

## Circuit Court Benchbook: Civil Proceedings—Revised Edition

### May-August 2009 Updates

Updates have been issued for the Circuit Court Benchbook: Civil Proceedings. A summary of each update appears below. The updates have been integrated into the website version of the benchbook; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined>.

## Chapter 1: General Rules Governing Court Proceedings

### 1.3(A) Disqualification of Judge

Judicial disqualification on due process grounds may be warranted when an individual with an interest in the outcome of a case has contributed an extraordinary amount of money to the election campaign of one of the judges who will decide the case. *Caperton v AT Massey Coal Co, Inc*, 556 US \_\_\_, \_\_\_ (2009). In *Caperton*, the chairman of a company contributed \$3 million, more than any other supporter, to the campaign of a prospective state supreme court justice who, if elected, would hear a major case involving the chairman's company. *Caperton*, *supra* at \_\_\_. Once elected, the other party in the case moved to disqualify the justice on due process grounds, based on the conflict caused by the chairman's campaign contribution. *Id.* at \_\_\_. The justice denied the motion to disqualify, and the state supreme court ultimately ruled in favor of the company. *Id.* at \_\_\_. The United States Supreme Court ruled that due process required recusal because, based on objective standards, the probability of actual bias on the part of the justice was too high to be constitutionally tolerable. *Id.* at \_\_\_. The Court stated:

“[While n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, . . . there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.” *Caperton*, *supra* at \_\_\_.

## Chapter 2: Jurisdiction

### 2.2(D) Subject Matter Jurisdiction

In addition to exclusive jurisdiction over contract and tort claims seeking only declaratory relief, the Court of Claims “also has concurrent jurisdiction over complaints seeking declaratory and equitable relief not based on tort or contract if ancillary to a contract or tort claim.” *Duncan v State of Michigan*, 284 Mich App 246, 286-287 (2009).

## Chapter 3: Pretrial Procedures

### 3.4(A) Separate or Joint Trial

Consolidating multiple cases for trial does not merge the cases into a single case for purposes of filing a timely appeal. *Chen v Wayne State Univ*, 284 Mich App 172, 194 (2009). In *Chen*, the plaintiff brought separate complaints against the defendant in both the circuit court and the Court of Claims, and the two cases were consolidated. *Chen, supra* at 193. The plaintiff attempted to file a single appeal for both cases, but the time to file an appeal in the Court of Claims case had expired. *Id.* at 193-194. The Court concluded that the Court of Claims appeal had to be dismissed as untimely “[b]ecause the cases retained their separate identities, [and] the time for appeal must be determined by reference to the final judgment or order for the individual cases.” *Id.* at 199. “[MCR 7.202(6)(a)] specifically defines the final judgment or order for a ‘civil case’—that is, the definition of final judgment or order refers to the final judgment or order in a *single* case. [Citation omitted.] Consequently, MCR 7.202(6)(a) cannot be understood to require consolidated cases to be treated as a single case for purposes of determining the timeliness of appeals.” *Chen, supra* at 194.

### 3.9(C) Setting Aside Default or Default Judgment Under MCR 2.612

“MCR 2.612 envisions a court relieving a party from its own judgment, not the judgment of a higher authority.” *Kidder v Ptacin*, 284 Mich App 166, 171 (2009). In *Kidder*, the Court of Appeals, based on a case that it later overruled, ordered that summary disposition be granted in favor of the defendants. *Kidder, supra* at 170. When the case on which the Court based its decision was overruled, the plaintiff did not appeal the decision to the Court of Appeals; instead the plaintiff moved under MCR 2.612(C)(1)(e) to reinstate her case at the trial court. The trial court erred in granting the plaintiff’s motion because the Court of Appeals opinion in the case constituted the law of the case and bound all lower courts with regard to the issue. *Kidder, supra* at 170. According to the Court:

“In this case, MCR 2.612(C)(1)(e) does not apply because this Court’s decision ordering the grant of summary disposition in favor of defendants has not been reversed or otherwise vacated; its holding has been *overruled* by subsequent case[.]law. There is an important distinction.

“Reversing or vacating a decision changes the result in the specific case before an appellate court. On the other hand, a decision to overrule a particular rule of law affects not only the specific case before the appellate court, but also future litigation. A decision to overrule is an appellate court’s declaration that a rule of law no longer has precedential value. However, an appellate court’s pronouncement that a rule of law no longer applies does not change the result of an effective judgment. In the instant case, this Court’s decision was in effect, as the time for filing an application with our Supreme Court had lapsed.” *Kidder, supra* at 170 (internal citations omitted).

