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MICHIGAN APPELLATE PRACTICE JOURNAL

AN OFFICIAL PUBLICATION OF THE STATE BAR OF MICHIGAN APPELLATE PRACTICE SECTION

Spring 2013, Vol. 17, No. 2

In this Issue

From the Chair

by Phillip J. DeRosier

A question recently arose on the Section's listserv concerning whether a defendant needed to file a cross-appeal in order to make an argument in support of the trial court's decision to grant summary disposition, where the argument was one that the trial court had *rejected*. The situation described involved a slip and fall case in which the defendant moved for summary disposition on alternative grounds: either (1) that the hazard was open and obvious, or, in the alternative (2) that the defendant did not have constructive notice of the hazard. The trial court apparently rejected the open and obvious argument, but agreed with the defendant that it lacked constructive notice and granted summary disposition on that basis. The question was whether in the plaintiff's appeal, the defendant was required to file a cross-appeal in order to argue the open and obvious doctrine as an alternative basis for affirming the trial court's grant of summary disposition.

Several people offered their thoughts, including me. The consensus seemed to be that although a cross-appeal was not necessary, it would be wise to file one to be "safe." This caution appeared to stem from certain Court of Appeals decisions like the one in *Robbins v Village Crest Condominium Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued Feb 7, 2012; 2012 Mich App LEXIS 213 (Docket No. 300842). In that case, the trial court dismissed the plaintiff's premises liability claim arising from her slip and fall on black ice, finding that the condition was open and obvious. The Court of Appeals, however, reversed, concluding that there was a "material question of fact regarding whether there were indicia of a potentially hazardous condition." *Id*. at *7.

In an attempt to offer an alternative basis for affirming the trial court's dismissal of the case, the defendant in *Robbins* argued that the plaintiff had failed to provide any evidence that the black ice caused her to fall in the first place. The defendant made this argument in the trial court, but the court did not address it – presumably because it found the condition to be open and obvious in any event. Although the Court of Appeals eventually addressed the argument, it was not before stating that it could have "refuse[d] to consider the issue" because the defendant did not file a cross-appeal. In support of that position, the Court of Appeals stated:

> In support of its argument that the circuit court correctly granted summary disposition in its favor, defendant argues that plaintiff's theory, i.e., that black ice caused her to fall, is not supported by the record. Specifically,

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> defendant argues that plaintiff offered nothing more than mere speculation and conjecture to establish that she slipped and fell on black ice. Defendant argued below that plaintiff's causation theory was mere conjecture, but the circuit court failed to address or decide the issue below. "Although filing a cross-appeal is not necessary to argue an alternative basis for affirming the [circuit] court's decision, the failure to do so generally precludes an appellee from raising an issue not appealed by the appellant." *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 351; 725 NW2d 684 (2006), citing *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999). While we could refuse to consider the issue because defendant has not filed a cross-appeal, we will address the issue because it involves a question of law for which all necessary facts have been presented. . . . [*Id*. at *8-9.]

The problem with *Robbins* is that the Court's assertion that the defendant was required to file a cross-appeal in order to argue lack of causation is impossible to square with established Supreme Court precedents, which have long held that although an appellee cannot obtain a more favorable outcome on appeal without filing a cross-appeal, "'an appellee who has taken no cross appeal may still urge in support of the judgment in its favor reasons that were rejected by a lower court.'" *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994) (citation omitted). See also *Cacevic v Simplematic Eng'g Co*, 463 Mich 997; 625 NW2d 784 (2001) ("[A]n appellee is not required to file a cross-appeal to advance arguments in support of a judgment on appeal that were rejected by the lower court."). Applying that rationale in *Cacevic*, the Supreme Court vacated footnote 2 of the Court of Appeals' opinion in that case, in which the Court of Appeals reversed a judgment on a jury verdict in the defendant's favor but, because the defendant did not file a cross-appeal, declined to address the defendant's alternative argument that the trial court should have granted its motion for a direct verdict. The Supreme Court found that this was error, and remanded the case to the Court of Appeals to consider the defendant's alternative argument.

In addition to being binding precedent, the Supreme Court's decision in *Cacevic* makes sense: since the defendant received a favorable judgment and thus was in no way aggrieved by it, why should the defendant have been required to file a cross-appeal in order to preserve the ability to rely on an alternative argument in support of that judgment? Applying *Cacevic* to the situation in *Robbins*, it should have been clear that the defendant in *Robbins* was free to defend the trial court's decision on any grounds it wished (assuming they were properly raised below, of course) – without the need for a cross-appeal.

So where did the *Robbins* Court go wrong? It appears that it was in misapplying the Court's prior decision in *Turcheck*. The *Turcheck* Court did say that the failure to file a cross-appeal "generally precludes an appellee from raising an issue not appealed by the appellant." *Turcheck*, 272 Mich App at 351. However, *Turcheck* did not involve a defendant seeking to advance an alternative basis for upholding a favorable decision. Rather, the "issue" that the *Turcheck* Court found to require a cross-appeal – whether the trial court properly denied the defendant's request for attorney fees – involved a challenge by the defendant to an entirely separate order than the one being appealed – an order dismissing the plaintiff's breach of contract action. Thus, the *Turcheck* Court properly determined that the defendant's "failure to file a cross-appeal from the trial court's denial of its request for attorney fees precludes it from now attempting to obtain a decision more

favorable than that rendered below," i.e., dismissal of the plaintiff's case. *Id*.

The *Turcheck* Court, in turn, cited *Kosmyna v Botsford Community Hosp*, 238 Mich App 694; 607 NW2d 134 (1999), which further undermines *Robbins*. In *Kosmyna*, the defendants appealed the trial court's order denying their motion to compel arbitration. In denying the motion, the trial court found that the defendants had waived their right to arbitration. On appeal, the Court of Appeals agreed that this was error, but nevertheless affirmed on the alternate ground that the arbitration agreement was unenforceable because it "[did] not comply with statutory requirements." *Id*. at 696. Rejecting the defendant's argument that the issue was not properly before the Court because the plaintiff "ha[d] not filed a cross appeal," the *Kosmyna* Court explained that a cross-appeal was not required "in order to argue an alternative basis for affirming the trial court's decision, even if that argument was considered and rejected by the trial court." *Id*.

In light of the Supreme Court's decisions in *Middlebrooks* and *Cacevic*, as well as the Court of Appeals' own decisions in *Turcheck* and *Kosmyna*, it seems clear that the *Robbins* panel was simply mistaken in suggesting that the defendant's failure to file a cross-appeal in that case meant that it did not properly preserve its alternative argument for affirming the trial court's summary disposition order. Although the *Robbins* decision is unpublished, and is thus not precedentially binding, it is still troubling because of the uncertainty it creates – as evidenced by the recent exchange on the listserv. And while there may be no "harm" in filing a cross-appeal as a precautionary measure it would be nice if the rules were clear so that a seemingly unnecessary filing can be avoided. Perhaps a court rule amendment is in order?

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Michigan Peremptory Orders: A Supreme Oddity

By Gary Maveal

This article is an abridgement of that forthcoming in Volume 58 of the Wayne Law Review. Both argue that Michigan's peremptory order rule has spawned an era of routine double appeals that the framers of our appellate courts had warned against.

MCR 7.302(H)(1) allows our Supreme Court to summarily affirm or reverse Court of Appeals judgments on an application for leave to appeal. Michigan's peremptory order rule contrasts starkly with rules in other states and its use is truly aberrant where the justices are not unanimous in the ruling.

National norms of state supreme courts prescribe that requests for discretionary review of an intermediate appellate court be either granted or denied. Judicial restraint dictates that the first question of appeal-worthiness be rigidly divorced from the ultimate determination of its merits. These deliberate customs of discretionary appeals are tempered to allow expedited ruling in emergency or if a party's right to immediate relief is clear, e.g., as in mandamus. Our Supreme Court followed this practice for most of the 20th Century.

