 (1929).
216. 478 Mich. 88, 731 N.W.2d 686 (2007).
217. *Id.* at 89-90, 731 N.W.2d at 686-87 (citing MICH. CT. R. 2.405(A)).
218. *Id.* at 91, 731 N.W.2d at 687.
219. *Id.* at 93, 731 N.W.2d at 688.
220. *Id.*
221. *Id.*
222. *Knue*, 478 Mich. at 93, 731 N.W.2d at 688.
223. *Id.* at 97, 731 N.W.2d at 690.
224. *Id.*
225. *Id* at 94, 731 N.W.2d at 689.
226. *Id.* at 93, 731 N.W.2d at 688.

cleared, weighing the offer against the verdict to determine if sanctions are warranted should be simplistic in legal actions.

For trial courts opting to apply the rule in equitable actions, the matter is made more complex because the equitable verdict needs to be reduced to a sum certain in order to weigh the offer against the verdict.[227] This type of analysis of equitable claims is supported by the sister rule addressing case evaluation proceedings. MCR 2.403(K)(3) allows the case evaluation panel to consider equitable claims in determining the amount of the award. MCR 2.403(O)(5) permits a trial court to consider both legal and equitable claims in determining whether sanctions should be imposed.

IV. SUMMARY DISPOSITION

A. Duplicative Interstate Actions

In *Valeo Switches and Detection Systems, Inc. v. EMCom, Inc.*[228] the court of appeals addressed the viability of a lawsuit filed in both Michigan and New York. On February 8, 2005, Valeo Switches and Detection Systems, Inc. (Valeo) filed a claim in Michigan against EMCom regarding alleged defective circuit boards.[229] EMCom subsequently sought coverage from Hanover Insurance Company (Hanover).[230] Hanover denied coverage and on March 22, 2005, instituted a declaratory action against EMCom in New York to determine whether it had a duty to defend or indemnify EMCom.[231] On April 6, 2005, EMCom answered Valeo's complaint and filed a third-party declaratory action against Hanover and other third-party defendants seeking a declaration that they were required to defend and indemnify EMCom.[232]

Hanover and the other defendants moved for summary disposition regarding EMCom's third-party claim under MCR 2.116(C)(6) arguing that the declaratory action filed in New York was between the same parties and involved the same claim.[233] Rule 2.116(C)(6) provides for summary disposition when "[a]nother action has been initiated between the same parties involving the same claim." The trial court granted summary disposition and dismissed EMCom's declaratory action.[234]

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227. Both MICH. CT. R. 2.405 and *Knue* suggest that the offer itself must be monetarily based and not equitable in nature.

228. 272 Mich. App. 309, 725 N.W.2d 364 (2006).

229. *Id.* at 310, 725 N.W.2d at 365.

230. *Id.*

231. *Id.*

232. *Id.* at 310, 725 N.W.2d at 365-66.

233. *Id.* at 310-11, 725 N.W.2d at 366.

234. *Valeo*, 272 Mich. App. At 310-11, 725 N.W.2d at 366.

On appeal, EMCom argued that Rule 2.116, which is derived from the common law plea of abatement by prior action, only bars a suit from being filed in Michigan if another action involving the same claim and parties is also filed in Michigan.[235] EMcom relied on *Sovran Bank M.A. v. Parsons*[236] where the court addressed the effect of a Florida case instituted prior to plaintiff's second filed action in Michigan involving the same claim. *Sovran Bank* held that the pending Florida case did not support dismissal pursuant to Rule 2.116(C)(6) because a court does not lose jurisdiction by reason a claim is filed in another state even when it involves the same claim.[237] The court also opined that a suit pending in another state does not constitute a prior action subjecting the latter filed suit to a plea in abatement.[238]

Valeo refused to follow *Sovran Bank* because it believed the court improperly applied Rule 2.116(C)(6).[239] *Valeo* opined that the supreme court cases relied upon by *Sovran Bank* to reach its holding, *Owen v. Owen,*[240] *In Re Elliott's Estate,*[241] *McKey v. Swenson*[242] are not controlling or instructive because they did not apply or interpret Rule 2.116(C)(6) property.[243]

Valeo also refused to follow *Hoover Realty v. American Institute of Marketing Systems*[244] believing that *Hoover Realty* ignored the plain language of GCR 1963, 116.1(4), the precursor to Rule 2.116(C)(6), when it held that a claim filed in another state does not constitute a prior pending action subjecting the subsequently filed suit to dismissal.[245] Since *Sovran Bank* and *Hoover Realty* were both decided prior to 1990, *Valeo*[246] decided not to follow these decisions as permitted by MCR 7.215(J)(1).