## **Chapter 6: Trial**

### **6.13(C) Jury Matters During Deliberations**

A defendant may be granted a new trial when the jury considers material not in evidence if the defendant can show “(1) that the jury was . . . exposed to an extraneous influence and (2) that the influence ‘created a real and substantial possibility [that] could have affected the jury’s verdict.’ [Citation omitted.] With respect to the second element, a defendant must ‘demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.’” *Unibar Maintenance Services, Inc v Saigh*, 283 Mich App 609, 627 (2009), quoting *People v Budzyn*, 456 Mich 77, 89 (1997). In *Unibar*, the trial court properly denied the defendants’ motion for a new trial on the basis of the jury’s consideration of extraneous evidence, because the defendants failed to show that the jury foreperson’s chart and summary of the trial testimony were prepared outside of the jury room or that the foreperson’s material contained information not presented at trial. *Unibar, supra* at 627-628.

## **Chapter 8: Rules in Particular Actions**

### **8.2(A) Class Action**

A trial court may not accept “a party’s bare assertion that the prerequisites [listed in MCR 3.501(A)] have been met.” *Henry v Dow Chemical Co*, 484 Mich 483, 500, 505 (2009). Rather, the party seeking class certification bears the burden of providing enough information to the court to establish that each prerequisite has in fact been met. *Henry, supra* at 502. “A court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to

satisfy the court that each prerequisite is in fact met.” *Id.* For example, pleadings alone may be sufficient “where the facts necessary to support [a particular] finding are uncontested or admitted by the opposing party.” *Id.* at 502-503. If the court must look beyond the pleadings, the Michigan Supreme Court cautions that “courts must not abandon the well-accepted prohibition against assessing the merits of a party’s underlying claims at this early stage in the proceedings.” *Id.* at 503.

## **8.2(C) Class Action**

In determining whether to certify a proposed class, a trial court may make both factual findings and discretionary determinations. *Henry*, 484 Mich at 495-496. A trial court’s findings of fact are reviewed for clear error, and its discretionary decisions are reviewed for an abuse of discretion. *Id.* at 496.

## **8.10(A) Medical Malpractice**

A plaintiff must file a notice of intent that satisfies the notice period requirements of MCL 600.2912b before he or she may begin a medical malpractice action.

*Bush v Shabahang*, 484 Mich 156, 170 (2009).

Whether defects are present in a party’s notice of intent is irrelevant to determining whether the statute of limitations is tolled. *Bush v Shabahang*, 484 Mich 156, 170 (2009). Rather, MCL 600.5856(c) only requires that the notice of intent comply with the “applicable notice period under [MCL 600.2912b]” in order to invoke the tolling provision. *Bush, supra* at 170. Where a trial court is presented with a defective notice of intent, it must apply a two-pronged test to decide whether the defects require dismissal without prejudice or whether to employ MCL 600.2301.<sup>1</sup> *Bush, supra* at 177. The two-pronged test is: “first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice.” *Id.* However, the Michigan Supreme Court concluded that “no substantial right of a health care provider is implicated[.]” because defective notices of intent should be expected at such an early stage in the proceedings, defendants are “sophisticated health professionals with extensive medical background and training[.]” and defendants who are able to act as their own reviewing experts should have “the ability to understand the nature of the claims being asserted against him or her even in the presence of defects in the [notice of intent].” *Id.* at 178. The Court went on to state that a cure is in the furtherance of justice “when a party makes a good-faith attempt to comply with the content requirements of [MCL 600.2912b].” *Bush, supra* at 178. Therefore, “[a]

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<sup>1</sup> MCL 600.2301 provides a mechanism for curing certain defects within any “process, pleading or proceeding.” *Bush, supra* at 176, quoting MCL 600.2301. In *Bush*, the Court concluded that the notice of intent is part of a medical malpractice proceeding, and MCL 600.2301 applies to the notice of intent process. *Bush supra* at 176-177.

dismissal would only be warranted if the party fails to make a good-faith attempt to comply with the content requirements.” *Id.* at 180.

**Note:** A notice of intent must include both notice of the nature of the claim against a defendant, and “‘a statement’ that provides information containing all of the enumerated requirements of MCL 600.2912b(4)[.]” *Esselman v Garden City Hosp*, 284 Mich App 209, 220 (2009). The notice of intent will be deemed insufficient if it does not contain both notice and such a statement. *Essleman, supra* at 220.

Nothing in MCL 600.2912b(4) requires a plaintiff’s notice of intent to identify the relationship between the parties being sued. *Potter v McLeary*, 484 Mich 397, 421 (2009). MCL 600.2912b(4)(f) “clearly states that all that need be done in this regard is to identify the names of the health professional and facility being notified.” *Potter, supra* at 421. With regard to a claim against a professional corporation (PC), if a plaintiff files an adequate notice of intent against a PC’s agent or employee based only on its vicarious liability for the conduct of its agent or employee, it is not necessary for the plaintiff to describe the legal doctrine of vicarious liability in its notice of intent to the PC. *Id.* at 422-423.

### **8.10(B)(2) Medical Malpractice**

Because MCR 2.110(A) does not include “mandatory attachments such as an affidavit of merit” in its definition of a pleading, permitting a party to amend an affidavit pursuant to MCR 2.118(A) is improper. *Ligons v Crittenton Hosp*, \_\_\_ Mich App \_\_\_, \_\_\_ (2009).