But in 1964, in anticipation of the opening of the Michigan Court of Appeals, the Supreme Court crafted a rule that it might summarily affirm or reverse any decision of that new court after a review of an application for leave to appeal—even when no emergency existed. As will be seen, the "peremptory order" rule melded others designed for mandamus and emergency cases into a blanket authorization to summarily decide the merits of any application to review the new court of appeals.

Innocent Origins: Peremptory Writs of Mandamus

The Supreme Court's original peremptory rulings were legitimately borne in the prerogative writs of prohibition and mandamus.

Before the Michigan Constitution of 1963, there was no appeal as of right in criminal cases. Incongruously, civil judgments carried a right to appeal to the Supreme Court if the judgment exceeded $500 or ruled a statute unconstitutional. R. Kagan, *The Evolution of State Supreme Courts*, 76 Mich. L. Rev. 961, 977-78 & n. 40 (1978); 1923 Mich. Pub. Acts 247. Instead, review of trial courts was available

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through common law writs such as bills of review, mandamus, and prohibition.

Mandamus was called a "peremptory" writ when it authoritatively concluded the action; as a "clear command to perform the duty or do the act indicated, no alternatives [were] given." Peremptory mandamus contrasted with "alternative mandamus," the latter writ gave the respondent official the option of complying or showing cause to the court why he should not do so. Complaints in mandamus against public officials and agencies in both the Michigan Supreme Court and circuit courts were typically resolved summarily based upon pleadings and affidavits.

The statute from 1915 authorized a show cause with four-days' notice of a hearing to resolve any contested facts. Mich. Comp. Laws § 15184 (1915). If a circuit court denied the writ, application for supreme court review was traditionally available by certiorari. See, e.g., *Woolman Constr. Co. v. Sampson,* 219 Mich. 125; 188 N.W. 420 (1922) (action to compel county drain commissioners to make payments to contractor); *Jackson v. Vedder,* 218 Mich. 292; 187 N.W. 702 (1922) (action against city clerk in election dispute concerning authorization to issue bonds).

Mandamus was also available in the supreme court as a matter of original jurisdiction and could be used to challenge rulings of trial judges before or after trial. Michigan (like other states) adopted practices of England's Court of King's Bench by assigning the supreme court with general supervisory control of public administrators. Mandamus thus played an important role in the development of responsible government throughout the United States. L. Goodman, *Mandamus in the Colonies: The Rise of the Superintending Power of American Courts*, 2 Am. J. of Legal Hist. 1, 34 (1958).

1931-33 Rules: Applications Granted or Denied Absent an Emergency

In 1931, rules of appellate practice were first codified to treat mandamus and other writs in the same way as most discretionary appeals.

Under the Michigan Court Rules of 1931, parties seeking mandamus or other discretionary writ had to seek leave to appeal from the Supreme Court. Rule 60 prescribed disposition of the application: the supreme court would endorse them as either "allowed" or "denied;" if allowed, briefing of the questions would follow as a matter of course. Mich. Ct. R. 60 (1931). If an emergency presented, Rule 67 allowed a party to urge an early hearing on the appeal - and it specified mandamus as a typical case warranting expediting. Mich. Ct. R. 67 (1931).

The court rules were amended in 1933 to improve appellate procedure. Revised Rule 60, §2(a) required applicants for leave to appeal to the supreme court to specify whether they sought review by general appeal or by prerogative write, i.e., mandamus, prohibition, or certiorari. This new requirement was the reason for adding language to the Rule authorizing something other than simply granting or denying the application.

If extraordinary writ was sought and deemed appropriate on the submitted papers, the new Rule 60, §5 provided: "[U]pon such application the court, in lieu of leave to appeal, may, in its discretion, order issuance of the proper original writ." K. Searle, Vol. 3 A Treatise on Pleading and Practice at Law and in Equity in the State of Michigan §1411 (1934). In practice, peremptory issuance of an extraordinary writ was confined to cases of a clear showing that respondent had violated a legal duty to perform or refrain from performing an act.

Rule 60 of the 1933 Rules thus authorized that the application for leave to appeal be granted, denied, or, alternatively, that "the proper original writ" issue if such were appropriate.

Practice under both the 1931 and 1933 versions of the Michigan Court Rules saw the Supreme Court issue summary orders only in cases of clear entitlement to the relief, or in emergencies. In all other case, the application was either granted or denied; if granted, the case was briefed as a calendar case.

The Studies Exploring the Idea of a Court of Appeals

U. of M. Law Professor Edson Sunderland, and state bar committees he served on, had examined the idea of creating an intermediate court of appeals for Michigan since at least 1922.

In 1933, Professor Sunderland was the chief author of a lengthy report for the Judicial Council examining the ideal structure for an appellate system. "The Organization and Operation of Courts of Review" studied all aspects of appellate procedure in the state courts. Comparing practices and statistics, and drawing on pertinent scholarship, it examined how to improve the capacity and efficiency of reviewing courts. Innovations in creating intermediate courts of appeals, adding lawyer staffing, and deciding cases without opinions were all reviewed. Chief among its findings were the "vexing aspects" of double appeals in states with intermediate courts of appeal.

The Sunderland report posited that allowing a discretionary second appeal would undermine public confidence

because non-lawyers could not understand how courts of "substantially equal ability" should reach different results on legal questions. It questioned double appeals in cases where a unanimous appellate court was later reversed by a bare majority of a state's supreme court. The report derided such judgments - by a minority of the combined number of all appellate judges - as "spectacle" to be avoided. Reviewing practices in other state supreme courts on discretionary appeals, the report questioned the true benefit of second appeals given their costs in time and expense.

Prof. Sunderland's aversion to double appeals no doubt caused Michigan to be one of the last major states to create an intermediate appellate court.

In 1956, a Joint Committee on Michigan Procedural Revision was formed among the bench, the State Bar, and the legislature. Charles Joiner chaired a statewide committee to propose comprehensive modernization of Michigan procedure. Jason Honigman, and the State Bar Committee on Civil Procedure he chaired, collaborated on the Joint Committee's work. The Joint Committee's ambitious rewrite of rules of pleading and practice covered the gamut of modern reforms that was later adopted as the Revised Judicature Act.

The Joint Committee also examined the court's decisional practices on applications for leave to appeal, compared them to practices in others states, and studied the desirability of an intermediate appellate court. Its report revisited the findings of the 1933 Sunderland Report in light of the court's increasing workload. But the Joint Committee warned that failing to guard against double appeals would undermine the value of a new court. While the problem of double appeals is most serious where a second appeal is a matter of right, the Joint Committee saw the danger in routine grant of discretionary review. It recommended that a court of appeals be established, but warned that its success required that it be the principal court for correcting errors; "double appeals" - review by the Supreme Court from decisions of a new court of appeals - were a serious hazard to avoid.

The Peremptory Order Rule Adopted as an Emergency in 1964

The 1963 General Court Rules carried forward a rule allowing a peremptory order only in case of emergency. GCR 1963, 806.5. That same year, Michigan voters adopted a new Constitution creating the Court of Appeals and giving convicted defendants a right to appeal. These new appeals as of right would begin in March 1964, before the new Court of Appeals would open in 1965. In apparent fear it would be overrun by delayed applications for leave to appeal, the Supreme Court hurriedly added a rule giving itself the power to summarily affirm or reverse any decision of that new court on any application, even when no emergency existed.

On January 21, 1964, with no notice to the bar of a proposed rule change, the court ordered that upon "*any* application for leave to appeal, the court may, in lieu of leave to appeal, issue an appropriate peremptory order." GCR 1963, 806.7, *reprinted in* 372 Mich. at xxii. *Supreme Court of Michigan, Resolution of Adoption,* 43 Mich. St. B. J. 34, 37 (1964). Ironically, the operative wording of the new sub-rule was lifted directly from former Rule 806.5 on emergencies. Citing a potential influx of cases on its docket as an emergency, the Court abandoned its tradition that only a true emergency could justify foregoing customs of deliberative processes on discretionary appeals.

