

**STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION**

COMPLAINT AGAINST

Formal Complaint No. 97

Hon. Richard B. Halloran, Jr.
Third Circuit Court
Coleman A. Young Municipal Center
2 Woodward Avenue
Room #511
Detroit, Michigan 48226

**RESPONDENT'S ANSWER TO FORMAL COMPLAINT
AND AFFIRMATIVE DEFENSES**

- 1) Paragraph 1 is admitted.
- 2) Paragraph 2 is admitted.
- 3) Paragraph 3 is denied in the form stated. Respondent does not deny that for a period of approximately one and one-half years (from mid-2013 through 2014) he did not follow a boilerplate format for questioning litigants in divorce cases as to: 1) whether they lived in the State of Michigan for 180 days and Wayne County for 10 days prior to the filing of the divorce complaint; and, 2) whether the "objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." However, during that one and one-half year period, Respondent always took the steps that he felt were necessary to legally establish those facts. Respondent denies that MCL 552.9(1) and MCL 552.6(3) (as cited numerous times in the Complaint) require that a family law judge follow the precise wording of those statutes in phrasing his/her

questions, to establish the facts required. Respondent believed that he complied with statutory and court rule requirements by taking judicial notice of facts not disputed in the pleadings, and by relying on statements made by the parties and/or their counsel. As for the Examiner's citing of MCR 3.210, the Master is urged to note that this rule has dozens of subsections. No specific subsection is cited in the Complaint. Notwithstanding the Examiner's failure to cite a specific subsection of that rule, Respondent believes that he was acting in good faith to comply with all of the requirements of this court rule.

A. *CHEBAB V. CHEBAB*

- 4) Paragraph 4 is admitted.
- 5) Respondent admits that attorneys appeared on behalf of both of the parties at the hearing.
- 6) Paragraph 6 is admitted.
- 7) Paragraph 7 is admitted. Respondent would add that the transcript confirms the fact that Respondent asked the lawyers if they were contesting jurisdiction and the fact that there had been a "breakdown" of the marriage relationship to the extent that the "objects of matrimony have been destroyed." Respondent also indicated that he was taking judicial notice of the "jurisdictional" facts required by statute. The attorneys were afforded the opportunity to object and they did not do so. Respondent admits that he did not question the litigants on these areas.
- 8) Paragraph 8 is admitted in part and denied in part. Respondent admits that no sworn testimony was taken from a party to the case at the June 17, 2013 hearing. However, Respondent took judicial notice of the necessary facts with the consent of two

seasoned family law attorneys, and he believed in good faith that he had the authority to do so.

- 9) Paragraph 9 is denied in the form stated. MCL 552.9(1) does not “require” that “sworn testimony” be taken to establish jurisdiction. See Attachment 1.
- 10) Paragraph 10 is denied in the form stated. MCL 552.6(3) does not “require” that “sworn testimony” be taken to establish a “breakdown in the marriage relationship.” See Attachment 2.
- 11) Paragraph 11 is admitted in part and denied in part. Respondent admits that sworn testimony was not taken. However, MCR 3.210 (which contains dozens of subsections) merely describes how testimony is to be taken and when it may be taken. This rule does not address MCL 552.9(1) or MCL 552.6(3). Respondent would add that he believed in good faith that he did take proofs in court based upon Michigan Rules of Evidence (MRE) 201 which establishes the parameters of “judicial notice.” Two seasoned family law attorneys were present and they did not object. In fact, they concurred in Respondent taking judicial notice on the matters required by statute.
- 12) Paragraph 12 is admitted.

B. *TAYLOR v TAYLOR*

- 13) Paragraph 13 is admitted. Both parties did appear and their counsel were present.
- 14) Paragraph 14 is admitted.
- 15) Paragraph 15 is admitted in part and denied in part. Respondent did not ask the parties whether they lived in Michigan for 180 days and Wayne County for 10 days prior to the time the complaint was filed. However, Respondent did establish jurisdiction in

his judgment, based upon the pleadings and the fact that there was no dispute as to those issues. At page 3 of the transcript which is not cited by the Examiner, Respondent indicated that he had reviewed the consent judgment of divorce prepared by the attorneys and that he was familiar with the case. Further, MCL 552.9(1) does not contain any language indicating that “sworn testimony” must be taken to establish jurisdiction i.e., that the party(s) lived in Michigan for 180 days and Wayne County for 10 days prior to the filing of the case. See Attachment 1.