Supreme Court has cautioned that an objective standard applies and that, under the court rule, recusal is not required based on an “appearance of impropriety.” *Adair v State of Michigan*, 474 Mich 1027, 1038-1041 (2006). The Court also discussed with approval the federal “duty to sit” doctrine—an obligation to remain on a case absent good grounds for recusal. *Adair, supra* at 1040-1041.

In most instances, disqualification requires a showing of actual prejudice. [MCR 2.003\(B\)\(1\)](#).

[MCR 2.003\(B\)\(2\)](#) mandates disqualification if a judge is personally biased or prejudiced for or against a party or attorney. In most cases, a showing of *actual* personal bias or prejudice is required. See *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 728-729 (1998). However, no showing of actual bias or prejudice is required if a litigant is denied his or her due process right to an unbiased and impartial decisionmaker because the judge “might have prejudged the case due to prior participation [in the case] as an accuser, investigator, fact-finder or initial decisionmaker.” *Crampton v Dep’t of State*, 395 Mich 347, 351 (1975). *Crampton* also discusses other factual situations in which a showing of actual bias or prejudice is not required, including situations where the judge has a pecuniary interest in the outcome, has been the target of personal abuse or criticism from the party, or is enmeshed in other matters involving the party. *Crampton, supra* at 351.

Claims that due process requires judicial disqualification should be examined on a case-by-case basis. *Cain*, 451 Mich at 514. “Due process requires judicial disqualification without a showing of actual prejudice only in the most extreme cases.” *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 599 (2003). The situation should be reviewed in light of the totality of the circumstances. *Van Buren, supra* at 601. Disqualification should only occur in situations “where ‘experience teaches that the probability of actual bias . . . is too high to be constitutionally tolerable.’” *Crampton*, 395 Mich at 351, quoting *Withrow v Larkin*, 421 US 35, 47 (1975).

Judicial disqualification on due process grounds may be warranted when an individual with an interest in the outcome of a case has contributed an extraordinary amount of money to the election campaign of one of the judges who will decide the case. *Caperton v AT Massey Coal Co, Inc*, 556 US \_\_\_\_\_, \_\_\_\_\_ (2009). In *Caperton*, the chairman of a company contributed \$3 million, more than any other supporter, to the campaign of a prospective state supreme court justice who, if elected, would hear a major case involving the chairman’s company. *Caperton, supra* at \_\_\_\_\_. Once elected, the other party in the case moved to disqualify the justice on due process grounds, based on the conflict

caused by the chairman’s campaign contribution. *Id.* at \_\_\_\_ . The justice denied the motion to disqualify, and the state supreme court ultimately ruled in favor of the company. *Id.* at \_\_\_\_ . The United States Supreme Court ruled that due process required recusal because, based on objective standards, the probability of actual bias on the part of the justice was too high to be constitutionally tolerable. *Id.* at \_\_\_\_ . The Court stated:

“[While] not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, . . . there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.” *Caperton, supra* at \_\_\_\_ .

“Letters, or even complaints, to the Judicial Tenure Commission alone do not require disqualification of a trial judge.” *Ireland v Smith*, 214 Mich App 235, 249 (1995). Disqualification is not required when the moving party has filed a complaint with the Judicial Tenure Commission until the judge has been privately censured or a complaint has been filed by the Judicial Tenure Commission itself. *People v Bero*, 168 Mich App 545, 552 (1988); *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 126-127 (1988).

A judge may not “perpetually recuse” himself or herself “from cases of a particular advocate or particular party because of derogatory comments made against the judge by the advocate or the party in a particular case, or because of the judge’s personal dislike of a particular advocate.” [Michigan Ethics Opinion JI-44 \(November 1, 1991\)](#).<sup>6</sup>

## **B. Motion to Disqualify**

If a motion to disqualify a judge is filed, it must be filed within 14 days after the moving party discovers the ground for disqualification or, if discovery of the ground for disqualification occurs within 14 days of

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<sup>6</sup> Available at [http://www.michbar.org/opinions/ethics/numbered\\_opinions/ji-044.htm](http://www.michbar.org/opinions/ethics/numbered_opinions/ji-044.htm).

- „ Exclusive jurisdiction as conferred by the Estates and Protected Individuals Code, the Mental Health Code, the Revised Judicature Act, and any other law or compact. [MCL 600.841\(1\)\(a\)-\(d\)](#).
- „ Concurrent jurisdiction on most matters as provided in the plan, except where the circuit court or district court has exclusive jurisdiction. [MCL 600.841\(2\)](#).

### **1. Exclusive Jurisdiction**

If a matter is brought in circuit court where exclusive jurisdiction rests in the probate court, it may be possible to appoint the circuit judge as an acting probate judge, or the matter may be removed to probate court. See [MCL 600.1021](#) for the transfer of jurisdiction to the family division of the circuit court, effective January 1, 1998.

