

STATE OF MICHIGAN
IN THE SUPREME COURT

CHARLES MOODY,

Plaintiff-Appellant,

and

GET WELL MEDICAL TRANSPORT,
PROGRESSIVE REHAB CENTER, and CAROL
REINTS, INC.,

Plaintiffs,

-vs-

HOME OWNERS INSURANCE COMPANY,

Defendant-Appellee.

Supreme Court No. _____ *Publ App*

Court of Appeals No. 301784 *2-2514*

*Wayne @ 10-006722-AV
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APPLICATION FOR LEAVE TO APPEAL

APPENDIX (under separate cover)

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*related to
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STATEMENT REGARDING (1) PROCEDURAL POSTURE, (2) DECISION APPEALED FROM, (3) JURISDICTION, (4) GROUNDS FOR RELIEF, AND (5) RELIEF SOUGHT

Procedural Posture

This 1st-party, no-fault action was tried in the 36th District Court. The district court, prior to trial, denied a motion to transfer the case to circuit court. (District court order denying motion to transfer, 12/9/2009, Ex. D) Thereafter, the district court entered a Judgment in Plaintiff-Appellant's (hereafter, Plaintiff) favor. (Judgment, 5/27/2009, Ex. E)

On appellate review, the Wayne Circuit Court reversed the trial court. (Order of the Wayne Circuit Court on Appeal, 12/3/2010, Ex. G; Excerpt of transcript, Circuit Court Opinion, 10/19/2010, Ex. F.) Plaintiff filed a timely application for leave to appeal to the Court of Appeals. The Court of Appeals denied the application, stating, "The application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review." (Order, 9/1/2011) Plaintiff filed a timely motion for reconsideration on September 16, 2011, that was denied on October 18, 2011. Plaintiff filed a timely application for leave to appeal to the Supreme Court, which remanded this matter to the Court of Appeals, as if on Leave Granted. (Order, 5/23/2012.) The Court of Appeals then consolidated Plaintiff Moody's appeal with Docket No. 301783, an appeal by certain medical providers. (Order, 6/1/2012.)

The Court of Appeals affirmed the circuit-appellate court (appellate court) order on February 25, 2014. *Moody v Home Owners Insurance Co.*, __ Mich.App. __, __ N.W.2d __ (2014) (Ex. H); Court of Appeals Docket Entries, (Ex. A).

STATEMENT OF THE ISSUES

ISSUE I

AT TRIAL, PLAINTIFF HAD MORE EVIDENCE THAN WAS NECESSARY TO DEMONSTRATE DAMAGES OF \$25,000, THE JURISDICTIONAL LIMIT. THE DISTRICT COURT HELD THAT IT HAD JURISDICTION TO TRY THE CASE AND DENIED DEFENDANT'S MOTION TO TRANSFER THE ACTION TO CIRCUIT COURT.

DID THE TRIAL COURT POSSESS JURISDICTION TO ENTER A JUDGMENT NOT TO EXCEED \$25,000?

Plaintiff-Appellant answers "Yes."

Defendant-Appellee answers "No."

The Court of Appeals answered "No."

The Wayne Circuit Court answered "No"

The trial court answered "Yes."

ISSUE II

DID THE CIRCUIT COURT ERR BY ORDERING A NEW TRIAL WHERE:

(1) DEFENDANT MADE NO REQUEST FOR A MISTRIAL AT THE TRIAL LEVEL;

(2) DEFENDANT FILED NO MOTION FOR NEW TRIAL AT THE TRIAL LEVEL;

(3) DEFENDANT WAIVED/FORFEITED ANY REQUEST FOR NEW TRIAL BY FAILING TO SET FORTH THE ISSUE IN ITS "STATEMENT OF THE ISSUES." MCR 7.212(C)(5);

(3) DEFENDANT, THROUGHOUT ITS APPELLATE BRIEF, MADE NO REQUEST FOR NEW TRIAL AT THE APPELLATE LEVEL; AND THEREFORE,

(4) PLAINTIFF WAS GIVEN NO OPPORTUNITY TO AND DID NOT RESPOND TO ANY ARGUMENT FOR NEW TRIAL, UNEQUIVOCALLY DENYING PLAINTIFF DUE PROCESS OF LAW ON APPEAL?

Plaintiff-Appellant answers "Yes."

Defendant-Appellee answers "No."

The Court of Appeals answered "No."

The Wayne Circuit Court answered "No"

The trial court was not presented with this issue.

STATEMENT OF FACTS AND PROCEDURAL POSTURE

Plaintiff-Appellant Charles Moody (Plaintiff) substantially relies upon the circuit-appellate court opinion for its summary of the facts and its framing of the issues. (Circuit Court Opinion, 10/19/10, Ex. F). After reviewing the circuit-appellate court opinion, Plaintiff will turn to the Court of Appeals decision.

Circuit Court Opinion

The circuit-appellate court explained the posture of the case. *Id.*, 4.

This matter is an appeal filed by Defendant-Appellant, Home Owners Insurance Company, from a judgment entered on May 27, 2010 by a judge of the 36th District Court after a jury trial of a first party no-fault case. The jury awarded Plaintiff-Appellee, Charles Moody, \$32,447.23 for medical expenses incurred at Henry Ford Health System. The judgment reduced that amount to the court's jurisdictional limit of \$25,000.

The circuit-appellate court reviewed the details of the trial court judgment, but the particulars are not relevant. The circuit-appellate court also briefly reviewed the details of the accident. Its review is presented, although these facts do not govern this appeal. *Id.*, 5.

The evidence at trial established that Charles Moody on November 21, 2009 was walking near the area of West Grand Boulevard and Linwood in the City of Detroit when he was forced to step into the street to walk around a puddle. Moody was struck by an unknown vehicle from behind. The vehicle's passengers then robbed him. Moody took a taxi to Henry Ford Hospital where he was treated on November 21 and 22, 2009. He incurred medical bills in the amount of \$32,437.23. Moody filed a complaint in 36th District Court on September 15, 2008 seeking no-fault benefits. Moody's complaint * * * alleged damages in whatever amount Plaintiff is found to be entitled not in excess of \$25,000.

The circuit-appellate court noted the jury verdict and the judgment. *Id.*, 4.

The jury awarded Plaintiff-Appellee, Charles Moody, \$32,447.23 for medical expenses incurred at Henry Ford Health System. The judgment reduced that amount to the court's jurisdictional limit of \$25,000.

The jury verdict frames the issue posed by this appeal. The verdict revealed that the "injuries suffered"¹ exceeded permissible "damages," *i.e.*, exceeded the jurisdictional limitation of the district court, \$25,000.00. Thus, the question is immediately posed: Upon the jury verdict, is the district court divested of jurisdiction and must it transfer the action to the circuit court for a new trial? Alternatively, does the district court have jurisdiction to enter a judgment for \$25,000.00?

The circuit-appellate court focused upon pre-trial arguments. *Id.*, 6-8. The circuit-appellate court described the arguments, after which the trial court "denied the transfer to circuit court." *Id.*, 8.

After counsel for Appellant learned through answers to interrogatories that Moody was going to present damage proofs to the jury trial of the \$32,447.23 Henry Ford medical bill, over \$110,000 in wage loss, and attendant care of \$262,800, counsel for Appellant requested the trial court to take judicial notice of MCL 600.8301 which provides that the district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed \$25,000. Appellant's counsel also advised the trial court that the minute Moody presented damages -- damage proofs in excess of \$25,000, the district court would lose jurisdiction and Appellant intended to move for summary disposition pursuant to MCR 2.116(D)(4). Finally, counsel for Appellant indicated that when Moody claimed he has damages in excess of \$25,000, the district court no longer has jurisdiction over the case.

In response, counsel for Moody argued it was a strategy decision. However, he never explained the strategy. Counsel further indicated that Moody should be able to present proofs in excess of \$25,000 because the jury may believe or disbelieve some of the damage claims. Finally, counsel for Moody indicated that it did not matter that the damage proofs exceeded \$25,000 because Moody was agreeing to limit his damages to \$25,000, the district court jurisdictional limit.

* * * After extensive argument over two days, the trial court ruled that she was going to permit Moody to present damage proofs in excess of \$25,000 because the complaint limited damages to \$25,000. The Court denied the transfer to circuit court.

¹ Plaintiff will refer to "injuries" to mean events that could give rise to awardable damages, subject to legal constraints. The term "damages" will refer to the dollar amounts that are legally awardable for the injuries.

Plaintiff Moody presented evidence of claimed injuries in excess of \$25,000.00. The circuit-appellate court noted that Plaintiff Moody presented claimed injuries of more than \$265,000.00 and the jury returned a verdict of \$32,447.23 (leading to a judgment of \$25,000). *Id.*, 8.

The circuit-appellate court explained that the first issue on appeal is whether the trial court had jurisdiction to try this cause of action, in view of the jurisdictional limit. MCL 600.8301(1). *Id.* The circuit-appellate court concluded, "In this Court's opinion, it is not appropriate for the district court to permit a Plaintiff to present damages in excess of the district court's jurisdictional limit." *Id.*, 12. The circuit-appellate court held, "It [the district court] had no jurisdiction to try Moody's case when the damage proofs exceeded its jurisdiction." *Id.*, 14. Accordingly, the circuit-appellate court reversed the district court Judgment and remanded the case to the district court, "for entry of an order dismissing the case or transferring it to the Wayne County Circuit Court." (Circuit Court Order, Ex. G).

In addition to its argument regarding jurisdiction, Defendant requested that the circuit-appellate court find that the trial court erred by denying its motion for directed verdict. However, the circuit-appellate court denied this relief. (Circuit Court Opinion, pp. 22-24, Ex. F).

The circuit-appellate court turned to "the final argument" raised by Defendant regarding alleged attorney misconduct by Plaintiff's attorney, Michael Fortner. Before reviewing the argument on alleged misconduct, it is critical to note the procedural posture pertaining to this specific issue. Defendant presented two arguments to the circuit-appellate court in support of its argument that the trial court erred by denying the motion for directed verdict. (Defendant's brief in the circuit-appellate court, pp. 34-36) Defendant did not move for a new trial in the district court and then did not request a new trial in the circuit-appellate court. As to the district court's

denial of the motion for directed verdict, the circuit-appellate court affirmed the district court. (Circuit Court Order, Ex. G, p. 2.) Nevertheless, the circuit-appellate court ordered a new trial, although no such relief was requested.

Plaintiff now turns to the allegations of misconduct by Mr. Fortner, only one of which the circuit-appellate court found significant. The other allegations are relegated to a footnote.²

The circuit-appellate court's order for new trial was "particularly" predicated upon a reference by Plaintiff's counsel regarding the Michigan Assigned Claims Facility. (Circuit Court Opinion, 29-30, Ex. F.) The circuit-appellate court found that Plaintiff's counsel's statement in opening argument that Defendant insurance carrier could have paid the no-fault benefits and been reimbursed by the Assigned Claims Facility (if the benefits were paid in error) by a claim for subrogation was wrong. *Id.*, 26-27.