Later in 1964, new rules for the Court of Appeals saw the Supreme Court's rules redrawn to authorize peremptory decision, including outright reversal, on both by-pass applications and applications for leave to appeal rulings of the new Court of Appeals. GCR 1963, 852 and 853.

From 1964-76, the peremptory order rule was hardly used because its broad language was read narrowly as an authorization for the rare case. In 1973, Honigman & Hawkins' treatise on the General Court Rules explained the power would "of course" be used "sparingly - only where it was clear that the matter was controlled by settled legal principles." It cited two cases that had presented bona fide public emergencies. *O'Brien v. Detroit Election Comm'n,* 383 Mich. 707; 179 N.W.2d 19 (1970)(granting mandamus to compel a scheduled election to proceed) and *Crestwood Sch. Dist. v. Crestwood Educ. Ass'n.,* 382 Mich. 577; 170 N.W.2d 840 (1969) (reviewing injunction against a strike by public school teachers).

But the treatise's influence to temper the Court's use of its broad rule ended in 1976.

Expanded use of Peremptory Orders in 1976

In 1975-76, the State Court Administrator's Report purported to explain its move toward the Supreme Court's more aggressive use of peremptory orders. Citing the growth of applications (over 1000 in 1976-77) and a mounting backlog, it said that similar problems had been a principal cause of the creation of the Court of Appeals in 1963. Since the intermediate court had "provided an immediate but not a lasting solution," a "major change in the judicial system must be initiated" to avoid a backlog of "intolerable proportions." The report didn't identify peremptory orders by name, but cryptically referred the justices using an "abbreviated procedure, authorized by Court Rule." State Court Admin. Office 1976-77 Report, State Court Administrator, Michigan 8 (1977).

The Supreme Court's decision to routinely use peremptory orders coincided with the greater use of commissioners in disposing of applications. The 1975-76 term

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began a period of rapid growth in the commissioner's staff, more than doubling from four to ten attorneys by 1980. The commissioner had assumed a prominent role in proposing and drafting peremptory orders for the justices, helping them issue 166 peremptory dispositions in 1976 (15.6% of the court's work product) and 103 in 1977 (8.9%).

Chief Justice Coleman's State of the Judiciary Message admitted the Court's stepped-up use of peremptory orders in 1979. In trying to cope with docket pressures, she said the court had "cut some procedural corners." The Chief Justice's remarks prefaced a statistical report citing G.C.R. 1963, 852.2(4)(g) and 853.2(4) and their "more summary procedure." Mich. State Court Admin. Office, State Court Administrator, Final Report pp. 10-12 (1978-1979). In context, her references were unmistakably to peremptory orders.

The Court continued to routinely use *per curiam* opinions and peremptory orders to summarily resolve applications—often by reversals. On average, peremptory orders made up over 10% of the court's dispositions between 1976-1986. This consistent percentage reported the aggregate of all final orders unaccompanied by an opinion, i.e., including affirmances, reversals, and orders of remand; yet the Justices' Annual Reports claimed that each such order included statements of specific reasons for the peremptory action. The reports also boasted that the "more summary procedure" saved twelve to twenty months' time otherwise consumed by decision upon leave granted. But apparently some of the justices grew concerned that the peremptory orders might be an aberration among state high courts.

As new chief justice in 1983, G. Mennen Williams chaired the justices' internal debate whether peremptory rulings ought to require more than a simple majority vote.

At an administrative conference on March 23, 1983, the justices voted that *per curiam* opinions and peremptory orders would be released only when votes to issue them were unanimous. The justice's resolution also directed the chief commissioner to report on the standards used in other states on peremptory dispositions.

Apparently no such report was delivered to the Justices. Yet a 50-state survey of supreme court practices had been prepared by The National Center for State Courts in 1980 - with input from the Michigan Supreme Court. The NCSC review of state supreme court certiorari procedures showed that Michigan's peremptory order rule was unlike any other; the invariable norm elsewhere was grant or denial of an application for discretionary appeal.

For reasons unexplained in the minutes of the Justices conferences, the Court's requirement of unanimity in approving the Commissioners proposed *per curiam* opinions and peremptory orders on applications was short-lived. In August 1983, the court revisited the issue and voted that peremptory orders could be entered upon the "concurrence of five justices, providing that the dissenting Justice or Justices agree that the disposition may be released over their dissent."

In the late 1980's, Justice Levin began openly disagreeing with the court's routine peremptory rulings, frequently dissenting from such orders and *per curiam* opinions. Nevertheless, the justices continued to issue nearly 200 peremptory orders each year throughout the 1990s.

Motions seeking peremptory reversal have become a common part of applications for leave to appeal to the Supreme Court. Statistics from 2002-10 from the Court Annual reports document that the Court's peremptory *reversals* averaged over thirty per year during this period:

2002 25	**2005** 35	**2008** 40
2003 32	**2006** 54	**2009** 23
2004 16	**2007** 43	**2010** 22

The Growth in Peremptory Rulings Over Dissents

As the court's use of commissioners and the peremptory order rule increased, so too did the number of published dissents to them. Peremptory orders and *per curiam* opinions on applications regularly resolved difficult legal issues without consensus among the Justices.

Many of these non-unanimous peremptory orders involve cases where all three members of the intermediate court's panel agreed by single opinion. In such cases where the supreme court reverses by a 4-3 vote, the losing party had persuaded a majority of the appellate judges of the justness of his appeal. Even where the lower court was not unanimous, reversals issued over dissents urging the majority to devote the time and trouble of granting leave before resolving significant legal questions. *See Genaw v. Genaw*, 486 Mich. 940; 782 N.W.2d 208 (2010). The supreme court regularly issues its terse reversals of court of appeals decisions by adopting the dissenting opinion below without stating what the issues were. *See Dean v. Childs,* 474 Mich. 914; 705 N.W.2d 344 (2005). Sometimes *per curiam* opinions issue over the minority's urging that the court instead grant leave to appeal to allow full briefing of the issues. *Providence Hospital v. Morrell,* 431 Mich. 194; 427 N.W.2d 531 (1988).

Peremptory reversals over dissents frequently involve fact-specific legal conclusions. Examples of such bare Supreme Court majorities reversing the court of appeals on legal questions infused with factual nuance include:

1. Whether evidence was sufficient to support a criminal

conviction. *People v. Quasarano*, 444 Mich. 903; 512 N.W.2d 317, 317 (1993)

2. Whether a civil rights plaintiff had established a *prima facie* case of employment discrimination. *Mich. Dept. of Civil Rights v. Fashion Bug of Detroit,* 473 Mich. 863; 702 N.W.2d 154 (2005) (reversing findings of racial discrimination by agency and circuit court, as well as the court of appeal affirmance based on those findings, in a six-sentence peremptory opinion).
3. Whether a pedestrian had slipped on black ice that was an open and obvious hazard. *Kachudas v. Invaders Self Auto Wash, Inc.*, 486 Mich. 913; 781 N.W.2d 806 (2010).
4. Whether motorists had suffered a severe impairment of bodily function under the No Fault Act. *Jones v. Olson,* 480 Mich. 1169; 747 N.W.2d 250 (2008).

Critique of Michigan's Rule

Michigan's peremptory order rule is contrary to norms of state supreme courts with intermediate courts of appeals. Other high courts do not typically allow non-unanimous rulings on the merits of an application except in an emergency or obvious entitlement warranting summary action. Only in such cases is it appropriate to conflate the issues of appealability with the merits.

Most states had similar experiences in creating their intermediate courts of appeals to accommodate the criminal defendant's entitlement to an appeal as of right. At the same time, most sought to relieve their high courts of the burden of increased volumes of criminal appeals and moved to make their supreme court's docket wholly discretionary (or nearly so). The new courts were to reduce the caseloads of supreme courts - to allow high courts to focus on centralized law-making and administration of justice. M. Shapiro, *Appeals*, 14 Law & Soc'y Rev. 629, 634 (1980); M. Osthus, The Am. Judicature Soc'y, Intermediate Appellate Courts 44-70 (1976).