### **2. Removal to Probate Court**

[MCL 600.845](#) states that a circuit court with concurrent jurisdiction is not deprived of that jurisdiction when jurisdiction is granted to the probate court by [MCL 600.801](#) *et seq.* Where concurrent jurisdiction exists between the probate court and another court, an action or proceeding may be removed from the other court to the probate court, “upon motion of a party and after a finding and order on the jurisdictional issue.” [MCL 600.846](#). See also [MCL 700.1303\(2\)](#).

### **3. Appeals from Probate Court to Circuit Court**

An aggrieved party may appeal a probate order, sentence, or judgment to the circuit court, unless prohibited by statute. [MCL 600.863](#) and [MCR 7.101](#) *et seq.* [MCR 7.101\(E\)](#) states that the probate court retains jurisdiction until it sends the record to the circuit court clerk. However, [MCL 600.861](#) provides for an appeal as a matter of right to the Court of Appeals in certain specified situations.

## **D. Court of Claims Jurisdiction**

[MCL 600.6419](#) governs the Court of Claims exclusive jurisdiction. It has exclusive jurisdiction where a complaint seeks relief against the State or its agencies for either money damages or equitable or declaratory relief. *Parkwood Ltd Dividend Housing Ass’n v State Housing Dev Auth*, 468 Mich 763, 773 (2003). “[T]he claim need not expressly claim money damages.” *Parkwood, supra* at 773.

In addition to exclusive jurisdiction over contract and tort claims seeking only declaratory relief, the Court of Claims “also has

concurrent jurisdiction over complaints seeking declaratory and equitable relief not based on tort or contract if ancillary to a contract or tort claim.” *Duncan v State of Michigan*, 284 Mich App 246, 286-287 (2009).

## E. Michigan Court of Appeals Jurisdiction

[MCR 7.208\(A\)](#) provides:

“After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

“(1) by order of the Court of Appeals,

“(2) by stipulation of the parties,

“(3) after a decision on the merits in an action in which a preliminary injunction was granted, or

“(4) as otherwise provided by law . . . .”

**Note:** [MCL 552.17\(1\)](#) and [MCL 552.28](#), statutes authorizing a trial court to amend child and spousal support orders after entry of judgment if circumstances so require, satisfy the “otherwise provided by law” exception in [MCR 7.208\(A\)\(4\)](#). *Lemmen v Lemmen*, 481 Mich 164, 166 (2008).

Filing a claim of appeal divests the circuit court of jurisdiction to amend its final orders. *Wiand v Wiand*, 205 Mich App 360, 369-370 (1994). Generally, the trial court can still enforce its orders unless there is a stay. [MCR 7.209\(A\)\(1\)](#). The trial court must first address a motion for bond or stay of proceedings before a party can file such a motion with the Michigan Court of Appeals. [MCR 7.209\(A\)\(2\)](#).

Filing the entry fee and a claim of appeal from a final judgment in the circuit court transfers jurisdiction to the Court of Appeals. [MCR 7.204\(B\)](#); [MCL 600.308](#); *Michigan State Emp Ass’n v Civil Svc Comm*, 177 Mich App 231, 245 (1989).

The lower court reacquires jurisdiction when the clerk returns the record to it. *Dep’t of Conservation v Connor*, 321 Mich 648, 654 (1948); *Luscombe v Shedd’s Food Products Corp*, 212 Mich App 537, 541 (1995). See [MCR 7.210\(H\)](#) and [\(I\)](#).

is good reason to believe that a party's allegations are 'groundless and unwarranted.'" *In re Surety Bond for Costs, supra* at 331-332.

The trial court's decisions regarding the legitimacy of a claim and a party's financial ability to post bond are reviewed for clear error. *In re Surety Bond for Costs*, 226 Mich App at 333.

## 3.4 Separate or Joint Trial

### A. Court's Discretion

[MCR 2.505](#) provides the court with discretion in deciding whether to consolidate or sever trials:

**“(A) Consolidation.** When actions involving a substantial and controlling common question of law or fact are pending before the court, it may

“(1) order a joint hearing or trial of any or all the matters in issue in the actions;

“(2) order the actions consolidated; and

“(3) enter orders concerning the proceedings to avoid unnecessary costs or delay.

**“(B) Separate Trials.** For convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, the court may order a separate trial of one or more claims, cross-claims, counterclaims, third-party claims, or issues.”

“Consolidation should not be ordered if the substantial rights of a party would be adversely affected or if juror confusion would result.” *Bordeaux v The Celotex Corp*, 203 Mich App 158, 163-164 (1993). “The decision to sever trials is within the trial judge's discretion and should be ordered only upon a most persuasive showing.” *Hodgins v Times Herald Co*, 169 Mich App 245, 261 (1988).

The court rule does not prescribe time requirements.