Although Plaintiff will not directly discuss this issue in his appeal, a major issue at trial was Plaintiff's residency – a predicate to determining whether Plaintiff had coverage under his father's insurance policy. Fortner, in opening argument, stated that Defendant could have simply paid the 1st-party no-fault claims and then, in the event that it was later adjudicated that Plaintiff had no residence with his father, seek subrogation from the Assigned Claims Facility. (Trial Tr.,

² The circuit-appellate court noted that Defendant's allegations (Defendant's brief in the circuit court, p. 35) first referred to comments made outside of the presence of the jury – the jury not having yet been selected. (Circuit Court Opinion, Ex. F, p. 25) The circuit-appellate court then found that the assertion that Fortner berated a juror could not have benefitted Plaintiff's case. *Id.*, 26. The circuit-appellate court also rejected the allegation that Fortner misstated the burden of proof as harmless, because the trial court properly instructed the jury. *Id.* Two further comments by Fortner were outside of the presence of the jury. *Id.*, 27. Another complaint by Defendant that Fortner had made a racial reference was rejected by the circuit-appellate court, because it was no such thing. *Id.*, 27. The circuit-appellate court rejected yet another complaint by Defendant, because Fortner had made an observation that was not erroneous and to which there was no objection. *Id.*, 28. The circuit-appellate court also reviewed two more allegations raised by Defendant, finding one made outside of the presence of the jury and the other (i) without objection and (ii) harmless. *Id.*, 28. Finally, regarding Fortner's characterization of an adjuster's testimony, there was no objection, and the circuit-appellate court found that the matter could have been cured by an instruction – the error was harmless. *Id.*, 29.

Vol. III, 12/10/2009, p. 54) Counsel for Defendant, Mr. Sowle, determined that he would explain the exact role of the Assigned Claims Facility, announcing:

MR. SOWLE: I have to object that that's an incorrect statement of the Michigan no-fault law. It's a – he's stating the exact opposite of what the actual law is and I will gladly explain it to the jury.

THE COURT: Your objection is noted. [Trial Tr., Vol. III, 12/10/2009, pp. 65-66]

Thereafter, Mr. Sowle carefully explained to the jury his understanding of the role of the Assigned Claims Facility, transcribed over four pages. (Trial Tr., Vol. III, 12/10/2009, pp. 98-102) These comments were made in opening argument, thoroughly responded to by Defendant, and never raised again throughout numerous weeks of trial – terminating on January 13, 2010, when the jury commenced deliberations. (Trial Tr., Vol. XIV, 1/13/2010, p. 96) Moreover, the trial court explained to the jury that the jury should follow the law as the court instructed and that statements by the lawyers are not evidence. It instructed (Trial Tr., Vol. XIV, 1/13/2010, pp. 84-85):

Members of the jury, the evidence and argument in this case have been completed and I will now instruct you on the law. That is, I will explain the law that applies to this case. Faithful performance by you of your duties is vital to the administration of justice. The law you are to apply in this case is contained in these instructions, and it is your duty to follow them. In other words, you must take the law as I give it to you. * * *

The lawyers' statements and arguments are not evidence.

Additional details regarding this issue are presented *infra*.

Court of Appeals Decision

The Court of Appeals decision (*Moody v Home Owners Insurance*, Ex. H) largely repeats the facts set forth in the circuit-appellate court (appellate) opinion. However, some errors require correction, which are discussed in the same order presented in the COA Opinion.

First, the Court of Appeals mischaracterized the significance of an argument made by Moody's counsel regarding the Assigned Claims Facility and the trial court's response. In fact, Defendant counsel explicitly stated, "I have to object that that's an incorrect statement of the Michigan no-fault law. It's a – he's stating the exact opposite of what the actual law is **and I will gladly explain it to the jury.**" Thereafter, counsel for Defendant **did** explain to the jury the role of the Assigned Claims Facility, transcribed over four pages. (Trial Tr., Vol. III, 12/10/2009, pp. 98-102) Moreover, these opening argument comments –thoroughly responded to by Defendant – were never raised again throughout numerous weeks of trial. The Court of Appeals characterized the trial court as **abdicating** "its responsibility to control the trial proceedings and to instruct the jury regarding the law." [Citations omitted.] This harsh assessment of the trial court is undeserved; Plaintiff welcomes review of the trial court transcript. Review makes clear that the trial court judge abdicated nothing. Additionally, the Court of Appeals stated that trial court judge failed to instruct the jury to ignore certain references that were so numerous that an instruction would likely have been ineffective. Again, review of the transcript demonstrates the contrary. Defendant counsel advised the trial court that **he would respond to Plaintiff counsel's** remark. Thus, the trial court acquiesced in Defendant's request and allowed him to respond.

This error by the Court of Appeal is tangential to the main error by the lower appellate courts, but it is nevertheless significant as seen *infra*.

Also, the Court of Appeals assessed the significance of the Plaintiff's attorney's reference to the Assigned Claims Facility, relying upon the circuit-appellate court's **factual** determination.

On this issue, **the circuit court sitting in its appellate capacity also made a pertinent finding of fact:** "Counsel for Moody purposely injected an irrelevant issue to prejudice the [defendant] and to erroneously suggest to the jury that the [defendant] may not be liable for any of the claims and can recover from a third-party source." A lower court's finding of fact is reviewed on appeal for clear error. MCR 2.613(C). "A finding is clearly erroneous if the reviewing court, on

the whole record, is left with the definite and firm conviction that a mistake has been made.” *Hughes v. Almena Twp*, 284 Mich.App 50, 60; 771 NW2d 453 (2009). [Emphasis added.]

However, the Court of Appeals reviewed the circuit-appellate court’s finding as if the circuit-appellate court were the trial court. It was not the trial court. In fact, Defendant never asked the trial court to rule whether Plaintiff counsel had deliberately injected an irrelevant issue into the proceedings in order to prejudice the jury. Rather, on appeal, the circuit-appellate court made this finding. The Court of Appeals assessment that “[a] lower court’s finding of fact is reviewed on appeal for clear error” is correctly applied to a trial court but not applicable to a lower appellate court. (Indeed, the Supreme Court does not review a Court of Appeals “finding” for clear error.) The Court of Appeals erroneously held that it will affirm the circuit-appellate court unless the Court of Appeals is “left with the definite and firm conviction” that the circuit-appellate court has made a mistake. The Court of Appeals presented no authority for that proposition! The Court of Appeals continued, “[T]he circuit court [appellate court] did not clearly err by finding” that Plaintiff’s counsel injected prejudice into the trial. Again, the Court of Appeals presented no authority for that proposition that the standard of review for a lower appellate court is “clear error.”

Because the Court of Appeals limited its review of the circuit-appellate court’s factual finding, it perpetuated the error made by the circuit-appellate court with regard to a new trial due to purported attorney misconduct. This mistake is not central to this appeal, but it is certainly consequential and must not be ignored.

PRESERVATION OF ERROR AND STANDARD OF REVIEW

Defendant raised and preserved its allegation of error as to Issue I (jurisdiction of the district court). However, **Defendant failed to raise and preserve its assertion of error**, with regard to a new trial. This proposition is discussed in full in argument, Issue II.

For Issue I, the standard of review regarding jurisdiction is *de novo*, inasmuch as an issue of law is presented. *Detroit City Council v. Detroit Mayor*, 283 Mich.App. 442, 449, 770 N.W.2d 117 (2009). This appeal also involves the interpretation of court rules; review is again *de novo*. *City of Plymouth v. McIntosh*, 291 Mich.App. 152, 804 N.W.2d 859 (2010).

Issue II concerns a new trial. The standard of review is whether the trial court abused its discretion. *People v. Miller*, 482 Mich. 540, 544, 759 NW2d 850 (2008). However, the standard of review is problematic in this case, because Defendant never requested a new trial in the trial court (district court) and again did not request this relief in the circuit-appellate court (on appeal). Undoubtedly, Defendant should not profit from its failure to preserve the issue. Accordingly, the issue was not preserved for appellate review, and additionally, it should be presumed that Defendant did not request a new trial in the district court, because Defendant comprehended that the district court would deny the motion. Therefore, assuming *arguendo* that appellate review is warranted, the district court should be deemed to have denied a motion for new trial. And, the standard of review should be whether the district court abused its discretion in its putative denial of the putative motion for new trial.

The Court of Appeals, in part, misapprehends the significance of this issue. Rather than address whether Defendant ever requested a new trial before the district court or ever argued to the circuit-appellate court that it was entitled to a new trial based on attorney misconduct, the Court of Appeals simply proceeded as if the circuit-appellate court was the trial court. Thus, the Court

of Appeals applied the wrong standard of review to the circuit-appellate court's opinion. More
discussion is presented *infra*.

LAW AND ARGUMENT

ISSUE I

AT TRIAL, PLAINTIFF HAD MORE EVIDENCE THAN WAS NECESSARY TO DEMONSTRATE DAMAGES OF \$25,000, THE JURISDICTIONAL LIMIT. THE DISTRICT COURT HELD THAT IT HAD JURISDICTION TO TRY THE CASE AND DENIED DEFENDANT'S MOTION TO TRANSFER THE ACTION TO CIRCUIT COURT.

THE TRIAL COURT POSSESSED JURISDICTION TO ENTER A JUDGMENT NOT TO EXCEED \$25,000.

This is an issue of first impression. No prior appellate decision holds that the district court is divested of jurisdiction, if evidence produced for the jury's consideration is more than the jurisdictional limit. The circuit-appellate court's holding is without precedent.

Introduction/Outline of Argument

Plaintiff structures his arguments as follows.

1. Preliminary considerations regarding the tactics of Defendant's arguments.
2. The district court had jurisdiction over this cause of action, where Plaintiff's claim is limited to \$25,000.000.
 - a. The governing statute confers jurisdiction.
 - b. Decisional authority confirms the District Court's jurisdiction.
 - c. The logic of the *ad damnum* clause to the jurisdictional limit.
 - d. MCR 4.002, the governing court rule, confirms the district court's jurisdiction.

1. Preliminary considerations of Defendant's tactics.

The circuit-appellate court ignored a basic proposition: it is axiomatic that a jury may choose to accept some parts of the testimony and reject other parts. *Weaver v Ann Arbor R. Co.*, 139 Mich. 590, 102 N.W. 1037 (1905) (“[T]he jury were entitled to * * * reject some parts of [the testimony] and accept others.”); *People v. Logan*, unpublished per curiam opinion (Mi.Ct.App. No. 226951, 2/2/2002) (approvingly noting that the “jury was also instructed that it was the sole determiner of which witnesses to believe and was free to accept some, none, or part of a witness's testimony.”); *People v. Knight*, unpublished per curiam opinion (Mi.Ct.App. No. 181136, 6/4/1996) (“First, the jury was free to believe some of Mr. Zarske's testimony and to not accept other parts of his testimony.”) The trial court, in full knowledge of the jury's discretion to accept only some of the evidence regarding damages, exercised its discretion to permit Plaintiff to present evidence of injuries that exceed \$25,000. The trial court was well aware that the jury would carefully scrutinize the evidence and determine what evidence it would accept as a basis for damages and what evidence it would reject, finding no compensable injuries. The circuit-appellate court's holding simply ignored this basic reality of trial practice.

Two practical aspects of Defendant's argument must be immediately noted: (1) the tactical advantage that Defendant seeks, not ever explicitly acknowledged by Defendant, and (2) the impact and effect on district court litigation that would be produced by embracing Defendant's argument.