To that end, states prescribed presumptive finality to their intermediate courts' decisions absent compelling grounds for supreme court review. Despite this shared history, Michigan's rule stands in sharp contrast with prevailing practices in the United States. The Appendix in the Wayne Law Review charts the rules and statutes of the thirty-nine other states with intermediate courts of appeal prescribing supreme court power to grant or deny applications for discretionary review. Our high court's focus on expedited error correction has not been emulated elsewhere.

Michigan's rule and practices raise at least two primary issues.

First, by inviting routine motions for peremptory reversal, has the court contributed to its increasing caseload? The open invitation to parties to pursue a second appeal by application for leave adds cost, delay, and uncertainty to all concerned. While the cost of this second appeal to a loser on the first is nominal, its burden on the justices is not. The Supreme Court's routine use of peremptory reversal makes a second appeal much more attractive to litigants. The court's regular use of peremptory orders may exacerbate its own workload.

Relatedly, peremptory orders may hamper the court of appeals in fulfilling its role by undermining its deliberative processes and the finality of its decisions. By engaging in non-unanimous, "error-correcting" peremptory orders, the court has departed from its professed selectivity and encouraged attorneys to counsel clients to seek further appeal rather than abide by a court of appeals mandate. It may also be that intermediate court judges are less inclined to strive for unanimity in decision where the supreme court regularly cites dissenting opinions as the basis for its peremptory orders. In the worst of all possible cases, summary decisions may lead to public perception that the court's accelerated judgments are motivated by politics or ideology.

Conclusion

The Michigan Supreme Court's 1964 rule on peremptory orders unjustifiably arrogated an extraordinary power. Summary action upon a request to review court of appeals decisions was never recommended as a desirable feature of Michigan's appellate system absent an emergency. In practice, peremptory orders have frequently been used as a tool for simple majorities of the court to short-circuit the process of discretionary review. Perfunctory reversals by peremptory order (over dissent) carry the obvious danger that they be perceived as overreaching by the justices. In any event, peremptory orders have contributed to Michigan effectively authorizing two appeals in civil cases.

Debate on the wisdom of the peremptory rule did not precede its emergency adoption in 1964. Nor did the court did not articulate a cogent rationale for its expanded use of the rule beginning in the mid-1970's. The court should engage in a debate on its rule and the bar should urge it to study the practical effects of peremptory orders on the administration of justice.

At a minimum, the Michigan Supreme Court should revise its rule by deleting the word "peremptory" and to allow instead summary reversal on an application only in cases of bona fide emergency or upon unanimous vote of the justices.

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Michigan's Changed Appellate Abuse of Discretion Standard

Part V: The New Standard and Factors Analysis

by Howard Yale Lederman

Welcome to this series, Part V. In Part I, we began with the Michigan Supreme Court's adoption of the almost insurmountable *Spalding v Spalding* abuse of discretion standard. In Part II, we traced the Michigan Supreme Court's adoption of the new *People v Babcock*[1] principled range of outcomes standard:

> Therefore, the appropriate standard of review must be one that is more deferential than de novo, but less deferential than the *Spalding* abuse of discretion standard…..an abuse of discretion standard recognizes that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome."[2] "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion[,] and, thus," the appellate court should "defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes.[3]

In Part III, we saw that although the Court's two cited decisions, *Conoco, Inc v J M Huber Corp* and *US v Penny,*[4] did not illuminate the principled range of outcomes standard, an uncited decision, *US v Koen,*[5] did. The *Koen* Court explained:

> Of course, an abuse of discretion standard does not mean no review at all. It simply means that we shall not second-guess the decision of a trial judge…in conformity with established legal principles[,] and, in terms of its application of those principles to the facts of the case, is within the range of options from which one could expect a reasonable trial judge to select.[6]

In Part IV, we saw how the Michigan Supreme Court extended the new standard from criminal to civil cases, and how the Court's adoption of the new standard was just as arbitrary as its adoption of the old. We also began answering the question under the new standard: What is an abuse of discretion? We began with an error of law constituting an abuse of discretion.[7] We focused on how errors of law-use of the wrong law or failure to use the right law-can be an abuse of discretion.

We saw an example of an error of law constituting an abuse of discretion under the new standard: *Brikho v Ulticare,*[8]where the Michigan Court of Appeals applied the new abuse of discretion standard and the Court's factors for evaluating and determining whether or not trial courts should accept late requests for admissions responses. The Court concluded that by failing to apply the three *Janczyk*[9] factors for determining whether or not to accept late requests for admissions responses, the trial court had abused its discretion. Thus, *Brikho* exemplifies not only an error of law constituting an abuse of discretion, but mandatory factors analysis conflicting with and constraining trial court discretion.

Since Michigan appellate courts are mandating trial court use of factors to analyze more and more discretionary decisions, we will focus on the inherent conflict and its possible resolution.

As I said in earlier parts, to almost all Michigan litigators, the abuse of discretion standard does matter. Michigan appellate courts review many different kinds of trial court decisions for abuse of discretion. Examples include whether to permit pleading amendments,[10] which discovery sanctions amounts to impose,[11] which case evaluation sanctions amounts to impose,[12] whether to uphold default entry or default judgment,[13] which hearing and trial evidence to admit or exclude,[14] whether to reconsider an order,[15] whether to remove a personal representative,[16] whether to adjourn a motion or hearing, [17] and whether to accept late requests for admissions responses.[18] If the abuse of discretion standard practically compels appellate courts to uphold lower court discretionary decisions, negative outcomes from appeals from such decisions are near certainties. But if the abuse of discretion standard permits appellate courts some latitude in reviewing and deciding these appeals, positive outcomes are likelier. So, the kind of abuse of discretion standard in place has great practical impacts.

In a growing number of discretionary decision areas, Michigan appellate courts have adopted factors analyses, where appellate courts analyze several factors to determine whether trial courts have abused their discretion. Factors analysis is attractive, because, as Justice Levin recognized, defining the exact boundaries of trial court discretion is impossible.[19] Doing so is also undesirable. While we do not want

trial court judges taking the law into their own hands and defying appellate court decisions, we also do not want them acting like mindless, rigid bureaucrats and robots. In recognizing more than one principled decision, the new abuse of discretion standard, like the old, promotes expanded trial court discretion. But the new standard also has ill-defined boundaries. So, the new standard needs some way of defining the boundaries. Factors analysis supplies that way.

Sometimes, appellate courts have compelled trial courts to use these factors. Examples of factors analysis areas include whether to default, dismiss, or otherwise sanction parties and attorneys for discovery order violations,[20] whether or not to find good cause to and a sufficient affidavit of merit to set a default entry aside,[21] whether or not to adjourn a court conference, hearing, or other proceeding,[22] whether to grant or deny a motion for preliminary injunction,[23] what level of spousal support to award,[24] whether or not to default or dismiss parties and cases for failure to comply with court rules or obey a court order,[25] whether or not to permit pleading amendments,[26] whether or not to accept late requests for admissions responses,[27] what amount of attorney fees to award.[28] These factors can be exclusive or nonexclusive. Whether express or implied, the purpose of factors analysis is to restrict trial court discretion. The restriction may be more or less. *Brikho* exemplifies the ultimate restriction: Apply the factors or face reversal. Factors analysis also adds some content and meaning to the principled range of outcomes standard.

In evaluating and determining what is an abuse of discretion, as a rule, Michigan appellate courts have not gone beyond the principled range of outcomes general definition. They have not compared and contrasted possible trial court decisions to help determine whether actual trial court decisions are an abuse of discretion or not. In Michigan appellate court decisions, you will not find two, three, or more possible trial court decisions with labels such as "principled," "unprincipled," "inside the range of principled decisions," or "outside the range of principled decisions." Rather, you will find appellate courts analyzing only actual trial court decisions. This situation makes developing general rules on what constitutes an abuse of discretion difficult. But factors analysis makes developing such rules easier. *Brikho* exemplifies the starting point: A trial court decision not applying the relevant factors exemplifies an error of law and is an abuse of discretion.