Valeo held the plain language of MCR 2.116(C)(6) is not limited to those actions only filed within Michigan[247] and affirmed the trial court's dismissal of EMCom's third - party declaratory action.[248] Valeo stated the policy behind the plea of abatement by prior action rule, embodied in MCR 2.116(C)(6), is designed to prevent parties from engaging in litigation harassment.[249] Thus, *Valeo* can be viewed as requiring trial

235. *Id.* at 312, 725 N.W.2d at 365.
236. 159 Mich. App. 408, 407 N.W.2d 13 (1987).
237. *Id.* at 412-13, 407 N.W.2d at 14.
238. *Id.* at 413, 407 N.W.2d at 15.
239. *Valeo*, 272 Mich. App. at 313, 725 N.W.2d at 367.
240. 389 Mich. 117, 205 N.W.2d 181 (1973).
241. 285 Mich. 579, 281 N.W. 330 (1938).
242. 232 Mich. 505, 205 N.W. 583 (1925).
243. *Valeo*, 272 Mich. App. at 313-17, 725 N.W.2d at 367-69.
244. 24 Mich. App. 12, 179 N.W.2d 683 (1970).
245. *Valeo*, 272 Mich. App. at 317, 725 N.W.2d at 369.
246. *Id.* at 318, 725 N.W.2d at 369.
247. *Id.* at 319, 725 N.W.2d at 370.
248. *Id.* at 320, 725 N.W.2d at 370-71.
249. *Id.* at 319-20, 725 N.W.2d at 370.

courts to surrender their autonomous adjudicative power to sister states to achieve a streamlined litigation process free from gamesmanship.

B. Service of Process, General Appearance, and Vicarious Liability

In *Al-Shimmari v. The Detroit Medical Center*[250] the plaintiff underwent back surgery and subsequently filed a notice of intent to sue Dr. Setti Rengachary, Harper-Hutzel Hospital, The Detroit Medical Center, and University Neurosurgical Associates PC after he continued to feel pain.[251] Given the applicable statute of limitations at the time, plaintiff had to file and serve defendants by March 17, 2004.[252] On April 6, 2004, defendants' counsel signed a stipulation for the admission of plaintiff's medical records in exchange for an extension to file responsive pleadings.[253]

On April 16, 2004, Rengachary filed two motions for summary disposition.[254] The first motion was based under MCR 2.116(C)(2), (3), and (8) claiming that he had not been properly served before the statute of limitations expired.[255] The second motion was based on MCR 2.116 (C)(7) and (8) claiming he had not been served within the limitations period.[256] Rengachary claimed the limitations period expired because he was not served until March 18, 2004.[257] Plaintiff disputed the assertions and submitted a proof of service indicating he was served within the limitations period on March 11, 2004.[258]

The trial court ordered an evidentiary hearing and ultimately determined that Rengachary was not served until March 18, 2004, and granted summary disposition under MCR 2.116(C)(7).[259] The remaining defendants moved for summary disposition on the vicarious liability claims arguing that since Rengachary had been dismissed, they could not be vicariously liable for his actions. The trial court ruled that the dismissal of the claims against Rengachary extinguished the claims against the other defendants and granted summary disposition under MCR 2.116(C)(7).[260]

The court of appeals reversed the orders and held that plaintiff was entitled to a jury trial on the service of process issue, and that the other defendants should not have been dismissed because the grant of

250. 477 Mich. 280, 731 N.W.2d at 29 (2007).
251. *Shimmari*, 477 Mich. at 284, 731 N.W.2d at 31.
252. *Id.* at 284-85, 731 N.W.2d at 31.
253. *Id.* at 285, 731 N.W.2d at 31.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Shimmari*, 477 Mich. at 285, 731 N.W.2d at 31.
258. *Id.*
259. *Id.* at 286, 731 N.W.2d at 31-32.
260. *Id.* at 286, 731 N.W.2d at 32.

summary disposition to Rengachary had not been on the merits.[261] The court also held that defendants' stipulation was not sufficient to constitute a general appearance in the action.[262]