1. Tactical advantage

In any no-fault insurance case, the asserted damages and the challenges thereto are often indefinite. Of course, there are categorical defenses, which, if successful, lead to no damages: (1)

there is no insurance coverage at all; (2) there was no accident; (3) no claimed injury is causally related to the accident. However, equally important to the litigation are the skirmishes fought in the trenches. Is each and every doctor's bill reasonable and necessary? Was attendant care necessary at all? For how many hours was attendant care reasonable and necessary? At what rate should the attendant be paid, \$8 per hour, \$20 per hour, somewhere in between? Did the patient require medical transportation? How often? Was the medical transportation provided at a reasonable rate? Even lost wages may be subject to dispute, particularly in the recent, distressed economy.

The circuit-appellate court ruled that any no-fault insurance claimant, any plaintiff, may only introduce evidence that totals \$25,000 or less. Then, the plaintiff must stop! At that juncture, the defendant is free to first argue the categorical defenses – no policy, no accident, no injury. Additionally, the defendant will contest the number of procedures, the rate billed for each procedure, the amount of attendant care, the attendant care billing rate, and so forth. It would be a poor defense attorney, indeed, who could not chip away at the evidence introduced by the plaintiff and who could not persuade the jury that 10-25% of the alleged damages are unreasonable, unnecessary, or overstated. Surely, the defense attorney will persuasively argue that not 100% of the claimed amount should be awarded. The jury's propensity to compromise will often lead to a verdict less than \$25,000.

Naturally, no defendant would agree that a plaintiff, in rebuttal, could add claims to bring the claim back to the \$25,000 limit. And, trials do not operate in that manner. The outcome cannot be reasonably debated. Defendant's argument that the plaintiff's evidence must not add to more than \$25,000 in injuries guarantees that verdicts will systemically be awarded in amounts significantly less than \$25,000. Defendant is not content to know that a plaintiff in the district

court is limited to \$25,000; rather, Defendant insists upon a methodological bias in its favor, notwithstanding that the plaintiff may be ready and able to present ample evidence of injuries that exceed \$25,000 – even upon due consideration of the defendant’s automatic objections and demands for discounts approximating 10-25% of the unpaid no-fault expenses.

Of course, the situation is entirely asymmetrical. Nothing bars a defendant from challenging 100% of every, uncompensated no-fault benefit. Nevertheless, on Defendant’s argument, the plaintiff is required to exercise scrupulous attention to ensure that his or her claims do not sum to even \$0.01 over \$25,000. Defendant’s argument is wonderfully adapted to confer an incalculable tactical advantage upon the defendant. It is no wonder that Defendant argues this position so vigorously.

2. Sweeping impact of Defendant’s reasoning

As noted, Defendant would force Plaintiff to exercise scrupulous attention to ensure that claims do not sum to even \$0.01 over \$25,000. This brings Plaintiff to the next preliminary consideration – the enormity of Defendant’s argument. Suppose that a plaintiff brought a no-fault action for medical bills summing to \$24,900 in district court and then (months after filing) found that the bills included an additional \$200. By Defendant’s reasoning, the trial court must dismiss the cause of action, notwithstanding the plaintiff’s willingness to accept the jurisdictional limit. No escape from this point can be made on the basis that a “small” amount of damages over \$25,000 may be tried (with the judgment limited to the jurisdictional amount). Jurisdiction is an absolute concept.³ Defendant’s argument raises ramifications that it simply ignores.

Plaintiff now turns to authority that rejects Defendant’s argument.

³ In *Freeland v. Liberty Mut. Fire Ins. Co.*, 632 F.3d 250, 251 (6th Cir. Ohio, 2011), the federal court dismissed the action, “because the amount in controversy is one penny short of our jurisdictional minimum.” (Emphasis added.)

2. The district court had jurisdiction over this cause of action, where Plaintiff's claim – expressed in his prayer for relief – is limited to \$25,000.00.

a. The governing statute conveys jurisdiction upon the District Court.

Subject-matter jurisdiction is “a court's power to hear and determine a cause or matter.” *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Property Taxes*, 265 Mich.App. 285, 291, 698 N.W.2d 879 (2005), citing *Bowie v. Arder*, 441 Mich. 23, 36, 490 N.W.2d 568 (1992). Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state. MCL 600.605. MCL 600.8301 confers jurisdiction on the district court; it provides, in pertinent part:

(1) The district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed \$25,000.00.

The primary goal of statutory interpretation is to ascertain and give effect to the legislative intent. *Frankenmuth Mutual Ins Co v. Marlette Homes, Inc*, 456 Mich. 511, 515, 573 N.W.2d 611 (1998). In determining legislative intent, a court should review the language of the statute. *Id.* If the statute is clear, the legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permitted. *Id.* A court must consider the object of the statute and the harm it is designed to remedy and apply a reasonable construction which best accomplishes the statute's purpose. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Dorsey*, 268 Mich.App. 313, 326, 708 N.W.2d 717 (2005).

Additionally, when interpreting a statute, this Court gives effect to every phrase, clause, and word. When a statute provides its own glossary, the terms must be applied as expressly defined. *In re Turpening Estate*, 258 Mich.App. 464, 465, 671 NW2d 567 (2003). “If the language

of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted.” *Donajkowski v. Alpena Power Company*, 460 Mich. 243, 248-249, 596 N.W.2d 574 (1999). Furthermore, “[w]here a statute does not define one of its terms it is customary to look to the dictionary for a definition.” *Marcelle v. Taubman*, 224 Mich.App. 215, 219, 568 N.W.2d 393 (1997) (utilizing *Black’s Law Dictionary*).

The applicable statute provides that the “amount in controversy” must not exceed \$25,000.00. The phrase “amount in controversy” is not defined by the statute. It is therefore appropriate to look to a dictionary for the definition. “Amount in controversy” is defined as the “The damages claimed or relief demanded; the amount claimed or sued for.” *Black’s Law Dictionary*, Fifth Edition, p 76. In other words, the “amount in controversy” is the amount at risk in the litigation. *AKC, Inc. v. ServiceMaster Residential/Commercial Services Ltd.*, Memorandum Opinion, 2013 WL 1891362 (U.S. District Court, N.D. Oh., 2013) *See, Corle v. Estate Planning and Preservation, Inc.*, Opinion and Order, 2011 WL 2836374 (U.S. District Court, N.D. Ind., 2011) (referring to the amount in controversy as an amount that is at risk).⁴ Accordingly, although misconduct may give rise to injuries of a larger amount, the claimant may waive his (her/its) claim to “damages” arising from the “injuries” that exceed the jurisdictional limit. The effect of the waiver is to reduce the amount at risk – to reduce the amount in controversy.

b. Decisional authority confirms the District Court’s jurisdiction.

Decisional authority holds that one looks to the complaint to determine if the court has jurisdiction.

⁴ In fn. 1, the court explained, “The Court also notes that “[i]n the class action context, the amount in controversy is measured in terms of each plaintiff’s separate claim, not the aggregate amount that may be at risk for the defendant.””

In *Clohset v. No Name Corp.*, 302 Mich.App. 550, 8840 N.W.2d 375 (2012), the court reviewed the issue of jurisdiction in the district court. The plaintiff Clohset brought an action in district court for possession of realty, not seeking damages. Clohset acknowledged that damages would exceed \$25,000 and would be sought in circuit court. The parties entered into a settlement agreement in 1998, for \$384,822.95, executing “pocket” consent judgments for potential entry in district and/or circuit court. Thereafter, in 1999, Clohset filed the district court consent judgment, stating that there was a default and that the amount owed was \$222,102.09. The district court entered the stipulated consent judgment on October 1, 1999. Nine years passed. On March 24, 2009, Clohset⁵ demanded \$222,102.09. Defendants stipulated to a renewal of the consent judgment, which the district court entered on September 15, 2009. There were further procedural gyrations not relevant to the outcome of this appeal.

Ultimately, the court considered whether the district court had jurisdiction to enter the 2009 consent judgment. The court found that the district court did have jurisdiction, noting that: (1) a consent judgment possesses a character that is distinct from that of an ordinary judgment, (2) the complaint was predicated upon MCL 600.8302(3) (jurisdiction regarding claims under MCL 600.5701 *et seq.*) and not upon MCL 600.8301(1) (the general grant of jurisdiction), and (3) having created the error, the defendants were not permitted to harbor the alleged error as an appellate parachute. Although this appeal is factually distinct from *Clohset*, the court’s opinion unequivocally delineates the general proposition that controls this action: **jurisdiction is established by the pleadings.**

First, the court set forth the general proposition that governs jurisdiction. It wrote:

While it is true that a judgment entered by a court that lacks subject-matter jurisdiction is void, *Altman v. Nelson*, 197 Mich.App 467, 472–473; 495 NW2d 826 (1992), subject-matter jurisdiction is established by the *pleadings*, and exists

⁵ Phillip Clohset was then acting on behalf of the Estates of Clarence and Virginia Clohset.

“when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous.” *In re Hatcher*, 443 Mich. 426, 444; 505 NW2d 834 (1993); see also *Grubb Creek Action Comm v. Shiawassee Co Drain Comm'r*, 218 Mich.App 665, 668; 554 NW2d 612 (1996), citing *Luscombe v. Shedd's Food Prod Corp*, 212 Mich.App 537, 541; 539 NW2d 210 (1995) (“A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint.”).

Because subject-matter jurisdiction is determined by reference to the pleadings, * * *. The district court accordingly had jurisdiction over this case.

Having properly acquired jurisdiction, the district court was obliged to render a final decision on the merits. “[W]hen a court of competent jurisdiction has bec[o]me possessed of a case its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of, and no court of coordinate authority is at liberty to interfere with its action.” *Schafer v. Knuth*, 309 Mich. 133, 137; 14 NW2d 809 (1944), quoting *Maclean v. Wayne Circuit Judge*, 52 Mich. 257, 259; 18 NW 396 (1884). A matter is finally and completely resolved when a judgment is entered. “A judgment is defined as the final consideration and determination of a court of competent jurisdiction on the matters submitted to it.” 6A Michigan Pleading & Practice (2d ed.), § 42:1, p. 235.7. In other words, once a court acquires jurisdiction, unless the matter is properly removed or dismissed, that court is charged with the duty to render a final decision on the merits of the case, resolving the dispute, with the entry of an enforceable judgment.

The court further explained that it was inconsequential that the consent judgment granted relief that “was different in kind from that initially requested in the district court complaint, nor by the fact that the monetary amount of the stipulated damages exceeded the general jurisdictional limit of the district court.” (In this case, Plaintiff did not request judgment for damages in excess of \$25,000.) Finally, the court noted that **a judgment of \$25,000 in damages would be allowed** under the general jurisdictional amount, regardless of the amount of the consent judgment.

Even assuming arguendo that the general jurisdictional limit applied, it might at most be argued that the monetary amount of the consent judgment in excess of the \$25,000 general jurisdictional limit (plus interest, costs, and attorney fees) was not recoverable, not that the entirety of the judgment was void. This was the result, for example, in *Brooks v. Mammo*, 254 Mich.App 486; 657 NW 2d 793 (2002), where this Court limited the plaintiff's recovery to the circuit [sic, district] court's \$25,000 general jurisdiction limit.