16) Paragraph 16 is denied in the form stated. MCL 552.6(3) does not contain language indicating that “sworn testimony” is required to establish that there has been a “breakdown in the marriage relationship . . .” See Attachment 2. Further, Respondent did question the parties about their intent to divorce and from their answers to Respondent established in his judgment the statutorily described “breakdown in the martial relationship.”

17) Paragraph 17 is denied in the form stated. The allegations assume that MCL 552.9(1), MCL 552.6(3) and MCR 3.210 contain language indicating that “sworn testimony” must be taken to establish the matters alleged in Paragraphs 15 and 16 of the Complaint. As for the allegation regarding MCR 3.210, Respondent incorporates by reference his answer to Paragraph 3 above.

18) Paragraph 18 is admitted. Respondent did sign the consent judgment of divorce that was prepared by the parties’ attorneys.

C. HIGHTOWER v HIGHTOWER

19) Paragraph 19 is admitted.

- 20) Respondent admits that the parties appeared without counsel.
- 21) Respondent admits that both parties were placed under oath.
- 22) Respondent does not challenge the quoted transcript. It appears accurate. Respondent would add that the transcript reflects the fact Respondent made findings based upon “the testimony” and a review of the divorce complaint. Respondent found that there was a “breakdown in the marital relationship to the extent that the objects of matrimony have been destroyed.” Plaintiff specifically informed Respondent that she would not “go back and live with [the defendant] as husband and wife.” All of this was done on the record, in open court. Further, the bench book published by the Institute of Continuing Legal Education (ICLE) for use by family law judges and attorneys, clearly indicates that there is no precise format that a family law judge must follow in order to establish jurisdiction and the fact that the parties believe a divorce should be granted. This publication was relied on by Respondent as it is by other family law judges throughout Michigan. The publication states:

G. Proofs at Judgment Hearings 10.22

The testimony of at least one party in a divorce action-typically, but not necessarily the plaintiff-must establish the court’s jurisdiction to enter a divorce judgment and the grounds for divorce. Some courts require only that the testifying party state that the contents of the complaint are true, that the plaintiff signed it, and that there is no possibility of reconciliation. This three-question method is common in larger circuits others require a brief, or more detailed, explanation of the grounds for divorce...

(see Attachment 3, emphasis added)

- 23) Paragraph 23 is denied in the form stated. MCL 552.9(1) does not contain a requirement that the “sworn testimony” be taken to establish jurisdiction.
- 24) Paragraph 24 is denied in the form stated. MCL 552.6(3) does not contain a requirement that “sworn testimony” be taken to establish that there has been a “breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed. . .”
- 25) Paragraph 25 is denied in the form stated. Respondent incorporates by reference his answer to Paragraph 3 above.
- 26) Respondent admits that he signed the judgment of divorce on October 3, 2013.

D. *McELRATH v McELRATH*

- 27) Paragraph 27 is admitted. Both parties and plaintiff’s counsel were present.
- 28) Paragraph 28 is admitted.
- 29) Paragraph 29 is admitted.
- 30) Respondent admits that due to oversight parties were not sworn.
- 31) Paragraph 31 is denied in the form stated. MCL 552.9(1) does not contain a requirement that “sworn testimony” be taken to establish jurisdiction. See Attachment 1.
- 32) Paragraph 32 is denied in the form stated. MCL 552.6(3) does not contain a requirement that “sworn testimony” be taken to establish a “breakdown in the marriage relationship . . .” See Attachment 2.
- 33) Paragraph 33 is denied in the form stated. Respondent did take what he believed were sufficient proofs in open court on which to grant a judgment of divorce. Respondent incorporates by reference his answer to Paragraph 3 above.

34) Respondent admits that on August 19, 2013 he signed the judgment of divorce.

E. OTHER CASES

35) Paragraph 35 is admitted.

36) Paragraph 36 is admitted.