The Supreme Court ruled that a trial court is not required to order a jury trial under MCR 2.116(I)(3) unless the motion is based upon MCR 2.116(C)(7), a jury trial has been demanded, and the issue raised by the motion is one in which there is a right to trial by jury.[263] Unless each of these three requirements is satisfied, a trial court is not required to conduct a jury trial.[264]

The Court concluded that the resolution of the (C)(7) motion hinged entirely on the sufficiency of service which is governed by (C)(3), and that since MCR 2.116(I)(3) allows a trial court to conduct a bench trial to determine whether service was sufficient, the court of appeals erred by holding a jury trial was required.[265] The court opined that even though the motion was brought pursuant to (C)(7), and a jury trial was demanded, MCR 2.116(I)(3) expressly does not require a jury trial to resolve disputed factual questions arising under (C)(3).[266] Therefore, there was no right to jury trial because once it was determined that service was insufficient under (C)(3), there was no factual issue regarding whether service had occurred within the limitations period.[267]

Plaintiff also argued that Rengachary entered a general appearance before contesting service of process granting the trial court jurisdiction over him regardless of when service occurred.[268] Plaintiff argued that since defendant entered into a stipulation, Rengachary may not object to the sufficiency of process.[269] The Court stated that waiver of service of process under MCR 2.116(C)(3) is governed under MCR 2.116(D)(1) which provides that a defendant waives an objection unless it is raised in the defendant's first motion or responsive pleading.[270]

The Court ruled that the stipulation was irrelevant because Rengachary complied with the court rule by objecting to service of process in his first motion for summary disposition.[271] In making this ruling, the court overruled *Penny v. ABA Pharmaceutical Co.*,[272] which held that a party who enters a general appearance submits to the court's jurisdiction and waives service of process.[273] The court believed *Penny*,

261. *Id.* at 286-87, 731 N.W.2d at 32.
262. *Id.* at 287, 731 N.W.2d at 32.
263. *Shimmari*, 477 Mich. at 289, 731 N.W.2d at 33.
264. *Id.*
265. *Id.* at 289-90, 731 N.W.2d at 33-34.
266. *Id.* at 290 n.6, 731 N.W.2d at 34 n. 6.
267. *Id.*
268. *Id.* at 291, 731 N.W.2d at 34.
269. *Shimmari*, 477 Mich. at 291, 731 N.W.2d at 34-35.
270. *Id.* at 291-92, 716 N.W.2d at 35.
271. *Id.* at 292, 716 N.W.2d at 35.
272. 203 Mich. App. 178, 181, 511 N.W.2d at 896, 897 (1993).
273. *Shimmari*, 477 Mich. at 293, 731 N.W.2d at 35-36.

which did not address MCR 2.116(D)(1), impermissibly "sweeps" beyond the scope of the Rule rendering the case invalid on this point.[274]

The Court also held that MCR 2.504(B), addressing the effect of involuntary dismissal, is dispositive regarding the viability of the vicarious liability claim.[275] The court held that MCR 2.504(B)(3) generally provides for a dismissal to operate as an adjudication on the merits unless otherwise ordered, and that the trial court stated in its order that the dismissal was with prejudice.[276] Thus, the court found the dismissal was an adjudication on the merits barring plaintiff's vicarious liability claims given there could be no imputed liability.[277]

In making this ruling, the court overruled *Rogers v. Colonial Fed. S & L Ass'n*,[278] which held that a judgment based on a statute of limitations is not an adjudication on the merits. The Court held that the case law relied upon by *Rogers* was superseded by the General Court Rules of 1963 which had a provision substantially similar to current MCR 2.504(B)(3) in GCR 1963, 504.2 and that *Rogers* failed altogether to address the effect of then-applicable GCR 1963, 504.2.[279] Thus, the court opined that *Rogers* was incorrectly decided because it was not in accord with the applicable court rules.[280]

The vicarious liability issue is the most significant ruling of *Shimmari*. The Court's interpretation of MCR 2.504(B)(3) obliterates the distinction between motions based on procedural and substantive grounds because dismissal is deemed adjudicated on the merits, unless otherwise ordered by the court, barring any subsequent suit on the basis of res judicata. And, as set forth in MCR 2.203(A) addressing compulsory joinder of claims, Michigan courts broadly apply the doctrine of res judicata barring every claim arising from the same transaction or occurrence.[281]