Thus, *Clohset* squarely repudiates the circuit-appellate court's ruling. Numerous decisions are in accord; no decision is in discord.

In *Trost v. Buckstop Lure Co., Inc.*, 249 Mich.App. 580, 587, 644 N.W.2d 54 (2002), the plaintiff Trost sought relief from a judgment entered in a previous action. Trost asserted that the prior judgment (for libel) was void for lack of subject matter jurisdiction. The court rejected Trost's argument; the court was clear that jurisdiction is determined by review of the (prior) complaint without regard to other matters. The court held:

Jurisdiction is the power of a court to act and the authority of a court to hear and determine a case. A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint. If it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has the power to act, then subject-matter jurisdiction exists. [*Id.*, at 586; internal quotation marks and citations omitted; emphasis added.] * * *

However, * * * subject-matter jurisdiction does not depend on whether the claim is true or false, but instead on the allegations pleaded (and not the facts) * * *. [*Id.*, at 587.]

In *Fox v. Martin*, 287 Mich. 147, 283 N.W. 9 (1938), a lien was imposed upon certain property; the lien automatically and unequivocally expired after one year. Nevertheless, the complainant foreclosed on the property more than one year after the lien was imposed. Thus, from the face of the complaint, it was clear that there was no juridical basis for a foreclosure against the debtor. The court explained that jurisdiction to foreclose was determined by looking to the allegations of the complaint:

Jurisdiction does not depend upon the facts, but upon the allegations. * * * The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry: * * *. Jurisdiction always depends upon the allegations and never upon the facts. [Internal quotation marks and citations omitted; emphasis added.]

In *Woods v. Massachusetts Protective Ass'n*, 34 F.2d 501 (1929), the plaintiff brought an action claiming only \$3,000, although the underlying insurance policy was for the sum of \$5,000.

The plaintiff did this to defeat federal court jurisdiction.⁶ The federal court held that the action was not removable to federal court, because the plaintiff did not claim \$5,000. In its extensive review of the subject, the court explained.

“[A] party may voluntarily remit and abandon all claim and right to recover the amount which thus exceeds the jurisdiction, and may maintain his action for an amount within the jurisdiction of the court. [*Id.*, at 502.]

* * *

A plaintiff in an action for damages may demand less than he has sustained and thereby restrict his recovery to the lesser amount and defeat a removal. [H]e may prefer to sue for that sum or less and thereby keep his case in the state court, rather than sue for the full damages with the resulting delay and annoyance and expense of a removal to the United States Circuit Court. [*Id.*, at 504.]

Accordingly, the district court in this case, like the federal court, properly determined that it should honor the complaint’s request for “damages” in an amount that do not exceed \$25,000, regardless of the amount of the “injuries.”

In *Etefia v Credit Technologies, Inc.*, 245 Mich. App. 466, 628 N.W.2d 577 (2001), the court considered whether the circuit court had properly transferred the action to the district court, despite the plaintiff’s allegation of a claim in excess of \$25,000. The court reversed. It found that, upon its “review of the allegations contained in plaintiff complaint and the nature of the damages available,” it could not determine with legal certainty that the value of the case was less than \$25,000. Thus, the circuit court had erred in transferring to district court. Germane to this appeal, the court looked to the complaint and to permissible inferences therefrom.

In *Iowa Central Ry. Co. v. Bacon*, 236 U.S. 305, 35 S.Ct. 357 (1915), the U.S. Supreme Court squarely rejected Defendant’s argument. There, the defendant contended that the damages

⁶ The federal court would honor the shorter contractual period of limitation (defeating the plaintiff’s claim), but state law would apply the longer statutory period of limitations.

were \$10,000 for the killing of the plaintiff's intestate and asserted that the federal court had jurisdiction. (The federal court had jurisdiction if the amount in controversy was over \$2,000.) However, the plaintiff had prayed for only \$1,990. The U.S. Supreme Court confirmed that the amount prayed for governed jurisdiction; the case was properly left in the state court.

In the petition it was alleged that the estate had been damaged in the sum of \$10,000, but judgment was asked only for the sum of \$1,990. * * *

[T]he case now under consideration was not, upon the face of the record, a removable one. **The prayer for recovery was for \$1,990, and consequently the amount required to give jurisdiction to the Federal court was not involved.** [*Id.*, at 308, 310; emphasis added.]

Brady v. Indemnity Ins. Co. of North America, 68 F.2d 302 (6th Cir. 1933), reaches the same conclusion. Plaintiff brought suit as a beneficiary of a \$15,000 accident insurance policy issued by the defendant, but the plaintiff prayed for only \$2,999.99 – one cent less than the federal jurisdictional amount (\$3,000). The defendant sought to remove the action to the federal court. The federal court held it did not have jurisdiction, because the prayer for relief governed jurisdiction.

It was the appellant's right to determine the amount of indemnity she would claim, not the appellee's. When she did so and sued therefor, that amount became the sum or value in controversy. That she claimed a lesser amount than she might have claimed for the purpose of preventing removal is not in our opinion important. **She had the right to sue for this lesser amount.** [*Id.*, at 304; emphasis added.]

Krawczyk v. Detroit Auto. Inter-Insurance Exchange, 117 Mich.App. 155, 323 N.W.2d 633 (1982), aff'd in part, rev'd in part, 418 Mich. 231, 341 N.W.2d 110 (1983), involving a claim for no-fault benefits, is also of interest. It was litigated when the district court jurisdictional amount was \$10,000. *Id.*, 158. After trial, the court reviewed the permissible no-fault benefits. The court found that the plaintiff was entitled, under the no-fault act, to damages of \$7,746 but to an award of \$12,435.95, inclusive of interest, costs and attorney fees. The court then turned to whether the

district court had jurisdiction to award \$12,435.95 or only \$10,000.00. However, the court never considered the possibility that asserted damages of \$12,435.95 implied that the district court was divested of jurisdiction to enter a judgment of \$10,000.00 – never imagined the decision reached by the circuit-appellate court to vacate the judgment awarded to Plaintiff in this case.⁷

Also worthy of note, jurisdiction is not defeated by speculation and conjecture regarding future events. In *New Hampshire Indem. Co. v. Scott*, 2012 WL 6537098 (U.S. District Court, M.D. Fla., 2012), NHIC (the insurer) brought a declaratory action, seeking a judgment that it had no duty to defend or indemnify. The insurance policy was for \$10,000/\$20,000 per person/occurrence. The court determined that it had no jurisdiction. The court rejected NHIC's argument that jurisdiction should be premised upon a potential insurance-bad-faith action (valued at more than \$75,000). The court dismissed and explained:

When NHIC filed this declaratory judgment action, an insurance-bad-faith action was wholly speculative. * * * NHIC argues essentially that, because the present action serves as a prerequisite to a future, speculative action, the amount in controversy in the future, speculative action controls the amount in controversy in the present action. **But a declaratory judgment's attenuated, collateral consequence perforce res judicata, collateral estoppel, or stare decisis contributes nothing to the amount in controversy.** The recovery available in a speculative, unfiled insurance-bad-faith action is not "in controversy" in this action. [Citations omitted; emphasis added.]

Accordingly, jurisdiction to try the case is always predicated upon the allegations in the complaint and not upon the proceedings or outcome. *Zimmerman vs. Miller*, 206 Mich. 599, 604-605 (1919) (jurisdiction of the court is determined by the amount demanded in the plaintiff's pleadings, not by the sum actually recoverable or that found by the judge or jury on the trial); *Grubb Creek Action Committee v. Shiawassee County Drain Com'r*, 218 Mich.App. 665, 668, 554

⁷ The Supreme Court also reviewed the items that were awardable under the no-fault law. *Krawczyk v. Detroit Auto. Inter-Insurance Exchange*, 418 Mich. 231, 341 N.W.2d 110 (1983). The Court partially reversed, finding that profit-sharing benefits are recoverable under the no-fault act and affirmed in all other respects. *Id.*, 236. Again, no consideration was directed toward divesting the district court of jurisdiction and awarding no damages.

N.W.2d 612 (1996) (“If it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has the power to act, then subject-matter jurisdiction exists.”); *Fifth Third Bank v. Wertz*, unpublished per curiam opinion (Mi.Ct.App. No. 250058, rel’d 1/25/05) (“*Etefia* make clear that it is only appropriate for a circuit court to hold that it lacks jurisdiction over a case due to the amount in controversy if it appears to a legal certainty from the allegations of a complaint that the amount in controversy is less than \$25,000.”).

Finally, *Walker vs. Dinh Van Thap and Liberty Lloyds Ins. Co.*, 637 So. 2d 1150 (1994), is squarely on point. There, the trial court’s jurisdictional limitation was \$10,000, but the court found that the plaintiff had sustained over \$21,000 in injuries, reduced by 50% comparative fault. The issue was whether: (1) the injuries should be reduced by 50% (\$10,500) and then reduced to \$10,000 (final judgment), or (2) the jurisdictional limitation should first be applied and then the amount reduced by 50% to \$5,000 (final judgment). The court determined that the “amount in dispute” (similar to Michigan’s “amount in controversy”) “means the maximum amount that the successful party may be awarded by judgment.” *Id.*, 1153. Thus, the judgment for plaintiff was for \$10,000. The court perceived that the plaintiff had suffered injuries of \$21,625.62 that must be reduced so that the judgment for damages was no greater than \$10,000. Pertinent to this appeal, it was never proposed – even by the defendant – that the entire judgment must be vacated, which is the result imposed by the circuit-appellate court.⁸

For all of the above reasons, Plaintiff requests that this Court reverse the Court of Appeals affirmance of the circuit-appellate court. The district court unequivocally had jurisdiction to adjudicate this cause of action where the alleged “injuries” exceeded \$25,000 but where the

⁸ In *Bullock v. Graham*, 681 So.2d 1248 (La. 1996), and in *Benoit v. Allstate Ins. Co.*, 773 So.2d 702 (La. 2000), the Louisiana Supreme Court further considered this and a related issue. However, in no event was the plaintiff precluded from recovering any amount.

Plaintiff conceded that he would never be able to recover “damages” in excess of the jurisdictional amount.

c. The logic of the *ad damnum* clause to the jurisdictional limit.

Defendant will no doubt assert that Plaintiff’s *ad damnum* clause⁹ does not govern the amount in controversy. To the contrary, this is the rare case where “saying it does make it so.”¹⁰ In the above cited federal decisions, there was no factual inquiry. As in this case, the request for relief was not a factual assertion – not to be proved true or false.¹¹ Rather, it was a binding acknowledgement that the plaintiff cannot achieve damages more than claimed.

Defendant may purposefully conflate and confuse a request for damages less than a specific amount with a claim for damages more than a designated amount. A claim greater than a jurisdictional minimum amount is only a claim, not a binding, self-imposed, enforceable limitation upon the plaintiff. *I.e.*, if the plaintiff seeks \$250,000 for a fire loss under insurance policy # 123, the fact that the insurance policy coverage is only \$10,000 will immediately disprove the assertion

⁹ “The clause in a complaint that sets a maximum amount of money that the plaintiff can recover under a default judgment if the defendant fails to appear in court.

“It is a fundamental principle of due process that a defendant must be given fair notice of what is demanded of him or her. In a civil action, a plaintiff must include in the complaint served on a defendant a clause that states the amount of the loss or the amount of money damages claimed in the case. This clause is the *ad damnum*. It tells a defendant how much he or she stands to lose in the case.