However, most discretionary decisions do not involve applying the wrong law or not applying the law. Rather, they involve applying the right law. So, the next and harder question is what is an abuse of discretion in this context? Factors analysis can help answer this through examples. We can see this best by concentrating on one discretionary decision area at a time.

Whether to default, dismiss, or otherwise sanction parties and attorneys for discovery order violations exemplifies an area, where, in defining the factors and compelling trial courts to use them, the Michigan Court of Appeals has been active. In 1990, the Court consolidated factors from several earlier Michigan appellate cases into the *Dean* factors.[29] These factors are:

1. Whether the violation was willful or accidental.
2. Whether the violating party had a history of refusing to respond to discovery requests or refusing to disclose witnesses.
3. Whether the violation prejudiced the other party.
4. Whether the other party had actual notice of the responsive discovery documents or information or witnesses and how much actual notice the other party had.
5. Whether the violating party had a history of deliberately delaying the proceedings.
6. How much the violating party complied with other discovery order provisions than the ones at issue.
7. Whether the violating party attempted to cure the violation.
8. Whether a lesser sanction would better serve the interests of justice.[30]

The Court has repeatedly emphasized that trial courts should evaluate these factors on the record and consider all its options in determining the proportionate sanction.[31] Since then, the Court has used the *Dean* factors to create an environment, where trial courts have broad, but not limitless, discretion. A few examples will illustrate how the Court has accomplished this.

Hardrick v ACIA[32] exemplifies a situation, where the trial court did not abuse its discretion through an error of law, but through an error in application of the law to a discovery order violation situation. *Hardrick* was a first-party No Fault Act case involving payment for attendant care services. After ruling that ACIA had violated its discovery orders, "by providing belated and incomplete responses to discovery requests [document requests and interrogatories]," the trial court rejected the "extreme" sanction of default judgment.[33] Instead, the trial court adopted the "`lesser sanction'" of barring ACIA "from presenting any witnesses or evidence." [34] So, ACIA could only cross-examine Hardrick's witnesses and challenge his evidence through objections and arguments.

The trial court's rationale was ingenious. Since the trial court applied the *Dean* factors, it did not commit an error of law. The trial court did not find willful violations. The trial court did find severe prejudice to Hardrick. The trial court cited passage of the discovery deadline, the case evaluation hearing date, and the dispositive motion deadline. The trial court found that default judgment was not justified. Rather, the trial court sanctioned ACIA with the above "`lesser sanction.'" Afterward, at Hardrick's counsel's request, the trial court adjourned the trial twice. In the meantime, "ACIA had

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supplied Hardrick with complete discovery[,] and Hardrick had sufficient opportunity to review the information, thereby eliminating any possible prejudice."[35] When ACIA moved for reconsideration of the sanctions order, the trial court, through a visiting judge, denied the motion. As expected, the trial court entered judgment on a jury verdict for Hardrick.

Reversing, the Court held that in choosing its above "lesser sanction," the trial court had abused its discretion. In its factors analysis, the Court began, by agreeing with the trial court's findings on several factors. The Court agreed that ACIA's violations were not willful. The Court agreed that the default judgment sanction was too severe. The Court implicitly agreed that until the two trial adjournments, ACIA's discovery violations had prejudiced Hardrick severely. Only because of the trial court's failure to re-evaluate the situation in light of the two adjournments and the motion for reconsideration did the Court begin to find an abuse of discretion. The Court found that the two adjournments and ACIA's provision of complete discovery had removed the prejudice. The Court concluded that the above "lesser sanction" was disproportionate to the new situation, and that the new situation called for a new sanction: Barring ACIA from presenting only undisclosed documents, information, and witnesses.

The Court recognized that the "lesser sanction" was more severe than a default entry or a default judgment, because the defaulted defendant could at least obtain a hearing or trial on the plaintiff's requested damages and call damages witnesses and introduce damages evidence there. Under the lesser sanction, ACIA could not call any witnesses and could introduce little evidence. Thus, the trial court's factors analysis had the perverse outcome of sanctioning a negligent discovery order violator more severely than a willful violator and exposing the negligent violator to a far greater judgment against it. As a result, the trial court's discovery sanction reconsideration decision was an abuse of discretion. Therefore, *Hardrick* illustrates an abuse of discretion arising not from an error of law, but from a misapplication of the law to the situation. Finally, *Hardrick* illustrates the Court's use of factors analysis to constrain the trial court's discretion and find an abuse of discretion based on far fewer than all the factors.

Other decisions illustrate the Court's use of factors analysis to find no trial court abuse of discretion. For example, in *Lawton & Cates, SC v International Brotherhood of Teamsters Local 299,*[36] the Court used factors analysis to uphold the trial court's witness exclusion sanction. There, Lawton & Cates served standard expert witness interrogatories on the Teamsters asking it to identify its expert witnesses, and describe the substance of their anticipated testimony. The Teamsters identified their expert, Donald Campbell, and outlined his testimony subjects: "[F]ee agreements, engagement versus retainer fees, etc."[37] The Teamsters continued that "Campbell had 'not finished' his review and analysis, but that he would testify regarding 'all facts in Plaintiff's correspondence' and facts in the correspondence of local union officers, and that he would rely on '[r]ules of professional conduct governing attorneys' as the basis for his opinions."[38] So far, so good. But after Campbell had completed his analysis, the Teamsters never supplemented their interrogatory responses. Lawton & Cates never deposed Campbell.

Just before trial, Lawton & Cates moved in limine for discovery sanctions. At oral argument, the Teamsters' counsel stated that he knew that Lawton & Cates wanted the Teamsters to supplement the above interrogatory responses, and that he knew that Lawton & Cates intended to move in limine to bar Campbell's testimony. Nonetheless, the Teamsters' counsel did nothing to supplement the above interrogatory responses. The trial court granted the motion and barred Campbell from testifying. The trial court explained that the Teamsters' unsupplemented interrogatory response identified Campbell, but did not disclose his conclusions and opinions. Also, the interrogatory response was too general and vague. Since Lawton & Cates could not prepare to address his undisclosed conclusions and opinions, the trial court excluded his testimony.

Affirming, the Court analyzed the factors and found no abuse of discretion. The Court found that although the Teamsters did not violate any other discovery rules or orders, the violation was willful due to the Teamsters' counsel's above prehearing knowledge and failure to act. The Court implied that though having every opportunity to cure the discovery rule violation, the Teamsters did nothing to cure it. The Court emphasized the substantial prejudice to Lawton & Cates. Lastly, the Court found that the sanction was proportionate, because the trial court limited it to the sole witness whose testimony the discovery violation affected. Thus, the Court could cite four strong factors to support the trial court's decision. Therefore, the Court used factors analysis to conclude that in barring Campbell's testimony, the trial court had not abused its discretion.

Let's change the *Lawton & Cates* facts a little bit. Let's say that the Teamsters' counsel did not have the above prehearing knowledge. Let's say that the Teamsters' counsel forgot to supplement his interrogatory responses. Let's say that Lawton & Cates moved in limine just before trial to bar Campbell's testimony. Let's say that the trial court granted the motion. This situation removes willfulness from the discovery rule violation. This situation also affects the attempt to cure factor: If the Teamsters' counsel did not see the violation, how could he try to cure it? Further, this situation opens a feasible

lesser sanction. The trial court could deny the motion, if the Teamsters made Campbell available for deposition immediately and paid all deposition attorney fees and costs incurred promptly. The question becomes: Does the drastic exclusion of Campbell's testimony remain a principled option for a negligent discovery rule violation?

Here, the requirement for the trial court to evaluate possible lesser sanctions on the record becomes crucial. This evaluation enables the appellate court to see and understand the trial court's factors analysis. This evaluation also enables the appellate court to apply its factors analysis better. Finally, this evaluation enables the appellate court to constrain the trial court's discretion. In our changed facts example, the trial court would have to evaluate the above lesser sanction on the record. Since exclusion of Campbell's testimony was a drastic sanction, the trial court would have the burden of establishing why the lesser sanction was not feasible. If the trial court could not do so, its rejection of the lesser sanction and exclusion of Campbell's testimony would not be a principled decision, but an arbitrary decision. This would be especially true in light of the drastic expert witness exclusion sanction at stake. Therefore, the changed facts situation impacts on an appellate court's factors analysis strongly enough to justify an appellate court's reversal of a trial court's decision barring Campbell's testimony as an abuse of discretion.