The fact that MCR 2.504(B)(3) provides the trial court with discretion regarding whether or not to dismiss a case on the merits has limited practical effect. As stated in the U.S. Supreme Court case *American Pipe*,[282] the statute of limitations: "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[283] Therefore, a court should

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274. *Id.*
275. *Id.* at 295, 731 N.W.2d at 36.
276. *Id.* at 295-96, 731 N.W.2d at 37.
277. *Id.* at 295-96, 731 N.W.2d at 37.
278. 405 Mich. 607, 619 n. 5, 275 N.W.2d at 499, 504 n.5 (1979).
279. *Shimmari*, 477 Mich. at 296-97, 731 N.W.2d at 37.
280. *Id.* at 297, 731 N.W.2d at 38.
281. *See* Gose v. Monroe Auto Equipment Co., 409 Mich. 147, 160-63, 294 N.W.2d at 165, 167-69 (1980).
282. *American Pipe*, 414 U.S. 538.
.283. *Id.* at 554.

dismiss a time-barred claim on the merits to prevent re-filing unless it is determined that the particular statute at issue permits the plaintiff to resurrect his claim even after the initial limitations period has expired.[284] Thus, the interplay between MCR 2.116(C)(7) and MCR 2.504(B) will generally put all claims to rest.

C. Adverse Inference Jury Instruction

One of the briefest opinions issued during the *Survey* period signaled that the Supreme Court may soon address a matter of great interest to members of the bench and bar: whether an adverse-inference jury instruction should be taken into consideration when ruling on a motion for summary disposition.

In *Banks v. Exxon Mobil Corp,*[285] the plaintiff was injured at a gasoline station when the pump burst and sprayed gasoline into his face; he sued alleging premises liability.[286]

One of gasoline station's video cameras videotaped the pumps, however, the defendants could not produce the videotape that may have shown defendants had notice of the defective pump before it caused plaintiff's injuries.[287] The trial court permitted a jury instruction that allowed it to infer that the videotape would have been adverse to defendants.[288] The court subsequently granted summary disposition under MCR 2.116 (C)(10) finding that the defendants did not negligently damage the pump and that they did not have constructive notice of the pump's dangerous condition.[289] However, the judge did not take the adverse inference jury instruction into consideration when ruling on the motion.[290] The Supreme Court reversed, stating that the facts may permit the jury to conclude that defendants should have discovered the defective pump prior to injury.[291]

Although not essential to the Supreme Court's order, Justice Kelly wrote a concurring opinion addressing whether the judge was required to have taken the adverse inference jury instruction into consideration. She opined that the issue is a matter of first impression for the Michigan appellate courts and reasoned that since the jury is empowered to take the inference into account, it logically flows that a judge must draw the

284. In *Verbrugghe*, 270 Mich. App. at 391-92, 715 N.W.2d at 78 (holding that the statutory scheme and case law governing medical malpractice actions permitted the filing of a second lawsuit even though the original lawsuit was time- barred). However, this holding is questionable given Washington v. Sinai Hospital of Greater Detroit, 478 Mich. 412, 733 N.W.2d 755 (2007).

285. 477 Mich. 983, 725 N.W.2d 455 (2007).

286. *Id.* at 984, 725 N.W.2d at 455-56.

287. *Id.* at 984, 725 N.W.2d at 456.

288. *Id.*

289. *Id.* at 983, 725 N.W.2d at 455.

290. *Id.* at 985, 725 N.W.2d at 456.

291. *Banks*, 477 Mich. at 984, 725 N.W.2d at 455.

adverse inference when ruling on a summary disposition motion.[292] She also stated that use of an adverse inference is legally supported by judicial decisions outside Michigan.[293] Thus, Justice Kelly believed the trial court erred in failing to consider the adverse inference.[294]

The legal underpinning of Justice Kelly's argument is supported in a generic sense under existing Michigan law pertaining to non-moving parties. In *Skinner v. Square D Co.*[295] the court stated: "[l]ike the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes *all legitimate inferences* in favor of the *nonmoving party.*"[296] Thus, requiring a trial court to consider an adverse-inference jury instruction obtained by a non-moving party can be viewed as simply an extension of the rule set forth in *Skinner*. In *Banks*, the trial court imposed a permissive adverse inference jury instruction. Thus, the court's inquiry would have been rather straightforward since the plaintiff, the non-moving party, obtained an instruction that, when viewed in a light most favorable to the plaintiff, permits the jury to infer the videotape would be harmful to the defendants.