“In some states, the *ad damnum* sets an absolute limit on the amount of damages recoverable in the case, regardless of how much loss the plaintiff is able to prove at trial. The reason for this rule is that a defendant should not be exposed to greater liability than the *ad damnum* just because he or she comes into court and defends himself or herself. In states that follow this rule, a plaintiff may be given leave to increase the amount demanded by amending the complaint if later circumstances can be shown to warrant this. For example, a plaintiff who sues for \$5,000 for a broken leg may find out after the action has begun that she will be permanently disabled. At that point, the court may allow the plaintiff to amend her complaint and demand damages of \$50,000.

In most states and in the federal courts, a plaintiff can collect money damages in excess of the *ad damnum* if proof can be made at trial to support the higher amount. A defendant may ask for more time to prepare the case in order not to be prejudiced at trial if it begins to look as though the plaintiff is claiming more money than the *ad damnum* demands. However, the defendant cannot prevent judgment for a higher amount.” The Free Dictionary (by Farlex), Ad damnum

¹⁰ In contract law, if Buyer states, “I offer to pay \$50 for the red wagon,” there is an offer. Saying it makes it so.

¹¹ In other contexts, see, 2 McCormick, Evidence (5th ed), § 249, p 100, discussing verbal conduct that creates a contract – not an “assertion” that is subject to the hearsay rule; *McCullough v. State*, 973 N.E.2d 62 (Ind.App.,2012) (Verbal conduct to which the law attaches legal significance, such as the contract on which suit is based, is not offered to prove the truth of the statements.)

that the amount in controversy exceeds \$25,000. On the other hand, if the plaintiff maintains an insurance claim for only \$2,999.99 or less (federal jurisdictional amount of \$3,000), the federal court has no jurisdiction. No further factual inquiry as to the insurance policy is warranted; jurisdiction remains with the state court as a matter of law (remand is required). The claimant's binding acknowledgment means that there is no amount in controversy over \$2,999.99 (notwithstanding an insurance policy with a \$15,000 face amount), because the plaintiff cannot secure a judgment exceeding the claimed amount. *Brady, supra*.¹² “[H]aving sued for only \$2,999.00, the appellant could not after judgment make any further claim under the policy.” *Id.*, 302. *Accord, St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586 (1938) (“If he [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.” Citing *Woods v. Massachusetts Protective Ass'n, D.C.*, *supra*, 34 F.2d 501.)¹³

In *AKC, Inc. v. ServiceMaster Residential/Commercial Services Ltd.*, 2013 WL 1891362 (U.S. District Court, N.D. Oh. 2013), after the defendant removed to federal court, the plaintiff filed a stipulation and declaration that its damages were less than \$75,000. The federal court remanded, noting that the plaintiff's “stipulation binds it “to a recovery of no more than this figure in state court.”” The doctrine of judicial estoppel barred the plaintiff from recovering more than \$75,000. *Accord: Doxey v. Scottsdale Ins. Co.*, 2013 WL 1501021 (U.S. District Court, W.D. La. 2013) (Remand is proper if the plaintiff demonstrates that it is legally certain that its recovery will not exceed the jurisdictional amount. Plaintiffs can meet this burden by filing a pre-removal

¹² *Brady v. Indemnity Ins. Co. of North America*, 68 F.2d 302 (6th Cir. 1933).

¹³ The Court further stated, at fn. 25, “And an amendment in the state court reducing the claim below the jurisdictional amount before removal is perfected is effective to invalidate removal and requires a remand of the cause: *Maine v. Gilman*, C.C., 11 F. 214; *Waite v. Phoenix Ins. Co.*, *supra*; *Harley v. Firemen's Fund Ins. Co.*, D.C., 245 F. 471.”

binding stipulation or affidavit affirmatively renouncing their right to accept a judgment in excess of \$75,000.00.)

The significance of the request for relief is also seen in numerous foreign decisions involving the award of damages where: (i) the plaintiff seeks a sum certain, (ii) the defendant defaults, and (iii) the damages awarded to the plaintiff cannot exceed the sum certain stated in the complaint, binding the plaintiff. *Hicks v. Pleasants* (A default judgment shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.); *Alexander v. McDow* (The entry of judgment for an amount in excess of that called for by the summons was indisputably error.); *Ruth v. Smith* (The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint.); *Koby v. Koby* (A trial court may not award relief beyond that sought in the complaint when the defendant does not file defensive pleadings and does not appear at trial.); *In re Genesys Data Technologies, Inc.* (Judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.); *Jensen v. Jensen* (In a default proceeding no relief may be granted in excess of that prayed for in the complaint.); *Oviatt v. Oviatt* (If greater relief be granted than the relief prayed, the defendant may have the judgment or decree set aside.); *Scannell v. Ed. Ferreirinha & Irmao, LDA* (A defaulted defendant retains a palpable reliance interest in the rule that assures that his liability on default will in no event exceed the amount of the plaintiff's demand.); *Elmen v. Chicago, B. & Q.R. Co.* (No judgment can be rendered in excess of the amount indorsed upon the summons in case of default in an action where the only relief sought is a money judgment.); *Smith v. Travellers' Protective Ass'n of America* (The restriction of the relief which may be granted a plaintiff, when no answer is filed by the defendant, applies only when the plaintiff moves for judgment by default final.); *City of Philadelphia, to Use of Watson v. Pierson* (The right of a plaintiff to judgment on

a rule for it for want of a sufficient affidavit of defense must be determined from it and the plaintiff's statement. The court can consider nothing else in disposing of the rule.); (*Troutbrook Farm, Inc. v. DeWitt* (A default judgment that exceeds the amount of demand for judgment to be null and void in its entirety.); *Harris v. Harris* (The plaintiff in a default case is limited in his recovery to that demanded in the prayer for relief.); *Capitol Brick, Inc. v. Fleming Mfg. Co., Inc.* (It is impermissible in a default judgment to render judgment for damages in excess of the damages specifically pleaded.); *Holt v. Holt* (A defaulting party should expect that the relief granted will not exceed that sought in the complaint.); *Matter of Marriage of Leslie* (To the extent a default judgment exceeds relief requested in the complaint, that portion of the judgment is void.); *National Operating, L.P. v. Mutual Life Ins. Co. of New York* (In default judgments, relief is limited to that which is demanded in the plaintiff's complaint.)¹⁴

Accordingly, Defendant's analysis is analytically deficient for its failure to appreciate that the relief requested – not to exceed \$25,000 – constrains the plaintiff's damages to the range: \$0 – \$25,000. By operation of law, only \$25,000 is in controversy; no factual inquiry is warranted. Moreover, as noted, there is no parallel between the claim that the claim is under an amount – a binding acknowledgment – and the opposite claim for an amount to exceed the jurisdictional minimum amount.

¹⁴ *Hicks v. Pleasants*, 158 P.3d 817, 821 (Alaska, 2007); *Alexander v. McDow*, 108 Cal. 25, 31, 41 P. 24 (1895); *Ruth v. Smith*, 29 Colo. 154, 158, 68 P. 278 (1901); *Koby v. Koby*, 277 Ga. 160, 160, 587 S.E.2d 48 (2003); *In re Genesys Data Technologies, Inc.*, 95 Hawai'i 33, 38, 8 P.3d 895 (2001); *Jensen v. Jensen*, 97 Idaho 922, 923, 357 P.2d 200 (1976); *Oviatt v. Oviatt*, 174 Iowa 512, 156 N.W. 687, 690 (1916); *Scannell v. Ed. Ferreirinha & Irmao, LDA*, 401 Mass. 155, 163, 514 N.E.2d 1325 (1987); *Elmen v. Chicago, B. & Q.R. Co.*, 75 Neb. 37, 105 N.W. 987, 988 (1905); *Smith v. Travellers' Protective Ass'n of America*, 200 N.C. 740, 158 S.E. 402, 405 (1931); *City of Philadelphia, to Use of Watson v. Pierson*, 211 Pa. 388, 393-394, 60 A. 999 (1905); *Troutbrook Farm, Inc. v. DeWitt*, 540 A.2d 18, 20 (1988); *Harris v. Harris*, 279 S.C. 148, 151-152, 303 S.E.2d 97 (1983); *Capitol Brick, Inc. v. Fleming Mfg. Co., Inc.*, 722 S.W.2d 399, 401 (1986); *Holt v. Holt*, 672 P.2d 738, 741 (Utah, 1983); *Matter of Marriage of Leslie*, 112 Wash.2d 612, 618, 772 P.2d 1013 (1989); *National Operating, L.P. v. Mutual Life Ins. Co. of New York*, 244 Wis.2d 839, 869, 630 N.W.2d 116 (2001).

d. MCR 4.002, the governing court rule, confirms the district court's jurisdiction.

Defendant argued on appeal to the circuit-appellate court that the trial court erred in failing to transfer the case to the circuit court, on the basis that the injuries suffered by Plaintiff exceeded \$25,000. In response, Plaintiff acknowledged that permissible "damages" in the district court, regardless of the extent of the "injuries," were \$25,000.00 and conceded that only this amount in damages could be awarded by the district court.

Defendant explained to the circuit court that it had raised the issue of the jurisdictional limit. (Defendant brief on appeal in the circuit court, pp. 7-8, 10)

Defense counsel raised its concerns as to this strategy with the trial court during housekeeping prior to the commencement of trial on December 8, 2009. Counsel for Home Owners specifically asked the Court to take judicial notice of the Court's jurisdictional limit found at MCL 600.8301. [*Id.*, 8]

In its brief to the circuit-appellate court, Defendant explained that the court rules include a mechanism by which a district court case may be transferred to the trial court. Defendant wrote, *id.*, 10:

Counsel for Home Owners also pointed out that the Michigan Court Rules contained a mechanism for the transfer of an action when a Court discovers that it lacks subject matter jurisdiction, MCR 2.227. Obviously, this Court rule would be unnecessary if subject matter jurisdiction was static and could not change as a case progresses.

However, the district court denied the motion to transfer. *Id.*

Regardless, the trial court ruled that the matter would not be transferred to Circuit Court and * * * damages would be limited to \$25,000.00.

Two rules explicitly permit a transfer from district court to circuit court: MCR 4.201 and MCR 4.002. The first rule requires virtually no discussion, since it clearly does not apply to the circumstances of the case. It is equally certain that the second rule does not permit Defendant to move to transfer the action, although some analysis is warranted.

MCR 4.201 does not apply to this cause of action.

MCR 4.201 addresses only an action for possession or recovery of realty -- referring to (i) the written instrument for occupancy, (ii) notice to quit or demand for possession, (iii) description of the premises or the holding, (iv) "rent," "rental period," "tenancy," "trespass" and other incidents regarding recovery of property, and (v) discussion of landlord-tenant summary proceedings. Clearly, this rule has no bearing here.

MCR 4.002 permits only the plaintiff to transfer to circuit court.

A motion to transfer is governed by MCR 4.002. The rule is set forth in detail, because it is dispositive.

Rule 4.002 Transfer of Actions from District Court to Circuit Court

(A) Counterclaim or Cross-Claim in Excess of Jurisdiction.