Consolidating multiple cases for trial does not merge the cases into a single case for purposes of filing a timely appeal. *Chen v Wayne State Univ*, 284 Mich App 172, 194 (2009). In *Chen*, the plaintiff brought separate complaints against the defendant in both the circuit court and

the Court of Claims, and the two cases were consolidated. *Chen, supra* at 193. The plaintiff attempted to file a single appeal for both cases, but the time to file an appeal in the Court of Claims case had expired. *Id.* at 193-194. The Court concluded that the Court of Claims appeal had to be dismissed as untimely “[b]ecause the cases retained their separate identities, [and] the time for appeal must be determined by reference to the final judgment or order for the individual cases.” *Id.* at 199. “[MCR 7.202(6)(a)] specifically defines the final judgment or order for a ‘civil case’—that is, the definition of final judgment or order refers to the final judgment or order in a *single* case. [Citation omitted.] Consequently, MCR 7.202(6)(a) cannot be understood to require consolidated cases to be treated as a single case for purposes of determining the timeliness of appeals.” *Chen, supra* at 194.

## **B. Standard of Review**

A trial court’s decision regarding consolidation is reviewed for an abuse of discretion. *Bordeaux*, 203 Mich App at 163-164.

# **3.5 Substitution or Withdrawal of Attorney**

## **A. Order Required**

The court should permit the withdrawal or substitution of counsel only with a stipulation and order or after a hearing on a motion to withdraw is served on the client. “An attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court.” [MCR 2.117\(C\)\(2\)](#). See also *Coble v Green*, 271 Mich App 382, 386 (2006).

Where the court has ordered an attorney to continue representing a client, the attorney must continue with the representation even if good cause exists for terminating the representation. [MRPC 1.16\(c\)](#).

## **B. Standard of Review**

A trial court’s decision regarding a motion to withdraw is reviewed for an abuse of discretion. *In re Withdrawal of Attorney (Cain v Dep’t of Corrections)*, 234 Mich App 421, 431 (1999).

“(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

“(a) Mistake, inadvertence, surprise, or excusable neglect.

“(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [MCR 2.611\(B\)](#).

“(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

“(d) The judgment is void.

“(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

“(f) Any other reason justifying relief from the operation of the judgment.”

“MCR 2.612 envisions a court relieving a party from its own judgment, not the judgment of a higher authority.” *Kidder v Ptacin*, 284 Mich App 166, 171 (2009). In *Kidder*, the Court of Appeals, based on a case that it later overruled, ordered that summary disposition be granted in favor of the defendants. *Kidder, supra* at 170. When the case on which the Court based its decision was overruled, the plaintiff did not appeal the decision to the Court of Appeals; instead the plaintiff moved under MCR 2.612(C)(1)(e) to reinstate her case at the trial court. The trial court erred in granting the plaintiff’s motion because the Court of Appeals opinion in the case constituted the law of the case and bound all lower courts with regard to the issue. *Kidder, supra* at 170. According to the Court:

“In this case, MCR 2.612(C)(1)(e) does not apply because this Court’s decision ordering the grant of summary disposition in favor of defendants has not been reversed or otherwise vacated; its holding has been *overruled* by subsequent case[]law. There is an important distinction.”

“Reversing or vacating a decision changes the result in the specific case before an appellate court. On the other hand, a decision to overrule a particular rule of law affects not only the specific case before the appellate court, but also future litigation. A decision to overrule is an appellate court’s declaration that a rule of law no longer has precedential value. However, an appellate court’s pronouncement that a rule of law no longer applies does not change the result of an effective judgment. In the instant case, this Court’s decision was in effect, as the time for filing an application with our Supreme Court had lapsed.” *Kidder, supra* at 170 (internal citations omitted).

Motions made pursuant to [MCR 2.612\(C\)\(1\)\(a\)-\(c\)](#) must be made “within one year after the judgment, order, or proceeding was entered or taken.” [MCR 2.612\(C\)\(2\)](#). Motions made pursuant to [MCR 2.612\(C\)\(1\)\(d\)-\(f\)](#) must be made within a reasonable time. *Id.*

An attorney’s negligence is generally attributable to his or her client and is not normally grounds to set aside a default judgment. *Pascoe v Sova*, 209 Mich App 297, 298-299 (1995). However, where the attorney withdraws from the case and does not provide notice to the client, and the client is defaulted because neither the client nor the withdrawn attorney appeared in court, grounds may exist to set aside the default judgment. *Pascoe, supra* at 300-301.

A party may request relief from a final judgment, order, or proceeding on the basis of fraud, misrepresentation, or other misconduct by the adverse party. [MCR 2.612\(C\)\(1\)\(c\)](#). “An evidentiary hearing is necessary where fraud has been alleged because the proof required to sustain a motion to set aside a judgment because of fraud is ‘of the highest order.’” *Kiefer v Kiefer*, 212 Mich App 176, 179 (1995).

“An order entered without subject-matter jurisdiction may be challenged collaterally and directly. Error in the exercise of jurisdiction may be challenged only on direct appeal. The erroneous exercise of jurisdiction does not void a court’s jurisdiction as does the lack of subject-matter jurisdiction. However, error in the exercise of jurisdiction can result in the setting aside of the judgment.” *Grubb Creek Action Comm v Shiawassee Co Drain Comm’r*, 218 Mich App 665, 669 (1996) (internal citations omitted).

refusal to consent would be unreasonable, and on such occasions the dissent ought not to prevail. It is hardly safe to attempt a definition of the proper rule by the mention of the exact documents or kinds of documents which should be suffered to go to the jury room.” *Hardaway v Consolidated Paper Co*, 366 Mich 190, 198-199 (1962), quoting *Kalamazoo Novelty Mfg Co v McAlister*, 36 Mich 327, 330 (1877).