However, the issue becomes much more complicated when removed from the rule in *Skinner*. For example, it is unclear how a court should treat a permissive adverse-inference jury instruction obtained by a moving party. It can be argued that simply allowing the trial court to make the inference in the moving party's favor, without any mitigating limitations, would impermissibly blur the distinction between the trial court's role of determining whether there are issues of fact and the jury's role of actually determining the facts: the jury may or may not decide to actually make the adverse inference. Thus, how a trial court views and treats the inference will directly bear on its determination of whether the non-moving party has obtained sufficient evidence where a jury could find in its favor.

Therefore, any utilization of an adverse-inference jury instruction will require guidance from the appellate courts. The role of the jury instruction must be infused or reconciled with the current case law governing summary disposition and account for the permutations involving moving/non-moving parties acquiring adverse-inference jury instructions in any given case.

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292. *Id.* at 984, 725 N.W.2d at 456.
293. *Id.* at 984-85, 725 N.W.2d at 456.
294. *Id.* at 985, 725 N.W.2d at 456.
295. 445 Mich. 153, 162, 516 N.W.2d 475, 479 (1994).
296. *Id.* (emphasis added).

V. JUSTICIABILITY

A. Third-Party Standing and Ripeness

In *Michigan Chiropractic Council v. Commissioner of the Office of Financial and Insurance Services*[297] the court set forth the test for third-party standing. In that case, the appellant-insurers offered a voluntary "preferred provider option" (PPO) to their no-fault automobile insurance policyholders allowing them to elect to limit their choice of medical care providers in exchange for reduced premiums.[298] Under the plan, if a policyholder seeks treatment outside the network of medical care providers, Preferred Providers of Michigan (PPOM), the policyholder must pay a deductible.[299]

In August 2000, the petitioners, representing the interests of Michigan chiropractors, filed a request with the Commissioner of the Office of Financial and Insurance Services (Commissioner) for a contested case hearing pursuant to MCL section 500.2028[300] and MCL section 500.2029[301] arguing the PPO violated the insurance code.[302] After not receiving additional information pursuant to its request, the Commissioner rejected the petitioners' request for a contested hearing and concluded that the endorsement did not violate Michigan's no-fault act.[303] The circuit court reversed the Commissioner's decision by holding that the PPO was illegal.[304] The court of appeals affirmed[305] and the supreme court granted leave directing the parties to address whether the petitioners had standing to challenge the PPO on behalf of the policyholders.[306]

In addressing whether petitioners may vindicate the rights of the policyholders, the court ruled that the test to establish third-party standing utilized by *Mary v. Lewis*[307] is "analytically deficient."[308] According to *Michigan Chiropractic Council*, *Mary* improperly permits third-party standing when a litigant can establish an economic injury, demonstrate that the interests between the litigant and the party possessing the right "intertwine," and show that the third-party's rights "are capable of evading constitutional review."[309] The court stated that

297. 475 Mich. 363, 716 N.W.2d 561 (2006).
298. *Id.* at 367, 716 N.W.2d at 565.
299. *Id.*
300. MICH. COMP. LAWS ANN. § 500.2028 (West 2002).
301. MICH. COMP. LAWS ANN. § 500.2029 (West 2002).
302. *Mich. Chiropractic Council*, 475 Mich. at 368, 716 N.W.2d at 565.
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at 369, 716 N.W.2d at 565-66.
307. 399 Mich. 401, 249 N.W.2d 102 (1976).
308. *Mich. Chiropractic Council*, 475 Mich. at 377, 716 N.W.2d at 570.
309. *Id.*

requiring an economic injury "is merely a component of the traditional standing doctrine," and that requiring the litigant and the third-party to have "intertwining interests" does not lead to the inference that the litigant "will be an ardent proponent" of the third-party.[310] Lastly, the requirement that a claim be capable of evading review is a consideration recognized in the doctrine of mootness, not standing.[311]

Although *Michigan Chiropractic Council* found *Mary* "analytically deficient" regarding its third-party standing test, it is clear *Michigan Chiropractic Council* in all practicality overrules *Mary* on this point.[312] Indeed, the court, immediately after criticizing *Mary* states, "[a]ccordingly, we adopt the traditional federal test for third party standing as articulated in *Tesmer*."[313] A declaration adopted by Justices Young, Taylor, Corrigan and Markman.