(1) If a defendant asserts a counterclaim or cross-claim seeking relief * * *.

(2) MCR 4.201(G)(2) and 4.202(I)(4) govern transfer of summary proceedings to recover possession of premises.

(B) Change in Conditions

(1) A party may, at any time, file a motion with the district court in which an action is pending, requesting that the action be transferred to circuit court. The motion must be supported by an affidavit stating that

(a) due to a change in condition or circumstance, or

(b) due to facts not known by the party at the time the action was commenced, the party wishes to seek relief of an amount or nature that is beyond the jurisdiction or power of the court to grant.

(2) If the district court finds that the party filing the motion may be entitled to the relief the party now seeks to claim and that the delay in making the claim is excusable, the court shall order the action transferred to the circuit court to which an appeal of the action would ordinarily lie.

Certain irrelevant aspects of MCR 4.002 are immediately noted. First, subsection (A)(1) clearly has no bearing, inasmuch as no counterclaim or cross-claim was filed. Second, subsection

(A)(2) merely provides that two court rules – MCR 4.201(G)(2) and MC 4.202(I)(4) – govern transfer of summary proceedings to recover possession of premises.

Third, the critical rule is subrule (B), governing a case where the movant wishes to transfer to the circuit court in order that he or she may achieve a judgment in excess of \$25,000.

A party may move for transfer to circuit court. MCR 4.002(B)(1). The party must be a plaintiff, a counter plaintiff, or a cross plaintiff, any of whom may seek a judgment in excess of \$25,000.00. However, **the party cannot be a defendant**. This is clear from the following subrules.

Subrules (B)(1)(a) and (b) require that the moving party provide an affidavit demonstrating either of two situations: (a) “a change in condition or circumstances” that caused the moving party to wish to “seek relief of an amount or nature that is beyond the jurisdiction or power of the court to grant” or (b) “facts not known by the party at the time the action was commenced” that caused the moving party to wish to “seek relief of an amount or nature that is beyond the jurisdiction or power of the court to grant.” In either case, the party seeking relief (making the claim) before the district court must present the affidavit in support of the motion to transfer to circuit court.

The district court must then determine if it should grant the motion. Subrule (B)(2) explicitly defines the circumstances under which the district court is empowered to grant the motion. The movant must show that he or she may be entitled to the relief available in the circuit court and not available in the district court.

If the district court finds that the party filing the motion may be entitled to **the relief** the party now seeks to claim and that the delay in making the claim is excusable, the court shall order the action transferred to the circuit court to which an appeal of the action would ordinarily lie.

There can be no doubt. MCR 4.002 permits a motion by the plaintiff (counter plaintiff or cross plaintiff), predicated upon the party’s affidavit that he or she wishes to seek relief that would not

be available in the district court. Upon motion accompanied by affidavit, the motion may be granted "if the district court finds that the party filing the motion may be entitled" to the relief now sought by the plaintiff-movant. No provision in the court rule permits a defendant to move to transfer to circuit court.

Hopp Management Co. v. Rooks, 189 Mich.App. 310, 314, 472 N.W.2d 75 (1991), explains the operation of the rule.

MCR 4.002(B) was generally intended to provide a method of transfer in those situations in which a change in condition or circumstance, including facts unknown at the time of filing, so alter a party's cause of action that relief only obtainable in the circuit court must now be sought. The typical situation is that in which a personal injury action is filed in district court and a party's medical condition worsens, or it is later discovered that the actual medical condition of the party is other than that originally believed at the time of filing. [Internal quotation marks and citation omitted.]

Thus, *Hopp* confirms that only the plaintiff is permitted to bring the motion.

Defendant ignored the critical significance of MCR 4.002 (and persuaded the circuit-appellate court to accept its error). In fact, the court rule absolutely undermines Defendant's jurisdictional argument. Defendant's jurisdictional argument and MCR 4.002 necessarily contradict each other. To see this, each is reviewed.

Defendant's Argument

1. The district court's jurisdiction is limited to \$25,000.
2. When the district court learns that "potential injuries" exceed the jurisdictional amount (\$25,000), the district court must transfer or dismiss the action for lack of jurisdiction.

MCR 4.002

1. The plaintiff may move to transfer to circuit court, asserting that he seeks relief beyond the jurisdictional amount and that the delay is excusable.
2. The motion must be supported by an affidavit demonstrating that the claimed injuries exceed the jurisdictional amount (\$25,000).

3. The district court may grant or deny the motion to transfer.

Unmistakably, Defendant's argument is utterly undermined by the court rule. Whereas Defendant argues (and the circuit-appellate court agreed) that the district court must transfer or dismiss the action for lack of jurisdiction, the court rule permits the district court to retain jurisdiction over the action, notwithstanding the affidavit demonstrating claimed injuries in excess of the jurisdictional limit. Defendant's argument is fully contradicted by the rule, as written. See, *Southfield Jeep, Inc. v. Preferred Auto Sales, Inc.*, unpublished per curiam opinion (Mi.Ct.App. No. 256014, 6/29/06) (After the district court verdict for the counter defendant of \$150,000, the district court's judgment is limited to \$25,000, and the counter defendant cannot transfer the matter to the circuit court for entry of a judgment of \$150,000.)¹⁵

In sum, first, the governing statute permits an action in district court where the plaintiff prays for relief not to exceed \$25,000, thereby conclusively binding the plaintiff to that sum or less and establishing the amount in controversy. Second, Michigan decisional authority overwhelmingly confirms that: (i) jurisdiction is determined by the pleadings, and (ii) judgments for \$25,000 are entered although the finder of fact may determine that there are injuries in excess of that amount. Third, Michigan's court rules contemplate a trial in the district court although the plaintiff has presented an affidavit of a claim that exceeds the jurisdictional amount. Thus, the circuit-appellate court erred by reversing the trial court, and the Court of Appeals erred by affirming the circuit-appellate court.

¹⁵ Judgment Reversed in Part, Appeal Denied, 477 Mich. 1061, 728 N.W.2d 459 (2007).

ISSUE II

THE CIRCUIT COURT REVERSIBLY ERRED BY ORDERING A NEW TRIAL WHERE:

- (1) DEFENDANT MADE NO REQUEST FOR A MISTRIAL AT THE TRIAL LEVEL;
- (2) DEFENDANT FILED NO MOTION FOR NEW TRIAL AT THE TRIAL LEVEL;
- (3) DEFENDANT WAIVED/FORFEITED ANY REQUEST FOR NEW TRIAL BY FAILING TO SET FORTH THE ISSUE IN ITS "STATEMENT OF THE ISSUES." MCR 7.212(C)(5);
- (4) DEFENDANT, THROUGHOUT ITS APPELLATE BRIEF, MADE NO REQUEST FOR NEW TRIAL AT THE APPELLATE LEVEL; AND THEREFORE,
- (5) PLAINTIFF WAS GIVEN NO OPPORTUNITY TO AND DID NOT RESPOND TO ANY ARGUMENT FOR NEW TRIAL AND WAS THEREBY DENIED DUE PROCESS OF LAW ON APPEAL.

1. Summary of argument

The circuit-appellate court apparently perceived that its decision regarding jurisdiction may be reversed upon further appeal.¹⁶ Accordingly, the trial court issued an ancillary determination. It held that alleged attorney misconduct demanded a new trial. This is unequivocal error upon the circumstances of this case. The procedural posture is critical for a proper analysis.

Defendant's second argument to the circuit-appellate court was that the trial court erred by denying Defendant's motion for directed verdict for two reasons. First, Defendant alleged that Plaintiff's residence precluded him from insurance coverage under Defendant's policy. The circuit-appellate court rejected this argument, affirming the jury finding. Second, Defendant asserted that alleged attorney misconduct entitled Defendant to a directed verdict.

Importantly, Defendant had not requested a new trial (either by motion for mistrial or by motion for new trial) before the trial court.¹⁷ Of equal significance, Defendant did not request a

¹⁶ Upon holding that the district court was without jurisdiction, there was no reason to review attorney conduct before that court.

¹⁷ Defendant also made no request for a curative instruction.

new trial on appeal. Accordingly, Plaintiff – on appeal – properly responded to Defendant’s argument that the trial court erred by failing to grant a directed verdict, not a new trial. (The criteria for a directed verdict are entirely distinct from the criteria for a new trial.) Plaintiff submits that the circuit-appellate court impermissibly crafted its ancillary decision.

The following propositions cannot be genuinely debated.

1. Defendant was required to request a new trial in the trial court in order to preserve this issue for appeal (by motion for mistrial or motion for new trial).¹⁸
2. Defendant waived or forfeited any request on appeal for new trial by failing to include the issue in its Statement of the Issues on appeal in its brief to the circuit-appellate court, pursuant to MCR 7.212(C)(5).
3. Defendant waived or forfeited any request for new trial by failing to make any such request or argument throughout its appellate brief to the circuit-appellate court, whereby Plaintiff had no opportunity to respond to the unmade request.
4. Defendant’s decision in both the trial court and the circuit-appellate court not to request a new trial is easily explained. Review of a motion for directed verdict is de novo. Review of a motion for new trial applies an abuse of discretion standard. Defendant – by not requesting a new trial – never acknowledged that it must show that the trial court abused its discretion, and the circuit-appellate court failed to acknowledge the proper standard of review.
5. Defendant “harbored” the alleged trial court error, which in any event was so inconsequential that it cannot properly serve as a basis for ordering a new trial.
6. Defendant’s reliance upon *Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97, 330 N.W.2d 638 (1982), is palpably wrong.

2. Defendant failed to preserve its argument for new trial in the trial court.

As this Court is well aware, the appellant must identify the manner in which an issue has been preserved in the trial court for review by the reviewing court (on appeal). MCR 7.212(C)(7);

¹⁸ Defendant, also, did not request a curative instruction.

MCR 7.101(I)(1) (applying the rule to the circuit court). Defendant's statement of facts in its appellate brief to the circuit-appellate court identified no event before the trial court where it moved for new trial.¹⁹ (Home Owners Brief on Appeal, pp. 1-12) Defendant presented additional facts in its argument concerning the alleged attorney misconduct (as to a directed verdict). *Id.*, pp. 34-36. Again, Defendant was unambiguous; it did not move for a new trial before the trial court.²⁰

An issue must be raised in the trial court for appellate review. In *People v. Dupree*, 486 Mich. 693, 702, 703, 788 N.W.2d 399 (2010), this Court held:

We have "long recognized the importance of preserving issues for the purpose of appellate review." *People v. Grant*, 445 Mich. 535, 546, 520 N.W.2d 123 (1994); see also *People v. Brott*, 163 Mich. 150, 152, 128 N.W. 236 (1910) ("This court has often held that it will not review questions that have not been raised in the trial court, and such is the rule according to the great weight of authority."). In accordance with the general rule of issue preservation, "issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *Grant*, 445 Mich. at 546, 520 N.W.2d 123.

Accord, *People v. Blockton*, 477 Mich. 882, 721 N.W.2d 798 (2006), ("Generally, appeals are limited to those issues raised in the application for leave to appeal, MCR 7.302(G)(4), and arguments not raised and preserved for review are deemed waived. *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557 [1994]"); *Able Demolition v. Pontiac*, 275 Mich.App. 577, 583 n. 2, 739 N.W.2d 696 (2007) (Able did not assert in the trial court that the contract is unclear and, therefore, this issue is not preserved for appeal. *Fast Air, Inc. v. Knight*, 235 Mich.App. 541, 549, 599 N.W.2d 489 [1999].")