37) Paragraph 37 is admitted in part and denied in part. Respondent admits that the cited statement was contained in his February 26, 2015 response. However, Respondent denies that the one sentence cited by the Examiner accurately reflects a full and accurate statement of his position as set forth in his 32 page response provided to the Judicial Tenure Commission (JTC) on February 26, 2015. In his lengthy response Respondent denied that he had engaged in misconduct and explained the reasons for his denial.

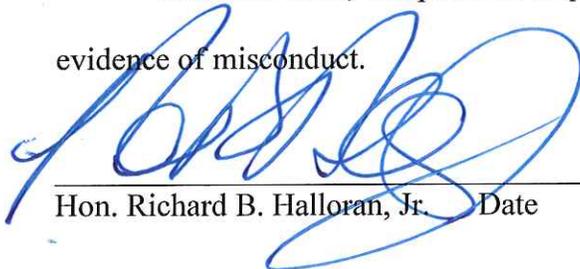
Even more importantly, on May 19, 2015 Respondent answered another inquiry from the JTC. That answer was also over 30 pages in length. That second answer was submitted after more transcripts (from divorce cases) were obtained. Respondent submitted documentation showing that *in pro per* cases he did follow what would be considered the more traditional approach for establishing jurisdictional requirements and the fact that there had been a “breakdown in the marital relationship.” Transcripts showed that during *in pro per* cases Respondent generally asked; 1) whether the party lived in Michigan for 180 days and Wayne County for 10 days prior to the filing; and, 2) questions about the breakdown in the marital relationship. Significantly, Respondent also pointed out that the sentence quoted by the Examiner in Paragraph 37 of the Complaint was not accurate as to *in pro per* cases.

38) Paragraph 38 is neither admitted nor denied. Respondent has no personal knowledge of SCAO's calculations and how they were arrived at. Respondent informed the Examiner of his lack of such information in his May 19, 2015 response and the Examiner never provided further information.

39) Paragraph 39 is denied in the form stated. The Examiner has chosen to ignore clarifying information provided to the JTC in Respondent's May 19, 2015 submission regarding *pro per* cases which comprise a substantial percentage of Respondent's docket. We incorporate by reference our answer to Paragraph 37 above.

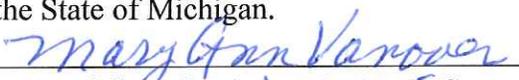
40) Paragraph 40 (a) – (o) contain conclusions of law which require no response. However, to the extent that the Master or the JTC feel an answer is required, each paragraph is denied as being untrue.

WHEREFORE, Respondent requests that the Complaint be dismissed as there is no evidence of misconduct.

 9/14/15

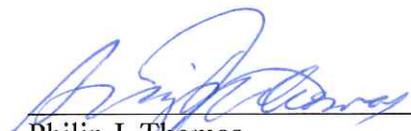
Hon. Richard B. Halloran, Jr. Date

Subscribed and sworn to before me this 14th
day of SEPT., 2015 in the County of WAYNE
in the State of Michigan.



Notary Public acting in WAYNE County.

My Commission Expires: 4-20-22



Philip J. Thomas

RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent intends to offer the following affirmative defenses at trial:

- 1) **Lack of Jurisdiction:** Pursuant to MCR 9.203(B), the Commission may not function as an Appellate Court. In this matter, the Commission is attempting to function as an appellate court by reviewing the judgments entered by Respondent for proper evidentiary support. Of all the divorce cases referenced in the Examiner's Complaint, not one of the judgments was ever the subject of a challenge, a motion for reconsideration, or an appeal regarding the allegations that form the substance of the Complaint. Despite those facts the JTC is now attempting to review the sufficiency of judgments entered by Respondent.

- 2) **Good Faith:** Pursuant to MCR 9.203(B) an erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct. During the 15 years prior to the time period referenced in the Complaint, Respondent followed what would be considered the traditional method of establishing proofs in divorce cases. Respondent came to believe that such boilerplate questioning had become archaic and he adopted what he perceived as innovative changes. Respondent believed in good faith that these innovative changes complied with MCL 552.9(1), MCL 552.6(3), relevant court rules and MRE 201. On January 14, 2015 after Respondent was notified that the JTC was looking into his method of taking of proofs in divorce cases, Respondent returned to his

practice of following the “traditional” format regarding this area. Respondent will show at trial/hearing that his actions were taken in good faith.