Thus, the court ruled that in order to establish third-party standing, as an initial matter, a litigant must satisfy the test set forth in *Lee v. Macomb County Board of Commissioner*.[314] *Lee* requires a plaintiff to establish: (1) plaintiff has suffered a concrete "'injury in fact'"; (2) the existence of a causal connection between the injury and conduct complained of that is "'fairly trace[able] to the challenged action of the defendant'"; and (3) that the injury will likely be "'redressed by a favorable decision.'"[315] After satisfying *Lee*, the litigant must have a "'close relationship'" with the party actually possessing the claim.[316] Lastly, and perhaps most importantly, the litigant must establish that there is a "'hindrance'" to the third-party's ability to protect its own interests.[317] The court ruled that petitioners lacked standing because there was no evidence demonstrating that the policyholders were prevented from protecting their own interests through litigation.[318]

Michigan Chiropractic Council's departure from *Mary* is most significant regarding the requirement that there be a "hindrance" to a third-party's ability to protect its own interest. Those parties seeking to

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310. *Id.*

311. *Id.*

312. Westlaw has given *Mary* a "yellow flag" status and states that it is "called into doubt by" Michigan Chiropractic Council. However, given the harsh criticism of the logic and rationale behind *Mary*, as well as a different third-party standing test, it appears that *Mich. Chiropractic Council* supplants *Mary*.

313. *Mich. Chiropractic Council*, 475 Mich. at 377, 716 N.W.2d at 570.

314. *Id.* (citing Lee v Macomb Co. Bd. Of Comm's, 464 Mich. 726, 629 N.W.2d 900 (2001)).

315. *Lee*, 464 Mich. at 739, 629 N.W.2d at 907.

316. *Mich. Chiropractic Council*, 475 Mich. at 378, 716 N.W.2d at 570.

317. *Id.*

318. *Id.* at 378, 716 N.W.2d at 571. The court also found that petitioners had standing to litigate on behalf of their member providers. *Id.* at 380-82, 716 N.W.2d at 571-73. However, the court determined their allegation that the policy endorsement violated MICH. COMP. LAWS ANN. § 500.3157 (West 2002) was not ripe for review because there was no evidence showing providers were being compensated at a rate less than their reasonable and customary charge. *Id.*

obtain standing on behalf of a third-party are saddled with the arduous task of producing evidence demonstrating how the third-party is hindered from protecting itself. Thus, the net effect of *Michigan Chiropractic Council* is that it will greatly limit the number of parties who are able to achieve third-party standing.

B. Statutory Intervention

In *Federated Insurance Co. v. Oakland County Road Commission*[319] the Michigan Supreme Court addressed whether the Attorney General can appeal as an intervenor when the losing parties did not seek leave to appeal.[320] The case involved chemical contamination of real property.[321] The Plaintiffs filed a cost recovery action pursuant to the Natural Resources and Environmental Protection Act.[322] The trial court granted the defendant's motion for summary disposition based on the statute of limitations and the court of appeals affirmed.[323]

The Attorney General was not a party in the trial court or the court of appeals, however, the supreme court nevertheless granted his timely application for leave to appeal as intervening appellant.[324] The Attorney General argued that the court of appeals misconstrued a provision of the Natural Resources and Environmental Protection Act, a statute the Michigan Department of Environmental Quality (MDEQ) routinely litigates.[325] The Plaintiffs, however, did not timely file an application for leave to appeal.[326] The defendant argued that the attorney general lacked authority to intervene to challenge the court of appeals judgment.[327]

The supreme court found that the statutory authority for the attorney general to intervene is found in MCL sections 14.101[328] and 14.28[329], which allow for the intervention in certain "actions."[330] The court opined that the case ceased being an "action" when the plaintiffs, the losing parties, failed to timely file an application for leave to appeal transforming the matter into a nonjusticiable controversy.[331] Stated

319. 475 Mich. 286, 715 N.W.2d at 846 (2006).

320. *Id.* at 288, 715 N.W.2d at 848.

321. *Id.* at 288-89, 715 N.W.2d at 848-49.

322. MICH. COMP. LAWS ANN. § 324.20101 (West 1999); *Federated Ins.*, 475 Mich. at 288-89, 715 N.W.2d at 849.

323. *Id.* at 289, 715 N.W.2d at 849.