Thus, in the discovery sanctions area, factors analysis has helped answer the questions: What is a principled decision? What is an abuse of discretion? This is true not only in the easier error of law area, but in the harder application of law to facts area. Factors analysis gives appellate courts a common starting point, a common frame of reference, in evaluating trial court discretionary decisions. Factors analysis promotes more consistent and rational appellate and trial court decisions. Indeed, as trial courts' use of factors analysis increases, appellate review of discretionary decisions becomes easier. Appellate and trial courts "are on the same page." Therefore, I expect to see factors analysis spread to more and more discretionary decision areas.

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Endnotes

1 *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

2 *Babcock,* 469 Mich 247, 269 (citations omitted).

3 *Babcock,* 469 Mich 247, 269, citing *Conoco, Inc v J M Huber Corp,* 289 F3d 819, 826 (CA Fed 2002) ("`Under an abuse of discretion review, a range of reasonable outcomes would survive review.'"), *US v Penny,* 60 F3d 1257, 1265 (CA 7, 1995), *cert den* 516 US 1121; 116 S Ct 931; 133 L Ed 2d 858 (1996) ("'a court does not abuse its discretion[,] when its decision 'is within the range of options from which one would expect a reasonable trial judge to select'") (citation omitted).

4 *Conoco,* 289 F3d 819, 826, and *Penny,* 60 F3d 1257, 1265.

5 *US v Koen,* 982 F2d 1101, 1114 (CA 7, 1992). *Accord, Cincinnati Insurance Co v Flanders Electric Motor Service,* 131 F3d 625, 628 (CA 7, 1997).

6 *Koen,* 982 F2d 1101, 1114. *Accord, Cincinnati Insurance Co,* 131 F3d 625, 628.

7 *Michigan Department of Transportation v Haggerty Corridor Partners Limited Partnership,* 473 Mich 124, 138; 700 NW2d 380 (2005), *People v Katt,* 462 Mich 272, 278; 662 NW2d 12 (2003), *Arath IV, Inc v Kent County Drain Commissioner,* 296 Mich App 214, 220; 818 NW2d 478 (2012), *lv den* 493 Mich 871; 821 NW2d 670 (2012).

8 Unpub Opin of the Michigan Court of Appeals, Docket No 258649, 2007 Mich App Lexis 19 (January 4, 2007).

9 *Janczyk v Davis,* 125 Mich App 683, 692-693; 237 NW2d 272 (1983).

10 *Eg, Weymers v Khera,* 454 Mich 639, 655, 666-667; 563 NW2d 647 (1997).

11 *Eg, Dean v Tucker,* 182 Mich App 27, 82; 451 NW2d 571 (1990).

12 *Eg, Ivezaj v ACIA,* 275 Mich App 349, 356; 737 NW2d 807 (2007).

13 *Eg, Saffian v Simmons,* 477 Mich 8, 9; 727 NW2d 132 (2007).

14 *Eg, People v Gursky,* 486 Mich 596, 606; 786 NW2d 579 (2010).

15 *Eg, In Re Beglinger Trust,* 221 Mich App 273, 279; 561 NW2d 130 (1997).

16 *Eg, Shoaff v Woods,* 274 Mich App 387, 396-397; 733 NW2d 419 (2007).

17 *Eg, Tisbury v Armstrong,* 194 Mich App 19, 20; 486 NW2d 51 (1992).

18 *Eg, Janczyk ,* 125 Mich App 683, 692.

19 *Ben B Fyke & Sons Co v Gunter Co,* 390 Mich 649, 659; 213 NW2d 134 (1973).

20 *Dean v Tucker,* 182 Mich App 27, 32-33; 451 NW2d 571

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(1990), *Bass v Combs,* 238 Mich App 16, 26; 604 NW2d 727 (1999), *overruled in part on other grounds Dimmitt & Owens Financial, Inc v Deloite & Touche (ISC) LLC,* 481 Mich 618, 628; 752 NW2d 37 (2008).

21 *Shawl v Spence Bros, Inc,* 280 Mich App 213, 238-239; 760 NW2d 674 (2008), *lv den* 483 Mich 913; 762 NW2d 507 (2009), *Huntington National Bank v Ristich,* 292 Mich App 376, 392; 808 NW2d 511 (2011).

22 *Tisbury v Armstrong,* 194 Mich App 19, 20; 486 NW2d 51 (1992).

23 *Michigan State Employees Association v Michigan Department of Mental Health,* 421 Mich 152, 157-158; 365 NW2d 93 (1984), *Alliance for the Mentally Ill of Michigan v Michigan Department of Community Health,* 231 Mich App 647, 660-661; 588 NW2d 133 (1998), *Campau v McMath,* 185 Mich App 724, 729; 463 NW2d 186 (1990).

24 *Olson v Olson,* 256 Mich App 619, 631; 671 NW2d 64 (2003), *lv den* 469 Mich 912; 670 NW2d 219 (2003), *Korth v Korth,* 256 Mich App 286, 289, 662 NW2d 111 (2003).

25 *Woods v SLB Property Management, LLC,* 277 Mich App 622, 631; 750 NW2d 228 (2000).

26 *Ben B Fyke & Sons,* 390 Mich 649, 659, *Weymers v Khera,* 454 Mich 639, 658; 563 NW2d 647 (1997).

27 *Janczyk ,* 125 Mich App 683, 692-693.

28 *Wood v DAIIE,* 413 Mich 573, 588; 321 NW2d 653 (1982), *Smith v Khouri,* 481 Mich 519, 529-530; 751 NW2d 472 (2008).

29 *Dean,* 182 Mich App 27, 32-33, citing *eg, North v Michigan Dept of Mental Health,* 427 Mich 659, 662; 397 NW2d 793 (1986), *MacArthur Patton Christian Association v Farm Bureau Insurance Group,* 403 Mich 474, 477; 270 NW2d 101 (1978), *Houston v Southwest Detroit Hospital,* 166 Mich App 623, 628, 631; 420 NW2d 835 (1987), *Bellok v Koths,* 163 Mich App 780, 783; 415 NW2d 18 (1987), *Middleton v Margulis,* 162 Mich App 218, 223; 412 NW2d 268 (1987), *Pollum v Borman's Inc,* 149 Mich App 57, 62-63; 385 NW2d 724 (1986).

30 *Dean,* 182 Mich App 27, 32-33.

31 *Eg, Kalamazoo Oil Co v Boerman,* 242 Mich App 75, 86; 618 NW2d 66 (2000), *Bass,* 238 Mich App 16, 26 *Vicencio v Ramirez,* 211 Mich App 501, 506; 536 NW2d 280 (1995), *Dean,* 182 Mich App 27, 32.

32 *Hardrick v ACIA,* Unpub Opin of the Michigan Court of Appeals, Docket Nos 294875, 298661, 299070, 2011 Mich App Lexis 2148 (December 1, 2011).

33 *Id* at *3.

34 *Id.*

35 *Id* at *7.

36 Unpub Opin of the Michigan Court of Appeals, Docket No 290479, 2010 Mich App Lexis 1724 (September 21, 2010).

37 *Id* at *4.

38 *Id.*

Stu's Tech Talk

by Stuart G. Friedman

Improving Your Mobile Life: Anticipatory Intelligence Apps and More for iPhones and iPads

Competition in the computer market stops stagnation. No matter how successful a product is, it is vulnerable to competition if the company slows down its development cycle. As a user of Apple mobile devices, I am starting to envy some of the features in Google's competing Android operating system. I am not prepared to "jump ship," but have been struggling to replicate some of Google's newest features on my iPhone.