- 3) Respondent reserves the right to add affirmative defenses as they become known through discovery.

Respectfully submitted by,


Philip J. Thomas

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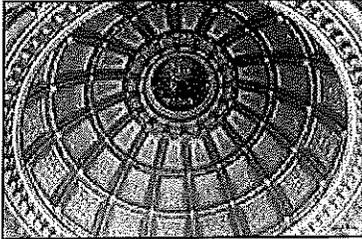
Paul J. Fischer, Examiner, Judicial Tenure Commission on Monday, September 14, 2015.

The foregoing statement is true to the best of my knowledge, information, and belief.


Mary Ann Vanover

9/14/15
Date

ATTACHMENT 1



MICHIGAN LEGISLATURE

Michigan Compiled Laws Complete Through PA 130 of 2015
 House: Adjourned until Wednesday, September 16, 2015 1:30:00 PM
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Revised Statutes of 1846 (EXCERPT) DIVORCE

552.9 Judgment of divorce; residency requirement; exception.

Sec. 9.

(1) A judgment of divorce shall not be granted by a court in this state in an action for divorce unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint and, except as otherwise provided in subsection (2), the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint.

(2) A person may file a complaint for divorce in any county in the state without meeting the 10-day requirement set forth in subsection (1) if all of the following apply and are set forth in the complaint:

(a) The defendant was born in, or is a citizen of, a country other than the United States of America.

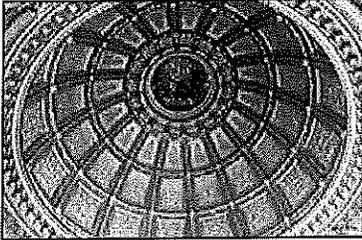
(b) The parties to the divorce action have a minor child or children.

(c) There is information that would allow the court to reasonably conclude that the minor child or children are at risk of being taken out of the United States of America and retained in another country by the defendant.

History: R.S. 1846, Ch. 84 ;-- CL 1857, 3230 ;-- CL 1871, 4741 ;-- How. 6231 ;-- Am. 1887, Act 137, Eff. Sept. 28, 1887 ;-- Am. 1895, Act 202, Eff. Aug. 30, 1895 ;-- Am. 1897, Act 116, Eff. Aug. 30, 1897 ;-- CL 1897, 8624 ;-- Am. 1899, Act 210, Eff. Sept. 23, 1899 ;-- CL 1915, 11400 ;-- CL 1929, 12731 ;-- Am. 1931, Act 139, Imd. Eff. May 21, 1931 ;-- Am. 1941, Act 2, Eff. Jan. 10, 1942 ;-- Am. 1947, Act 323, Eff. Oct. 11, 1947 ;-- CL 1948, 552.9 ;-- Am. 1953, Act 174, Eff. Oct. 2, 1953 ;-- Am. 1956, Act 95, Eff. Aug. 11, 1956 ;-- Am. 1957, Act 257, Eff. Sept. 27, 1957 ;-- Am. 1958, Act 227, Imd. Eff. May 26, 1958 ;-- Am. 1959, Act 174, Eff. Mar. 19, 1960 ;-- Am. 1974, Act 344, Imd. Eff. Dec. 21, 1974 ;-- Am. 1989, Act 217, Imd. Eff. Nov. 27, 1989

Popular Name: No-Fault Divorce

ATTACHMENT 2



MICHIGAN LEGISLATURE

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Revised Statutes of 1846 (EXCERPT) DIVORCE

552.6 Complaint for divorce; filing; grounds; answer; judgment.

Sec. 6.

(1) A complaint for divorce may be filed in the circuit court upon the allegation that there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. In the complaint the plaintiff shall make no other explanation of the grounds for divorce than by the use of the statutory language.

(2) The defendant, by answer, may either admit the grounds for divorce alleged or deny them without further explanation. An admission by the defendant of the grounds for divorce may be considered by the court but is not binding on the court's determination.

(3) The court shall enter a judgment dissolving the bonds of matrimony if evidence is presented in open court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.