Submitting documents to the jury that have not been admitted into evidence may be harmless error, “unless the error operated to substantially prejudice the party’s case.” *Phillips v Deihm*, 213 Mich App 389, 402 (1995). Substantial prejudice exists where the evidence that was submitted to the jury was either inadmissible or had not been presented to the jury during trial. See *Phillips, supra* at 403. In *Phillips*, the defendant objected to the jury’s consideration of charts that were not introduced at trial, but were used in the plaintiff’s closing argument. *Id.* The Michigan Court of Appeals concluded that the charts “contained nothing that the jury had not already seen without objection in open court,” and that the charts did not contain “anything unfairly prejudicial to [the] defendant[.]” *Id.*

A defendant may be granted a new trial when the jury considers material not in evidence if the defendant can show “(1) that the jury was . . . exposed to an extraneous influence and (2) that the influence ‘created a real and substantial possibility [that] could have affected the jury’s verdict.’ [Citation omitted.] With respect to the second element, a defendant must ‘demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.’” *Unibar Maintenance Services, Inc v Saigh*, 283 Mich App 609, 627 (2009), quoting *People v Budzyn*, 456 Mich 77, 89 (1997). In *Unibar*, the trial court properly denied the defendants’ motion for a new trial on the basis of the jury’s consideration of extraneous evidence, because the defendants failed to show that the jury foreperson’s chart and summary of the trial testimony were prepared outside of the jury room or that the foreperson’s material contained information not presented at trial. *Unibar, supra* at 627-628.

At the request of a party or on its own, the court may provide the jury with a full set of written or electronically recorded instructions, or a partial set in response to a jury request or with the agreement of the parties. [MCR 2.516\(B\)\(5\)](#).



## 8.2 Class Action

### A. Generally

One or more members of a class may sue or be sued as representative parties if:

- § the class is so numerous that joinder of all members is impracticable (numerosity);
- § there are common questions of law or fact (commonality);
- § the claims or defenses of the representative parties are typical of the class (typicality);
- § the representative parties will fairly and adequately assert and protect the interests of the class (adequacy); and
- § a class action is superior to other methods of adjudication (superiority). [MCR 3.501\(A\)\(1\)\(a\)-\(e\)](#).

A helpful analysis of these factors is found in *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597-602 (2002). All of the listed requirements must be met. *A&M Supply Co, supra* at 597. “[A] case cannot proceed as a class action when it satisfies only some, or even most, of these factors.” *Id.* The court rule and case law suggest that findings are required for both the initiation and maintenance of a class action. [MCR 2.501\(A\)\(1\)](#) and [\(B\)](#).

~~“When evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true. . . . The burden is on the plaintiff to show that the requirements for class certification exist.” *Neal v James*, 252 Mich App 12, 15-16 (2002) (internal citations omitted).~~

A trial court may not accept “a party’s bare assertion that the prerequisites [listed in MCR 3.501(A)] have been met.” *Henry v Dow Chemical Co*, 484 Mich 483, 500, 505 (2009). Rather, the party seeking class certification bears the burden of providing enough information to the court to establish that each prerequisite has in fact been met. *Henry, supra* at 502. “A court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met.” *Id.* For example, pleadings alone may be sufficient “where the facts necessary to support [a particular] finding are uncontested or admitted by the opposing party.” *Id.* at 502-503. If the court must look beyond the pleadings, the Michigan

Supreme Court cautions that “courts must not abandon the well-accepted prohibition against assessing the merits of a party’s underlying claims at this early stage in the proceedings.” *Id.* at 503.

## **B. Procedure and Timing for Certification**

Subject to the parties’ stipulation or good cause shown, [MCR 3.501\(B\)\(1\)\(a\)](#) requires that a motion for class certification be made within 91 days of filing a complaint having class action allegations. See also *Hill v City of Warren*, 276 Mich App 299, 306 (2007). However, the court rule “does not forbid subsequent motions for certification or mandate any particular timing requirements for bringing them.” *Hill, supra* at 306. In *Hill*, the defendants argued that [MCR 3.501\(B\)\(1\)\(a\)](#) precluded the plaintiffs from filing their renewed motion for class certification because the motion was not made within 91 days of the Supreme Court’s remand order. *Hill, supra* at 305. Having concluded that the court rule’s 91-day limit applied only to the parties’ initial motion for certification, the Court of Appeals found “no clear error in the trial court’s finding that class certification [was] appropriate.” *Id.* at 306, 317.