324. *Id.*

325. *Id.* at 290, 715 N.W.2d at 849.

326. *Id.* The court denied plaintiffs' cross-application for leave to appeal because it believed plaintiffs were attempting to circumvent MICH. CT. R. 7.302(C)(3) which bars late applications. *Id.* at 289 n.1, 715 N.W.2d at 849 n.1.

327. *Federated Ins.*, 475 Mich. at 290, 715 N.W.2d at 849.

328. MICH. COMP. LAWS ANN. § 14.101 (West 2004).

329. MICH. COMP. LAWS ANN. § 14.28 (West 2004).

330. *Federated Ins.*, 475 Mich. at 293-94, 715 N.W.2d at 851.

331. *Id.* at 294, 715 N.W.2d at 851-52.

differently, since the Attorney General did not represent an aggrieved party in the action and the losing parties below did not timely file an application for leave to appeal, there was no case in which the attorney general could intervene.

The majority's decision curiously prohibits the attorney general from representing the public interest given the inaction of private parties. As stated by Justice Weaver in her dissenting opinion: "the majority effectively requires the Attorney General to convince another party, over whom the Attorney General has no control and who the Attorney General does not represent, to pursue an appeal."[332] Thus, under the umbrella of a nonjusticiable controversy, the majority laid to rest any prospect of advocating the state's interest given a litigation decision driven by private interests.

A plain reading of the intervention statutes shows that the legislature empowered the attorney general to intervene at any stage of a proceeding: "[s]uch right of intervention shall exist at any stage of the proceeding."[333] Therefore, the Attorney General was not required to intervene at an earlier stage in order to preserve its right to appeal. Notwithstanding the explicit statutory language, the practical effect of the majority's holding required the Attorney General to intervene earlier in the litigation process to ensure it would not be bound by the actions of the private parties. Moreover, since the Attorney General filed a timely claim of appeal, it appears that he sought to intervene while there was still an active proceeding.

The majority also found that the Attorney General did not represent an aggrieved party.[334] The majority stated that in order to be an aggrieved party and have standing on appeal, the litigant must "demonstrate an injury arising from either the actions of the trial court or the appellate court judgment . . . ."[335] In this case, this threshold is arguably achieved given the plain language of section 14.28, which empowers the attorney general to intervene, "in any cause or matter . . . which the people of this state *may be a party or interested.*"[336] Thus, it is enough if the state's interest is negatively impacted in order to be an aggrieved party.[337] As stated by Justice Weaver, "[t]he interests of the

332. *Id.* at 314, 715 N.W.2d at 862.

333. MICH. COMP. LAWS ANN. § 14.101 (West 2004).

334. *Federated Ins.*, 475 Mich. at 297, 715 N.W.2d at 853.

335. *Id.* at 292, 715 N.W.2d at 850.

336. MICH. COMP. LAWS ANN. § 14.28 (2004) (emphasis added).

337. The majority opined that where the Attorney General seeks to intervene to argue a point of law, the intervention statutes provide only "statutory amicus", not true party status; therefore, the majority held that a precondition for the Attorney General to intervene is the presence of a party with appellate standing (which the Attorney General did not independently have). *Federated Ins.*, 475 Mich. at 295 n.7, 715 N.W.2d at 852 n.7.

people of Michigan and the MDEQ in this case are sufficient under Michigan's prior case law to make them "'aggrieved parties.'"[338]

At its core, justiciability in this case was defined by whether there was a cognizable state interest preserved for appellate review. For the majority, the state interest was not preserved because none of the litigating parties represented that interest and sought leave to appeal. For the dissent, the interest was preserved even though the state did not actively litigate below because the state had a cognizable interest running from the lawsuit's inception through the attorney general's timely claim of appeal.