Two years ago, Apple upped the mobile device game with its Siri assistant which was able to talk to you and handle simple voice tasks (e.g. Call Joe, or Set up a meeting, etc.). While hardly perfect, Siri was often a godsend for folks on the go. Last year, Apple added its passbook application which stored train and plane tickets (together with many loyalty or gift cards) and put them on your desktop just in time. This was the start of predictive intelligence. These features made users of the competing Google Android system somewhat jealous. (See the inset to get some ideas how to use Siri productively).

Some Popular Siri Commands

Call Joe – Call someone from your phone book;

Launch Pandora – Launch an application;

Setup an appointment with Joe at 9am – schedule an appointment;

Tell Linda I'm running late – Send a text message;

Give me directions to the Wayne County Circuit Court – give me turn-by-turn directions to a destination;

Note that I spent $12 on parking on the Smith matter— take a note;

Wake me up tomorrow at 7am – wakeup call;

What time is it in Beijing China? – world clock;

Email Joe and say Motion Filed – email;

Tell me about Delta Airlines DL-10 – check on flight status of flight;

What is the exchange rate for the Canadian Dollar, British Pound, euro? – get the exchange rate for a foreign currency.

What is 21 days from April 13, 2013? Date calculation.

Remind me when I get to the office to call Judge Smith – location based reminders. (Remember that you need to create a contact called "Office").

Google's return salvo was its "Google Now" program. Google Now was a remarkable program using a model known as predictive intelligence. The program monitors your emails, calendar, GPS, and contacts and tries to predict the information you need now and offer it to you on informational cards. Thus, if it sees that you have oral arguments at the Michigan Supreme Court at 9:00 am on Thursday, May 31, it will go through your calendar and tell you when you should get out the door, give you an alert concerning traffic conditions, and offer to reroute you if you have a problem. Google Now will store your boarding pass electronically and will even let you know if flight details have changed.

If you order a package from Amazon.com, Google Now will automatically add the package tracking information to the system, alert you when the package should be there and offer to track it. Google Now quickly became the "must have application" and there is mounting speculation that Apple will be launching a competitor in the near future. There are also rumors that Google will be releasing its own version of Google Now for Apple. Eric Schmidt, the CEO of Google has stated that when Google Now gets released for Apple is "up to Apple;" and suggested that Google had already submitted it to the Apple store.

In the meantime, there are two free Apple Apps that do a nice job of implementing some of this functionality.

Osito (originally named "Sherpa") is an application written by several former Google employees that can create similar functionality to Google and even has an interface which resembles Google Now. I have played with the Application for several days and found it to be a very powerful application, with one critical flaw. The only email service that Osito knows how to work with is Google Mail which rules it out for most users. Hopefully, the coders behind this program fix this serious wart.

Easilydo is another predictive intelligence application with similar functionality. Its interface is not quite as elegant as Osito, but it integrates with most emails services including Google Mail, iCloud, Microsoft Exchange, iMap. It also ties

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into your calendar, contacts, and GPS. The only people who will have problems will be some corporate users who have secured email clients such as Good. Easilydo will provide similar functionality to Google Now with respect to time departure warnings which include road delay warnings and severe weather warnings.

It will also monitor your email and offer to build contacts from people you regularly email. It will advise you when friends or clients have upcoming birthdays and offer to send birthday greetings (with an optional gift card to Starbucks or Amazon at your expense). It will search through your contacts, spot duplicates and offer to merge them. It will also harvest conference call notifications from emails, extract the call-in numbers, and PINs and offer to connect you to these services at the appropriate time.

Because of Apple's security policies, none of these programs can implement as deeply as Google Now does on Android. For example, all of these programs would be better if they could build themselves into home screens on your devices. Hopefully, Apple's eventual entry into this market will incorporate this functionality.

In the interim, Easilydo does a great deal to reduce my Android envy.

Better Calendaring

Another application that attempts to fill a gap in the Apple ecosphere is Fantastical. Fantastical is a direct substitute for Apple's calendar program. It will read the same data files as Apple calendar and provides the same synchronization as Apple's program. (In fact, you are still free to use both applications). What I find is that Fantastical is far better focused on the small screen. Rather than trying to look like a paper calendar ("skeumorphism"), Fantastical focuses on getting the information into your system quickly. To add a date, you can simply type in a sentence like "Smith Motion Hearing next Friday at 2 pm" and it will create the event in this fashion. Fantastical's interface is also designed to allow you to swipe to a date very quickly and works well on both iPads and iOS devices.

Better Mail

I have also been working to deal with the onslaught of email. Recently several programs have been introduced to try and help with this goal.

The first is Mailbox which has just come out of public beta testing. Mailbox allows you to quickly act on your email while on the go. You can swipe to archive (hide but retain emails), defer taking action on it for a set period of time, or to add it to a list ("calls to return,"). I find this feature very helpful because it is very easy to forget to answer an email which you opened on a mobile device, but needed to deal with back at the office.

Mailbox's big problem is that it only works with Google Mail. While it works with Google's business mail service attached to its Google Apps for Business, it does not work with competing systems like Microsoft Exchange. For me, this was a deal-breaker. I can only hope that Mailbox adds support for the other standards.

MailPilot is another program in this class and has launched with a great deal of fanfare and venture capital support. At $15, it is actually somewhat pricey for a mobile app. MailPilot promises to do everything that Mailbox does and to handle other formats such as Exchange. The program has a great deal of promise and I am still using it. My concern is that the program feels like it was released a little too quickly. The program still crashes a little too often, seems slow to connect to some mail servers (even on wifi networks), and I've watched mail come into my system which doesn't appear in MailPilot. I find myself going back to Apple's program to see if it missed something (which it sometimes does). The program has a great deal of promise, but doesn't seem like it is quite ready for prime time. I am anxiously waiting for the next version of the program, but can't recommend it at this time.

Update: After the article was submitted, Google released its "Google Now" application for Apple's iOS operating system. The first release only supports Google's own calendaring and email system which undercuts much of the utility of the program, but the program has a great deal of potential. Hopefully Google will include support for other email and calendaring systems in future versions of Google Now.

Stuart Friedman *is a criminal appellate attorney and a frequent speaker on technology issues.*

Department of Corrections Makes Minor Changes to its Phone System

Criminal appellate attorneys should note that the Department of Corrections recently changed its prisoner collect phone call system because their vendor recently reorganized. PCS is now "Global Tel." Web accounts are now managed at *www.offenderconnect.com*. The customer service number remains unchanged (855-466-2832), but the prompts have changed. Previous account balances were transferred to the new system.

Unpublished Opinions in the Michigan Court of Appeals

By Larry J. Saylor

The Michigan Court of Appeals web site informs the public that "like most appellate courts, the Court of Appeals observes the principle of stare decisis so that the holding in an earlier decision serves as binding precedent in a later appeal."[1] Yet only opinions selected by the court for publication are precedentially binding under the rule of stare decisis,[2] and in 2012, the Michigan Court of Appeals published only 8% of its opinions. This article reviews the history of the rule governing publication, and makes four modest proposals: First, MCR 7.215 should be amended to allow State Bar sections to request publication of an unpublished opinion.[3] At present, only the parties to a case can request publication, although from 1985 to 1995 the rule allowed "[a]ny person" to do so. Allowing State Bar sections to request publication is a reasonable middle ground that will allow interested non-parties, who may have a much broader view of the law than either the parties or the panel, to request publication, yet will not lead to an excessive number of requests. Second, the court should reinstate the 1985-1995 rule that allowed the majority of a panel to grant a request for publication, rather than requiring that the panel be unanimous. Third, MCR 7.215(D)(4), which prohibits the Court of Appeals from granting a request for publication after the Supreme Court has denied leave to appeal, serves no discernible purpose and should be repealed. Finally, the court itself should designate more of its cases for publication. This could be done with no change to the rules.