## **C. Standard of Review**

~~“[A] trial court’s ruling regarding certification of a suit as a class action” is reviewed for clear error. *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 370 (1998). See also *Zine v Chrysler Corp*, 236 Mich App 261, 270 (1999).~~

In determining whether to certify a proposed class, a trial court may make both factual findings and discretionary determinations. *Henry*, 484 Mich at 495-496. A trial court’s findings of fact are reviewed for clear error, and its discretionary decisions are reviewed for an abuse of discretion. *Id.* at 496.

# **8.3 Contracts**

## **A. Elements**

“The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.” *Mallory v Detroit*, 181 Mich App 121, 127 (1989).

## E. Parties

Although a judge may be a nominal defendant in a case seeking an order of superintending control, the judge is not an aggrieved party, and thus has no standing to appeal an order of superintending control. *Wayne Co Prosecutor v Recorder's Court Judge*, 66 Mich App 315, 316 (1975).

## F. Standard of Review

"The grant or denial of a petition for superintending control is within the sound discretion of the court. Absent an abuse of discretion, [the reviewing court] will not disturb the denial of a request for an order of superintending control." *In re Goehring*, 184 Mich App 360, 366 (1990).

# 8.10 Medical Malpractice

## A. Notice

Generally, a person alleging medical malpractice may not commence an action against a health professional or a health facility until he or she "has given the health professional or health facility written notice under [MCL 600.2912b] not less than 182 days before the action is commenced." MCL 600.2912b(1). A plaintiff must file a notice of intent that satisfies the notice period requirements of MCL 600.2912b before he or she may begin a medical malpractice action. *Bush v Shabahang*, 484 Mich 156, 170 (2009). The tacking on of additional 182-day periods is not allowed, no matter how many notices are subsequently filed or how many health professionals or health facilities are notified. MCL 600.2912b(6). "[T]he prohibition . . . against tacking only precludes a plaintiff from enjoying the benefit of multiple tolling periods. It does not . . . restrict the application of the tolling provision in [MCL 600.5856(d)]<sup>1</sup> to the initial notice of intent to sue if the tolling provision in [MCL 600.5856(d)]<sup>2</sup> did not even apply to the initial notice of intent to sue. Stated otherwise, if the initial notice did not toll the statute of limitations period, there would be no problem of 'successive 182-day periods' that [MCL 600.2912b(6)] prohibits." *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 7-8 (2005).

Whether defects are present in a party's notice of intent is irrelevant to determining whether the statute of limitations is tolled. *Bush v*

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<sup>1</sup> Now MCL 600.5856(c).

<sup>2</sup> Now MCL 600.5856(c).

*Shabahang*, 484 Mich 156, 170 (2009). Rather, MCL 600.5856(c) only requires that the notice of intent comply with the “applicable notice period under [MCL 600.2912b]” in order to invoke the tolling provision. *Bush, supra* at 170. Where a trial court is presented with a defective notice of intent, it must apply a two-pronged test to decide whether the defects require dismissal without prejudice or whether to employ MCL 600.2301.<sup>3</sup> *Bush, supra* at 177. The two-pronged test is: “first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice.” *Id.* However, the Michigan Supreme Court concluded that “no substantial right of a health care provider is implicated[.]” because defective notices of intent should be expected at such an early stage in the proceedings, defendants are “sophisticated health professionals with extensive medical background and training[.]” and defendants who are able to act as their own reviewing experts should have “the ability to understand the nature of the claims being asserted against him or her even in the presence of defects in the [notice of intent].” *Id.* at 178. The Court went on to state that a cure is in the furtherance of justice “when a party makes a good-faith attempt to comply with the content requirements of [MCL 600.2912b].” *Bush, supra* at 178. Therefore, “[a] dismissal would only be warranted if the party fails to make a good-faith attempt to comply with the content requirements.” *Id.* at 180.

The 182-day notice period may be shortened to 91 days “if all of the following conditions exist:

“(a) The claimant has previously filed the 182-day notice required in [MCL 600.2912a(1)] against other health professionals or health facilities involved in the claim.

“(b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).

“(c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).

“(d) The claimant did not identify, and could not reasonably have identified a health professional or health

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<sup>3</sup> MCL 600.2301 provides a mechanism for curing certain defects within any “process, pleading or proceeding.” *Bush, supra* at 176, quoting MCL 600.2301. In *Bush*, the Court concluded that the notice of intent is part of a medical malpractice proceeding, and MCL 600.2301 applies to the notice of intent process. *Bush supra* at 176-177.

facility to which notice must be sent under subsection (1) as a potential party to the action before filing the complaint.” [MCL 600.2912b\(3\)\(a\)-\(d\)](#).

The notice of intent must state, at least, all of the following:

- (a) the factual basis for the claim;
- (b) the alleged standard of practice or standard of care;
- (c) how the health facility or health professional breached the standard of practice or standard of care;
- (d) what should have been done to comply with the standard of practice or standard of care;
- (e) how the breach of the standard of practice or standard of care was the proximate cause of the claimant’s injuries;
- (f) the names of all the health facilities and health professionals the claimant is notifying pursuant to [MCL 600.2912a](#). [MCL 600.2912b\(4\)](#).