C. Uniform Fraudulent Transfer Act and Necessary Joinder of Parties

In a matter of first impression, the court in *Mather Investors, LLC v. Larson*[339] addressed whether the Uniform Fraudulent Transfer Act[340] (UFTA) requires the transferor to be joined to void a fraudulent transfer. In that case, Alice Maddock incurred $53,000.00 in nursing home bills and allegedly transferred $63,000.00 in assets to William Larson.[341] The Plaintiff sued both individuals for breach of contract and fraudulent transfer under the UFTA.[342] However, the plaintiff failed to serve Maddock before her death and she was dismissed from the lawsuit.[343] Notably, the plaintiff alleged no contractual relationship with Larson and no estate was opened for Maddock.[344]

Larson moved for summary disposition arguing that Maddock or her estate were necessary parties and that Larson could not be liable under the UFTA without a determination that Maddock or her estate were liable to the plaintiff.[345] The trial court agreed but gave the plaintiff an opportunity to move to substitute the estate if it could prove lack of prejudice.[346] The trial court ultimately denied the plaintiff's motion and dismissed the case.[347]

The court of appeals held that the plain language of the UFTA does not require joinder of the debtor transferor.[348] However, after reviewing the applicable case law addressing mandatory joinder in general, the

338. *Id.* at 313, 715 N.W.2d at 861.

339. 271 Mich. App. 254, 720 N.W.2d at 575 (2006).

340. MICH. COMP. LAWS ANN. § 566.31 (West 1996).

341. *Mather Investors*, 271 Mich. App. at 255, 720 N.W.2d at 576.

342. *Id.*

343. *Id.*

344. *Id.* It appears that an estate was subsequently opened sometime after litigation ensued.

345. *Id.*

346. *Id.*

347. *Mather Investors*, 271 Mich. App. at 255, 720 N.W.2d at 576. The denial was affirmed on appeal.

348. *Id.*

court stated that the dispositive inquiry is whether complete adjudication can be ascertained without joining the debtor transferor.[349]

The court stated that, pursuant to the UFTA, the transferor must actually be liable on a claim in order to be a debtor and that Maddock, or her estate, did not part with an interest regarding adjudication on the issue of liability to another party.[350] The court then stated: "Therefore, unless the transferor's liability has already been determined in a proceeding that afforded the transferor a meaningful opportunity to defend, the transferor's 'presence in the action is essential to permit the court to render complete relief.'"[351]

Thus, a general rule may be extrapolated from *Mather*: notwithstanding the express language of the UFTA, actions require the presence of the transferor if the transferor has not previously been provided an opportunity to contest liability.

VI. VENUE

A. Actions to Recover Underinsured Motorist Benefits

In consolidated appeals, the court in *Ferguson v. Pioneer State Mutual Insurance Co.*,[352] in a matter of first impression, addressed whether MCL section 600.1621[353] or section 600.1629[354] governs contract-based actions to recover no-fault insurance benefits resulting from personal injury. Both cases involved victims of personal injury who brought lawsuits seeking to obtain benefits that were denied by the defendant.[355] The defendant sought to change venue in both actions pursuant to MCL section 600.1629 and both trial courts denied the motion asserting that venue was governed by MCL section 600.1621 since the actions sounded in contract.[356]

The defendant argued that MCL section 600.1629 was controlling because the plaintiffs were seeking to recover damages for personal injury albeit through a breach of contract action.[357] The court opined that pursuant to MCL section 600.1629(1), the issue turned on whether the complaints are, "based on . . . *another legal theory seeking damages for personal injury*".[358]

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349. *Id.* at 259, 720 N.W.2d at 578.
350. *Id.*
351. *Id.*
352. *Id.* at 259-60, 720 N.W.2d at 578 (quoting in part MICH. CT. R. 2.205(A)).
353. 273 Mich. App. 47, 731 N.W.2d 94 (2006).
354. MICH. COMP. LAWS ANN. § 600.1621 (West 1996).
355. MICH. COMP. LAWS ANN. § 600.1629 (West 1996).
356. *Ferguson*, 273 Mich. App. at 48-50, 731 N.W.2d at 95-97.
357. *Id.*
358. *Id.* at 51, 731 N.W.2d at 97 (emphasis included).

The court found that the plaintiffs were not seeking damages for personal injury. [359] The court stated that the plaintiffs are not alleging that the defendant is responsible for the injuries; rather, the actions are based on contractual agreements between the parties and that, absent a contract, the plaintiffs would have no cause of action against the defendant. [360] Accordingly, the court held that MCL section 600.1621 applied and affirmed the trial courts' decisions.[361] It is apparent that the court sought to avoid allowing similar contract-based claims to parade as tort actions within the venue statutory framework. In doing so, the court delineated a distinction between the often seen murky overlap in substantive contract and tort law.

359. *Id.* at 52, 731 N.W.2d at 98.
360. *Id.* at 53, 731 N.W.2d at 99.
361. *Id.*