In this case, Defendant failed to assert in the trial court that it should be granted a new trial²¹ (and continued not to raise the assertion on appeal). Accordingly, the circuit-appellate court should not have granted any such appellate relief.

¹⁹ Defendant also demonstrated no request for a curative instruction and no motion for mistrial.

²⁰ See preceding footnote.

²¹ See preceding footnote.

The circuit-appellate court provided no procedural rationale for ordering a new trial that was not requested at the trial court level or at the circuit-appellate court level. The Court of Appeals assumed that burden.

The Court of Appeals:

(1) Reviewed the circuit-appellate court ruling regarding the putative attorney misconduct as a finding of fact (for clear error), even though the circuit was not the trial court.

(2) Held that the circuit-appellate court (although not the trial court) “did not clearly err regarding the facts.

(3) Determined that the circuit-appellate court granted appropriate relief with regard to the purported attorney misconduct, even though (a) no such relief was requested at the trial court level, and (b) no such relief was requested at the circuit court level.

(4) Recognized that Defendant had proposed at both the district court and the circuit court appellate level that it was entitled to a directed verdict and determined that this request was sufficient for the circuit-appellate court to grant a new trial for purported attorney misconduct, notwithstanding that Plaintiff was never put on notice that any consideration was being given to such relief.

Plaintiff respectfully maintains that the Court of Appeals analysis is unprecedented and wrong. Essentially, the Court of Appeals jettisoned established law regarding preservation of error.

3. Defendant waived/forfeited its argument for new trial by failing to raise the issue in its statement of the issues.

MCR 7.212(C) provides, in pertinent part:

(C) Appellant's Brief; Contents. The appellant's brief must contain, in the following order:

* * *

(5) A statement of questions involved, stating concisely and without repetition the questions involved in the appeal. * * *

* * *

(7) The arguments, each portion of which must be prefaced by the principal point stated in capital letters or boldface type. As to each issue, the argument must include

a statement of the applicable standard or standards of review and supporting authorities.

Defendant's brief on appeal to the circuit court provided no statement of an issue to the effect that it was or is entitled to a new trial. To the contrary, Defendant asserted either of two arguments regarding the alleged attorney misconduct.

First, Defendant structured its argument to indicate that it was entitled to a directed verdict. In its statement of the argument for directed verdict, it contended that it was entitled to a directed verdict because of (a) the "residency" issue and (b) the alleged misconduct issue. (Defendant's Brief on Appeal, p. ii) The text in favor of a directed verdict is structured in the same manner. (Defendant's Brief on Appeal [in the circuit-appellate court], pp. 34-36). There is absolutely no statement of an issue concerning a new trial. And, of course, no matter how deeply one may delve into the text (facts or argument), there is no mention of a "new trial" issue.

Second, even more confusing, in the text directed to the argument for directed verdict, Defendant somehow tied the alleged attorney misconduct argument to its assertion that the district court was divested of jurisdiction, asserting that Plaintiff "must file in Circuit Court" (revisiting Issue I). (Defendant's brief in the circuit-appellate court, p. 36.) In sum, Defendant never presented the issue of a new trial in its Statement of the Issues (or in its entire brief).

The law is both unequivocal and unambiguous. An issue not presented in the statement of the issues is waived. *River Inv. Group, L.L.C. v. Casab*, 289 Mich.App. 353, 369, 797 N.W.2d 1 (2010) ("This issue is waived because plaintiff failed to state it in the statement of questions presented in its brief on appeal."); *English v. Blue Cross Blue Shield of Michigan*, 263 Mich.App. 449, 459, 688 N.W.2d 523 (2004) ("An issue not contained in the statement of questions presented is waived on appeal."); *Caldwell v. Chapman*, 240 Mich.App. 124, 132, 610 N.W.2d 264 (2000) ("Again, this issue is not raised in the statement of questions presented. If defendant is attempting

to argue this as an issue, he has waived it by failing to properly present the issue.”); *Marx v. Department of Commerce*, 220 Mich.App. 66, 81, 558 N.W.2d 460 (1996)(“However, this issue is not raised in the statement of questions presented. Review is therefore inappropriate.”); *Hammack v. Lutheran Social Services of Michigan*, 211 Mich.App. 1, 7, 535 N.W.2d 215 (1995) (“This argument was not raised in the statement of the questions presented and, therefore, review is inappropriate.”) (Citations and internal quotation marks omitted in all above references.)

Accordingly, inasmuch as Defendant failed to present the issue of a new trial in its statement of the issues (or anywhere in its appellate brief to the circuit-appellate court), the issue was waived. The Court of Appeals ignored the requirement that Defendant (appellant in the circuit-appellate court) was required to present issues in conformity with MCR 7.212(C)(5) and MCR 7.212(C)(7).

4. Defendant waived/forfeited any request for new trial by failing to make any such request or argument throughout its appellate brief, making it impossible for Plaintiff to respond to any such request.

As thoroughly discussed *supra*, Defendant made no request for a new trial in the district court. Plaintiff is fully aware that an issue may, on rare occasions, be reviewed on appeal although not preserved in the trial court. However, in this case, the issue of a new trial was not raised in the trial court and again not raised in the circuit-appellate court on appeal. Defendant led Plaintiff to understand that the issue of alleged misconduct was directed toward its argument for directed verdict.²² For the circuit-appellate court to craft a wholly different relief, of which Plaintiff had absolutely no notice, deprived Plaintiff of due process of law.

Undoubtedly, due process of law is required of appellate proceedings. See, generally, *Pellegrino v. AMPCO Systems Parking*, 485 Mich. 1134, 789 N.W.2d 777 (2010); *Dixon v.*

²² Plaintiff understands that this argument was illogical. However, Plaintiff is not required to re-write and re-argue on Defendant’s behalf and then respond to the re-written and re-argued propositions.

Deegan, 465 Mich. 970, 642 N.W.2d 679 (2002) (regarding right to appellate counsel for a misdemeanor); *People v. Jackson*, 463 Mich. 949, 620 N.W.2d 528 (2001) (regarding right to appellate counsel after a guilty plea); *People v. Billings*, 283 Mich.App. 538, 770 N.W.2d 893 (2009); *People v. Johnson*, 144 Mich.App. 125, 373 N.W.2d 263 (1985) (noting that the United States Supreme Court held that under the Due Process Clause of the Fourteenth Amendment, a criminal defendant is entitled to the effective assistance of appellate counsel in a first appeal as of right).

In *In re Rood*, 483 Mich. 73, 92, 763 N.W.2d 587 (2009), the Court reviewed the “most basic requirements of procedural due process.”

The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner.

The opportunity to be heard includes the right to notice of that opportunity. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations and internal quotation marks omitted.]

The circuit-appellate court gave no consideration to Plaintiff’s right to due process of law. Defendant made no request for a new trial in the trial court. Defendant made no request for a new trial in its brief to the circuit-appellate court. Defendant noted its objection to alleged misconduct and asserted that it provided a basis for reversing the trial court’s denial of a motion for directed verdict. Even at oral argument (at which time, any such argument would constitute a transparent ambush), there was no argument that Defendant was entitled to a new trial. Additionally, Defendant presented no discussion on appeal regarding the criteria for the trial court to grant or deny a new trial and no discussion of the standard of review for appellate review of the trial court’s decision.

In sum, there was no opportunity to be heard, no notice of the opportunity to be heard, no notice reasonably calculated to alert Plaintiff to the possibility of a new trial. Certainly, there was no opportunity to be heard at a meaningful time and in a meaningful manner. Plaintiff learned that he was at risk of undergoing a new trial only when the circuit-appellate court issued its opinion, presenting Plaintiff with a *fait accompli*. Plaintiff, accordingly, requests that this Court reverse the circuit-appellate court's opinion and order.

The Court of Appeals responded to Plaintiff's contention that he was denied due process. It wrote, "The essential requisites of procedural due process are adequate notice, an opportunity to be heard, and a fair and impartial tribunal. [Citation omitted.] Appellants received ample notice and opportunity to be heard of this issue, * * *." Sadly, the Court of Appeals was wrong. Plaintiff had no ample notice – indeed, no notice at all – that the circuit-appellate court was considering a new trial on the basis of purported attorney misconduct. The briefs submitted to the circuit-appellate court unequivocally establish this proposition.

5. Defendant's decision not to request a new trial in either the trial court or the circuit court is explained by the difference in the standard of review between a directed verdict and a new trial.

As an aid to resolving whether the Court of Appeals should have reversed the circuit-appellate court, this Court may consider Defendant's reason for not-moving for a new trial and then not requesting this relief on appeal.

At the trial court level, Defendant was undoubtedly aware of the criteria for granting a motion for directed verdict (discussed *infra*). More significantly, it was also aware that the trial court has great discretion to grant or deny a motion for new trial for purported attorney misconduct. The appellate court will not reverse the trial court's decision regarding a motion for new trial, unless the appellate court finds an abuse of discretion.

The law is plain. In *Veltman v. Detroit Edison Co*, 261 Mich.App. 685, 688, 683 N.W.2d 707 (2004), the defendant moved for a mistrial based on alleged misconduct. This Court held, “Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice.” In *Veltman*, this Court affirmed the trial court’s denial of a new trial under the following circumstances.

Defendant cites the following incidents as misconduct by plaintiffs’ counsel sufficient to justify a new trial: (1) improperly arguing that defendant lied when answering interrogatories about a similar fire at a Plymouth courthouse; (2) improperly stating in his opening statement that the jurors should put themselves in plaintiffs’ place; (3) speaking too loudly during a bench conference, which may have been heard by the jury; and (4) improperly commenting about some documents that were wrongly stapled together. Either separately or collectively, we do not believe the challenged comments require reversal.

In *Persichini v. William Beaumont Hosp.*, 238 Mich.App. 626, 632, 607 N.W.2d 100 (1999), this Court again affirmed the trial court’s exercise of discretion, noting that it would reverse only upon an abuse of discretion, which is defined as follows.

An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion.

Accordingly, Defendant was fully aware that a motion for new trial demanded that the trial court exercise its discretion in granting the motion and that a reviewing court would reverse only upon finding an abuse of discretion. *Wiley v. Henry Ford Cottage Hosp.*, 257 Mich.App. 488, 498, 668 N.W.2d 402 (2003) (“On appeal, this Court reviews a trial court’s decision whether to grant a new trial for an abuse of discretion. An abuse of discretion occurs when the decision was so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias.”); *Manley v. Detroit Auto. Inter-Insurance Exchange*, 127 Mich.App. 444, 449-450, 339 N.W.2d 205 (1983) (Regarding alleged jury misconduct, “the grant or denial of a motion for a new trial is committed to the sound discretion of the trial court; no basis for reversal

is presented unless the trial court's discretion was abused.”); *Kokinakes v. British Leyland, Ltd.*, 124 Mich.App. 650, 654-655, 335 N.W.2d 114 (1983); *Hilgendorf v. St. John Hosp. and Medical Center Corp.*, 245 Mich.App. 670, 682, 630 N.W.2d 356 (2001) (Regarding attorney misconduct, “[w]hether to grant or deny a motion for a new trial is entrusted to a trial court's discretion, which requires appellate review to be for an abuse of that discretion.”).