**Note:** A notice of intent must include both notice of the nature of the claim against a defendant, and “‘a statement’ that provides information containing all of the enumerated requirements of MCL 600.2912b(4)[.]” *Esselman v Garden City Hosp*, 284 Mich App 209, 220 (2009). The notice of intent will be deemed insufficient if it does not contain both notice and such a statement. *Essleman, supra* at 220.

In satisfying [MCL 600.2912b\(4\)\(e\)](#), the claimant must include specific allegations regarding the conduct of any named defendants. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 699-700 (2004). “[I]t is not sufficient under this provision to merely state that defendants’ alleged negligence caused an injury. Rather, [[MCL 600.2912b\(4\)\(e\)](#)] requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury. *Roberts, supra* at 699-700 n 16.

Nothing in [MCL 600.2912b\(4\)](#) requires a plaintiff’s notice of intent to identify the relationship between the parties being sued. *Potter v McLeary*, 484 Mich 397, 421 (2009). [MCL 600.2912b\(4\)\(f\)](#) “clearly states that all that need be done in this regard is to identify the names of the health professional and facility being notified.” *Potter, supra* at 421.

With regard to a claim against a professional corporation (PC), if a plaintiff files an adequate notice of intent against a PC's agent or employee based only on its vicarious liability for the conduct of its agent or employee, it is not necessary for the plaintiff to describe the legal doctrine of vicarious liability in its notice of intent to the PC. *Id.* at 422-423.

Both the claimant and the health professional or health facility receiving the notice must allow each other “access to all of the medical records related to the claim” in their control. [MCL 600.2912b\(5\)](#). In addition, the claimant must also “furnish releases for any medical records related to the claim that are not in the claimant’s control, but of which the claimant has knowledge.” *Id.*

“Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

“(a) The factual basis for the defense to the claim.

“(b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.

“(c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.

“(d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant’s alleged injury or alleged damage.” [MCL 600.2912b\(7\)\(a\)-\(d\)](#).

If the claimant does not receive a written response by day 154, he or she may start a medical malpractice action on the expiration of the 154-day period. [MCL 600.2912b\(8\)](#).

In lieu of furnishing a written response, a health professional or health facility may submit an affidavit to the court certifying that he or she was not involved in the occurrence alleged in the action. [MCL 600.2912c\(1\)](#). “Unless the affidavit is opposed pursuant to [[MCL 600.2912c\(2\)](#)], the court shall order the dismissal of the claim, without prejudice, against the affiant.” [MCL 600.2912c\(1\)](#). “Any party to the

affidavit “devoted a majority of his or her professional time during the year before the alleged malpractice to practicing or teaching the same health profession as the defendant health professional.” *Bates v Gilbert*, 479 Mich 451, 458 (2007) (an ophthalmologist was not qualified to speak to the standard of care of an optometrist because they are two different health professions).

## 2. Nonconforming Affidavits of Merit

An affidavit that is timely filed is presumed valid and only a successful challenge to its validity will cause the affidavit to lose this presumption of validity. *Kirkaldy v Rim*, 478 Mich 581, 586 (2007),<sup>4</sup> citing *Saffian v Simmons*, 477 Mich 8, 13 (2007). Consequently, a defendant is still obligated to file a timely answer to a complaint even if the defendant believes the affidavit is defective. *Kirkaldy, supra* at 586. “A defendant’s unilateral belief that the affidavit of merit does not conform to the requirements of [MCL 600.2912d](#) does not constitute ‘good cause’ for failing to respond timely to a medical malpractice complaint, and thus is not a proper basis to challenge the entry of a default.” *Saffian v Simmons*, 477 Mich 8, 16 (2007).

“If the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If that challenge is successful, the proper remedy is dismissal without prejudice.” *Kirkaldy*, 478 Mich at 586. Because MCR 2.110(A) does not include “mandatory attachments such as an affidavit of merit” in its definition of a pleading, permitting a party to amend an affidavit pursuant to MCR 2.118(A) is improper. *Ligons v Crittenton Hosp.*, Mich App \_\_\_\_\_, \_\_\_\_\_ (2009).

An affidavit that fails to name the health professional whose conduct allegedly caused the injury at issue fails to conform to the requirements of [MCL 600.2912d](#). *Glisson v Gerrity*, 274 Mich App 525, 534-535 (2007), rev’d on other grounds 480 Mich 883 (2007).

A plaintiff does not need to file an amended or additional affidavit when filing an amended complaint if the first affidavit met the requirements in [MCL 600.2912d](#). *King v Reed*, 278 Mich App 504, 520 (2008). In *King*, the plaintiff learned additional facts during the course of discovery that prompted him to amend his complaint to include theories of negligence not included in the plaintiff’s original affidavit of merit. *King, supra* at 512. The defendant argued that the plaintiff’s failure to file an amended or additional affidavit

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<sup>4</sup> Overruling *Geralds v Munson Healthcare*, 259 Mich App 225 (2003), and *Mouradian v Goldberg*, 256 Mich App 566 (2003). *Kirkaldy, supra* at 583.