History: R.S. 1846, Ch. 84 ;-- Am. 1847, Act 105, Eff. May 16, 1847 ;-- Am. 1848, Act 150, Imd. Eff. Mar. 30, 1848 ;-- Am. 1851, Act 64, Eff. July 5, 1851 ;-- CL 1857, 3227 ;-- CL 1871, 4738 ;-- How. 6228 ;-- CL 1897, 8621 ;-- CL 1915, 11397 ;-- CL 1929, 12728 ;-- CL 1948, 552.6 ;-- Am. 1971, Act 75, Eff. Jan. 1, 1972

Popular Name: No-Fault Divorce

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ATTACHMENT 3

Michigan Family Law

Edited by
Hon. Marilyn J. Kelly
Judith A. Curtis
Richard A. Roane

Volume 1

The Institute of Continuing Legal Education

2004-55-35

Michigan Family Law
Seventh Edition

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Judith A. Curtis

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- 10.1 Stipulation and Order for Withdrawal of Pleadings (Divorce)
 - 10.2 Default, Affidavit, and Notice of Entry (Divorce)

- file the proof of service of default, MCR 2.603(A)(2)(b); and
 - file a request for a Friend of the Court recommendation. (In some counties, the Friend of the Court issues recommendations automatically. Note that the time for paying the additional Friend of the Court fees for mediation and investigation varies by county. Attorneys should consult local practice for the proper procedure.)
2. Determine that the waiting period has expired.
 3. Prepare a proposed judgment of divorce, and prepare and serve a motion for entry of default judgment (form 10.6), with a proposed judgment attached. (If the defendant has not appeared, this step is not necessary and sometimes not possible. Nevertheless, it is a good practice to have the opposing counsel or party see, and if possible approve, the proposed judgment, especially if it awards the plaintiff substantial assets or provides relief different to that requested in the complaint.) The hearing date in the notice of hearing must be at least seven days after service of the motion. MCR 2.603(B)(1)(b). See §10.11.
 4. Have the judgment approved by the Friend of the Court, if required by the court. MCR 3.211(G).
 5. Make enough copies to obtain true copies for the client, the opposing party or attorney, and the Friend of the Court if support is ordered.
 6. Arrange a date and time for the parties to sign documents transferring rights in property.
 7. Prepare the documents to take to the hearing (see the list of documents needed above). Also, if entering a default judgment that is not a consent judgment, prepare evidence to present to the court so that the court can make the necessary findings to determine that the provisions for property division, spousal support, etc., in the proposed judgment are equitable. See §§10.7 and 10.11.
 8. Give the documents and fees to the judge's clerk and present proofs at the hearing (see §10.22). If you are not entering a consent judgment signed by both parties, the proofs on the record must include evidence so the court can make the necessary findings to determine that the provisions for property division, spousal support, etc., in the proposed judgment are equitable. See §§10.7 and 10.22.
 9. If the court approves the judgment,
 - obtain true copies of the judgment and leave the original and the Friend of the Court copy with the court clerk,
 - serve a copy of the judgment on the defendant within seven days,
 - file proof of service of the judgment on the defendant,
 - record any documents transferring property and any order canceling notice of lis pendens, and
 - serve orders dissolving injunctions on third persons.
 10. If the court does not approve the proposed judgment, present a modified proposed judgment in accordance with the court's opinion within 14 days. MCR 3.210(B)(4).

G. Proofs at Judgment Hearings

§10.22 The testimony of at least one party in a divorce action—typically but not necessarily the plaintiff—must establish the court's jurisdiction to enter a divorce

judgment and the grounds for divorce. Some courts require only that the testifying party state that the contents of the complaint are true, that the plaintiff signed it, and that there is no possibility of reconciliation. This three-question method is common in larger circuits. Others require a brief, or more detailed, explanation of the grounds for divorce. If you are not entering a consent judgment signed by both parties, the proofs on the record must include sufficient evidence so the court can make the necessary findings to determine that the property division, spousal support, and other provisions in the proposed judgment are equitable. See §10.7. An attorney might ask the following questions:

- What is your name?
- What is your present address?
- How long before you began this action did you continuously live in Michigan?
- How long before you began this action did you continuously live in [county] County?
- When, where, and by whom were you married to the defendant?
- What was [your / the defendant's] name before you married the defendant?
- Were any children adopted, born, or conceived during this marriage? [Are you / Is your wife] pregnant now?
- What are the names and ages of these children?
- When were you separated?
- Where is your spouse presently residing?
- You state in your complaint for divorce that there has been a breakdown of your marriage to the extent that the objects of matrimony have been destroyed and no reasonable likelihood remains that your marriage can be preserved. Is this statement true?
- Describe to the court briefly the facts on which you base this statement.
- Do you think there is any possibility of reconciliation?
- [If entering a consent judgment signed by both parties:] You and your spouse have entered into a property settlement agreement that has been written into the proposed judgment of divorce. Is that correct?
- Here is a copy of the proposed judgment of divorce. Is that your signature? Is that your spouse's signature?
- Have you had an opportunity to read the terms of the property settlement agreement in the proposed judgment of divorce? Do you understand the terms of this agreement and are they satisfactory to you? (Attorneys should seek agreement from their clients concerning specific important provisions, especially spousal support and pension rights.)
- The Friend of the Court has recommended that you have custody of your minor children. Do you desire such custody?
- (If entering a default judgment that is not a consent judgment, counsel should ask the client questions on the record to develop facts to allow the court to make any necessary findings, as appropriate to the case, including findings on the spousal support factors, property division factors, child custody factors, findings that the property division is equitable, and findings regarding attorney fees under MCR 3.206(C).)

- The Friend of the Court has recommended \$[amount] for the support and maintenance of your minor children. Is this recommendation satisfactory to you?
- Do you desire to have your former name restored to you?

After asking any other pertinent questions, the attorney should state that if the court has no questions or objections, the plaintiff moves for entry of a (default) judgment of divorce.

III. Relief from Judgments

A. In General

§10.23 A party wanting to contest a divorce judgment or other order entered in a divorce action has several avenues of relief available: amendment, rehearing, appeal, clarification, modification, or setting the order or judgment aside for fraud. Each of these remedies is subject to specific procedural requirements and is available only if the specific grounds can be established. For example, rehearing contemplates an entirely new trial, but modification seeks changes in certain provisions of the judgment because of changed circumstances. Therefore, it is essential that the attorney carefully analyze the reasons for a client's dissatisfaction with the judgment to determine the proper remedy, if any. The use of an incorrect procedure may preclude the use of the correct procedure if, for instance, it causes the attorney to miss a deadline for seeking relief under the proper method. *E.g., Clark v Clark*, 315 Mich 254, 23 NW2d 653 (1946) (claim that proofs did not support modification of order should have been raised by appeal of order for modification and could not be raised by subsequent motion for modification); *Colestock v Colestock*, 135 Mich App 393, 354 NW2d 354 (1984) (defendant should have appealed trial court's initial ruling that plaintiff's tort cause of action was not marital asset; ruling was not proper grounds for motion to set aside judgment); *Banner v Estate of Banner*, 45 Mich App 148, 206 NW2d 234 (1973) (errors in proceedings that might have been sufficient to warrant reversal on direct appeal may not constitute adequate grounds for motion for relief from judgment).

MCR 2.119 governs postjudgment motions in domestic relations actions. MCR 3.213.

B. New Trial or Rehearing

§10.24 A rehearing or new trial may be ordered on the motion of a party or on the court's own initiative. MCR 2.611. A new trial is granted if a party's substantial rights are materially affected by the grounds listed in MCR 2.611(A)(1) and .612(C)(1): irregularity in the proceedings, fraud or other misconduct of the prevailing party, a decision against the great weight of the evidence, newly discovered evidence, an error of law or mistake of fact by the court, void judgment, or any other reason justifying relief from the operation of the judgment. *Curylo v Curylo*, 104 Mich App 340, 304 NW2d 575 (1981); *Hoven v Hoven*, 9 Mich App 168, 156 NW2d 65 (1968); *see also* MCR 2.613(A) (error or defect in order is not ground for vacating, modifying, or otherwise disturbing judgment or order unless refusal to take this action appears to court to be inconsistent with substantial justice).