Consequently, Defendant's tactical decision not to bring a motion before the trial court is easily comprehended. Defendant perceived the hurdle posed by requesting that the trial court exercise its discretion in granting a new trial. Defendant also recognized the high hurdle in persuading an appellate court to reverse the trial court.

Accordingly, Defendant did not file a motion for new trial before the trial court. Then, on appeal, Defendant merely disregarded its failure to request a new trial of the trial court (on the basis of alleged misconduct). Without regard to logic, Defendant asserted that the alleged misconduct constituted a basis for reversing the trial court's denial of its motion for directed verdict. (The circuit-appellate court held that the district court did not err in denying the motion for directed verdict. Circuit Court Order, Ex. G, p. 2.)

Undoubtedly, Defendant appreciated that an appellate court will review a motion for directed verdict, *de novo*, by reference to whether the Plaintiff had presented a *prima facie* case to the jury. *Petto v. The Raymond Corp.*, 171 Mich.App. 688, 693, 431 N.W.2d 44 (1988) (“It is well established that a motion for directed verdict tests whether or not the plaintiff has made a prima facie case.”); *Guider v. Smith*, 157 Mich.App. 92, 106, 403 N.W.2d 505 (1987) (“In deciding whether a directed verdict is proper, the standard of review is whether, taking the evidence in a light most favorable to the nonmoving party, a prima facie case of liability has been established.”); *Blanchard v. Monical Machinery Co.*, 84 Mich.App. 279, 282, 269 N.W.2d 564 (1978) (“The

standard of appellate review in measuring the granting of directed verdicts * * * is whether, taking the evidence in a light favorable to plaintiff, a prima facie case of liability is established. If so, a motion for directed verdict should be denied.”); *Hastings Mut. Ins. Co. v. Croydon Homes Corp.*, 73 Mich.App. 699, 702, 252 N.W.2d 558 (1977).

Defendant, on appeal to the circuit-appellate court, in its issue regarding the trial court’s denial of the motion for directed verdict, emphasized that the decision was reviewed *de novo* (not for an abuse of discretion). Defendant was correct in this regard. Sadly, the circuit-appellate court then considered whether it should grant relief never requested by Defendant before either the trial court or the circuit-appellate court, and even more egregious, failed to recognize that a new trial on that basis should be ordered only if the trial court abused its discretion in denying a motion – never made – for new trial. The Court of Appeals then aggravated this patent error by assessing whether the circuit-appellate court clearly erred – a standard of review that applied to the district court and not to the circuit-appellate court. In sum, one error has been piled upon another error to lead to this outcome.

6. Defendant “harbored” the alleged trial court error, which in any event was so inconsequential that it cannot properly serve as a basis for ordering a new trial.

It will be recalled from the statement of facts that Defendant objected to Fortner’s comments regarding the Assigned Claims Facility and indicated to the trial court that counsel would explain the exact role of the Assigned Claims Facility.

MR. SOWLE: I have to object that that’s an incorrect statement of the Michigan no-fault law. It’s a – he’s stating the exact opposite of what the actual law is and I will gladly explain it to the jury.

THE COURT: Your objection is noted.

Thereafter, Mr. Sowle carefully explained to the jury his understanding of the role of the Assigned Claims Facility, transcribed over four pages. (Trial Tr., Vol. I, 12/15/2009, pp. 98-102)

As noted, Plaintiff assumes that the comments regarding the Assigned Claims Facility were wrong or irrelevant. Notably, these comments were made in opening argument, thoroughly responded to by Defendant, and never raised again throughout numerous weeks of trial – terminating on January 13, 2010, when the jury commenced deliberations. (Trial Tr., Vol. XIV, 1/13/2010, p. 96) Moreover, the trial court explained to the jury that the jury should follow the law as the court instructed and that statements by the lawyers are not evidence. It instructed (Trial Tr., Vol. XIV, 1/13/2010, pp. 84-85):

Members of the jury, the evidence and argument in this case have been completed and I will now instruct you on the law. That is, I will explain the law that applies to this case. Faithful performance by you of your duties is vital to the administration of justice. The law you are to apply in this case is contained in these instructions, and it is your duty to follow them. In other words, you must take the law as I give it to you. * * *

The lawyers' statements and arguments are not evidence.

Manifestly, Defendant determined that the matter was settled and that there was no need to move for a new trial.²³ Defendant – after the verdict for Plaintiff – raised the alleged misconduct as a basis for directed verdict.

In *People v. Clark*, 243 Mich.App. 424, 622 N.W.2d 344 (2000), the defendant moved to change venue. The trial court denied the motion without prejudice, “stating that it was willing to reconsider the motion at any time during the jury selection process.” *Id.*, 426. Thereafter, counsel for defendant “never renewed the motion.” *Id.* This Court explained that the alleged error was waived.

Defense counsel never renewed the motion for a change of venue, but, rather, expressed satisfaction with the jury after the jury selection process was completed. Defense counsel's failure to renew the motion and his expression of satisfaction with the jury waived the change of venue issue. A defendant may not waive objection to an issue before the trial court and then raise it as an error before this

²³ Nor did Defendant request a curative instruction or move for mistrial.

Court. To hold otherwise would allow defendant to harbor error as an appellate parachute. [*Id.*; citations and internal quotation marks omitted.]

“Counsel's actions are usually based, quite properly, on informed strategic choices * * *.” *Strickland v. Washington*, 466 U.S. 668, 691, 104 S Ct 2052, 80 L.Ed.2d 674 (1984). In this cause of action, counsel for Defendant advised the trial court that he would “gladly explain it to the jury” (the role and function of the Assigned Claims Facility). This he did; over four pages of transcript is devoted to his explanation. Unambiguously and without equivocation, counsel for Defendant made an informed, strategic decision to elucidate Plaintiff's decision to bring his claim against the Defendant, Home Owner's Insurance, and not against the Assigned Claims Facility. Indeed, upon a full appreciation of Mr. Sowle's exposition to the jury, it may be concluded that the parties' discussion of the Assigned Claims Facility worked against Plaintiff's interest. Certainly, Defendant's able counsel decided not to request a new trial at the trial court level or at the appellate level. For the circuit-appellate court to grant a new trial on appeal raises “harboring error” to unprecedented levels.

Additionally, Fortner's comment regarding the Assigned Claims Facility was inconsequential, providing no reasonable basis for reversing the trial court. (It will be recalled that if Defendant had moved for new trial and if the trial court had denied the motion, the standard of review is “abuse of discretion.”) The allegedly offending comment was made during opening argument on December 15, 2009, and never repeated during the course of the trial culminating four weeks later on January 13, 2010. During all of this time, Defendant perceived no reason to move for a new trial; indeed, any such motion would have been properly denied and would not have been reversed for abuse of discretion.. As noted above, the jury was properly instructed that it should follow the law as the court instructed and that statements by the lawyers are not evidence. Under the standards applicable to a request for new trial (a request never raised), there was no

basis for an appellate court to reverse the trial court upon the belated argument presented to the circuit-appellate court. See, generally, the extensive analysis in *Veltman v. Detroit Edison Co.*, 261 Mich.App. 685, 688-691, 683 N.W.2d 707 (2004), noting that the standard of review is abuse of discretion and rejecting the defendant's (preserved) argument in favor of new trial, on the basis of the plaintiff counsel's alleged multiple acts of misconduct. Accord, *Wiley v. Henry Ford Cottage Hosp.*, 257 Mich.App. 488, 501-505, 668 N.W.2d 402 (2003).

Manifestly, the circuit-appellate court's alternative rationale for granting a new trial requires appellate review and reversal, because it cannot logically stand for multiple reasons.

7. Defendant's reliance upon *Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97, 330 N.W.2d 638 (1982), is palpably wrong.

Defendant relies upon *Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97, 330 N.W.2d 638 (1982). Defendant wrote, quoting *Reetz*, at 102, "Where improper conduct by one or both parties influences the outcome of a trial, an appellate court may reverse although the appellant's attorney did not seek to hear [sic, cure] the error." But Defendant misinterpreted the decision, and on the facts of this appeal, *Reetz* gives no support to Defendant's position.

In *Reetz*, this Court considered the case where there was attorney misconduct but where there was no immediate objection and no request for a curative instruction. This Court explained, "The 'no objection-no ruling-no error presented' rule requires counsel to seek to have error cured before the case is submitted to the jury." *Id.*, 101-102. This Court explained that the rule is not inviolate. "When a cure is not feasible, that rule need not be invoked." *Id.*, 102. This Court certainly did not waive the requirement that the appellant must request a new trial in the trial court to preserve the request on appeal.²⁴ Indeed, in *Reetz*, critically, upon the close of trial, the appellant

²⁴ If Defendant had ever requested a curative instruction, denied by the trial court, implicitly or explicitly asserting that it would otherwise be denied a fair trial, Defendant might not be required to redundantly move for mistrial or for a new trial. No such thing occurred.

moved for a new trial. *Reetz*, at 99 (“Kinsman's motion for new trial was denied, and it appealed * * *.”) Unlike Defendant in this case, the *Reetz* appellant did preserve the issue in the trial court and then properly raised the issue on appeal. *Id.* Manifestly, the procedural posture of this appeal is entirely different from that of *Reetz*. It would belabor the obvious to again identify the deficiencies in Defendant’s argument. *See, Badalamenti v. William Beaumont Hospital-Troy*, 237 Mich.App. 278, 281, 602 N.W.2d 854 (1999) (In an appeal involving attorney misconduct, defendants appealed from the trial court's postjudgment order denying defendants' motions for, *inter alia*, a new trial.); *Kern v. St. Luke's Hospital Ass'n of Saginaw*, 404 Mich. 339, 346, 273 N.W.2d 75 (1978) (Where the appellant alleging attorney misconduct sought a new trial on appeal, “the trial court [had] denied plaintiffs' motion for a new trial.”)

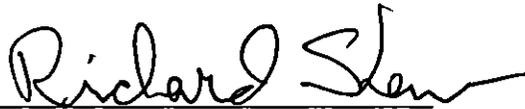
In sum, the decision below is without precedent; an appellant is never accorded a new trial on appeal where: (1) no request for a curative instruction in the trial court, (2) no request for a mistrial in the trial court, (3) no request for a new trial in the trial court, (4) no request for a new trial in the statement of the issues in the circuit-appellate court brief, (3) no request for a new trial throughout the appellate brief, and (4) no request for a new trial at oral argument before the circuit-appellate court, all of which caused the reviewing appellate court to fail to conform to the correct standard of review on this issue. The circuit-appellate court patently erred in ordering a new trial in this regard, and its order should be reversed.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellant Moody herein, by and through his attorneys, respectfully prays that this Honorable Court grant his application for leave to appeal and pursuant thereto reverse the Court of Appeals Opinion and reverse the Order of the Wayne County Circuit Court on Appeal, December 3, 2010, together with costs, and remand this matter to the trial court for post-trial proceedings.

Respectfully submitted,

RICHARD E. SHAW

A handwritten signature in cursive script that reads "Richard Shaw". The signature is written in black ink and is positioned above a horizontal line.

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Dated: April 1, 2014