Statistics. For some years, the Michigan Court of Appeals published an annual report tabulating its case dispositions, but did not report the number of published and unpublished opinions. That changed with the court's 2012 Annual Report,[4] which reported that it published 174 opinions affecting 212 separate docket numbers (some of the opinions involved consolidated appeals). Eighty-six of the published opinions were authored and 88 were published per curiam opinions. In 2012, the court disposed of 2,689 cases by opinion, and another 3,358 cases by unpublished order, for a total of 6,047 case dispositions.[5] Depending on whether the proper numerator is 174 or 212, the Court of Appeals published either 6% or 8% of its opinions, and disposed of either 3% or 4% of all filed cases by published opinion.[6]

Publication figures are available for the federal courts of appeal and only a few other state intermediate courts of appeal, but the Michigan Court of Appeals appears to be toward the low end in percentage of decisions released for publication. In 2011, the U.S. Court of Appeals for the Sixth Circuit published nearly 13% of its 2,775 opinions on the merits. The publication rates for other federal courts of appeal ranged from a low of 9% in the Eleventh Circuit to a high of more than 36% in the First and D.C. Circuits. On average, the federal courts of appeal published 15% of their opinions.[7] Statistics for state courts are harder to come by. In 2012, the Texas Court of Appeals published nearly 54% of its 10,975 opinions.[8] That court has published over 50% of its opinions since the Texas Supreme Court eliminated the "do not publish" category for civil appeals in 2004.[9] In 2012, the Wisconsin Court of Appeals published 13% of its 988 opinions on the merits, including 45% of its 283 three-judge opinions.[10] In 2011, the Court of Appeals of Indiana published over 24% of its 2397 opinions.[11]

Difference Between Published and Unpublished Opinions in Michigan. Publication of Michigan Court of Appeals opinions is governed by MCR 7.215. Although unpublished opinions of the Court of Appeals are readily available on Westlaw and Lexis, and even on the Court of Appeals' own web site, and nothing in the Michigan Court Rules prohibits citing them,[12] whether an opinion is published is important because it determines whether the opinion is binding as precedent. "A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis," while "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis . . .."[13]

On the other hand, a published Court of Appeals opinion is precedent even if an application for leave to appeal is pending with the Supreme Court, and even if the Supreme Court has granted leave to appeal.[14] In contrast, a Court of Appeals opinion is effective as between the parties only "after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court . . .."[15] Thus, a published opinion is binding as precedent on non-parties even when it has not yet become effective as between the parties.

Types of Opinions and Standards for Publication. All opinions of the Court of Appeals "must be written," and must be one of three types: (1) signed opinions, which

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"bear[] the writer's name and "shall be published by the Supreme Court reporter of decisions"; (2) per curiam opinions, which "shall not be published unless one of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk," and (3) memorandum opinions, which "shall not be published."[16] Thus, all signed (or "authored") opinions are published, and at the time a per curiam opinion is released, any member of the panel can direct that it be published.[17]

While the rules require the Court of Appeals to publish certain types of opinions, the rules place no limits on the types of opinions that **can** be designated for publication. An opinion must be published if it is signed,[18] or if it:

1. establishes a new rule of law;
2. construes a provision of a constitution, statute, ordinance, or court rule;
3. alters or modifies an existing rule of law or extends it to a new factual context;
4. reaffirms a principle of law not applied in a recently reported decision;
5. involves a legal issue of continuing public interest;
6. criticizes existing law;
7. creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported; or
8. decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.[19]

Opinions that do not fit within any of these categories could still be useful as precedent. For example, in many areas of the law, such as consumer protection, real estate, trade secrets, antitrust, employment discrimination, and child custody, statutes establish broadly-stated rules of law that must be applied by judges to particular facts, for example by ruling on dispositive or post-trial motions. Over time, these statutes develop a judicial gloss that resembles the common law – and serves the same purpose. In other areas, like torts and contracts, the law is largely or entirely judge-made. In all of these areas, significant opinions applying the law to particular facts should be published to allow the law to develop and guide bench and bar in future cases. Yet these types of cases are not mentioned in MCR 7.215(B), and the importance of a particular opinion to the development of the law may not be as obvious to the panel deciding the case as it is to the parties (who may have other agendas, as discussed below), and interested observers.

Requesting Publication: Under the current version of MCR 7.215(D), only a party to the case may request publication of an authored or per curiam opinion that is initially released as unpublished, and the rule establishes a tight deadline of 21 days from release of the opinion for doing so:

1. Any **party** may request publication of an authored or per curiam opinion not designated for publication by

   (a) filing with the clerk 4 copies of a letter stating why the opinion should be published, and

   (b) mailing a copy to each party to the appeal not joining in the request, and to the clerk of the Supreme Court.

   Such a request must be filed within 21 days after release of the unpublished opinion or, if a timely motion for rehearing is filed, within 21 days after the denial of the motion.[20]

A party that is served with such a request may file a response within 14 days. The panel that decided the case must decide whether to grant the request "[w]ithin 21 days after submission of the request," or only 7 days after the response. However, "[f]ailure of the panel to act within 21 days shall be treated as a denial of the request."[21] While any member of the panel may direct publication of a per curiam opinion at the time it is released, a request to publish an opinion may be granted only "if the panel unanimously so directs."[22] Moreover, "The Court of Appeals shall not direct publication if the Supreme Court has denied an application for leave to appeal under MCR 7.302."[23] This subrule is curious for two reasons. First, it is virtually impossible that the Supreme Court would deny an application for leave to appeal within the 42 days allowed for a request for publication to be made and decided.[24] As we will see below, this subrule is an artifact of an earlier version that gave the Court of Appeals 182 days to decide whether to publish. Second, and in any event, denial by the Supreme Court of an application for leave to appeal would seem to **increase** the precedential value of the Court of Appeals opinion and make publication more appropriate, not less.

Resolving Conflicts Between Panels. The rule also sets out a procedure for resolving conflicts between panels regarding published opinions. "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule."[25] A panel that follows a prior

published decision only because it is required to do so by this subrule must so indicate in its opinion, and that panel's opinion must also be published.[26] The chief judge must then poll the judges of the Court of Appeals and "if appropriate" convene a special panel to resolve the conflict.[27] "The decision of the special panel must be by published opinion or order and is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court."[28] There is no procedure for resolving conflicts among unpublished opinions, or between published and unpublished opinions.

History of MCR 7.215(A), (C) and (D). The present MCR 7.215(A), (C) and (D) are the product of several pendulum swings between publication and non-publication of Court of Appeals opinions. The Court of Appeals was created by the Michigan Constitution of 1963,[29] and began operation in 1965.[30] Until 1972, all of the Court of Appeals' opinions were published.[31] In 1972, the Supreme Court amended GCR 1965, 821.1 to provide that per curiam and memorandum opinions of the Court of Appeals would no longer be published, "unless so directed by any one of the judges deciding the case."[32]

When the Michigan Court Rules were adopted in 1985, GCR 1963, 821.1 became MCR 7.215(A).[33] An August 1995 amendment modified MCR 7.215(A) to require that the initial decision to publish a per curiam or memorandum opinion must be made by a majority of the panel rather than by a single judge.[34] In 2001, MCR 7.215(A) was amended to restore the right of a single judge to direct publication.[35]

Nothing in the General Court Rules specified whether unpublished opinions had precedential effect. MCR 7.215(C), new in 1985, provided for the first time that "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis."[36]

The original MCR 7.215(D), also new in 1985, provided that "[a]ny person" could request publication of an opinion not designated for publication by simply sending a letter to the clerk:

> (D) Requesting Publication. Any person may request publication of an opinion not designated for publication by
>
> (1) filing with the clerk 4 copies of a letter stating why the opinion should be published, and
>
> (2) mailing a copy to each party to the appeal not joining in the request.
>
> The panel that filed the opinion shall decide the request.[37]

The 1985 rule contained no time limit for requesting or directing publication.

The Supreme Court amended MCR 7.215(D) in January 1987 to allow any party served with a copy of a request for publication to respond within 14 days.[38] The amendment still did not limit the time to request publication, but prohibited the Court of Appeals from directing publication more than 182 days after release of the unpublished opinion, or denial of a timely motion for reconsideration. The 1987 amendment also added the proviso that the Court of Appeals could not direct publication if the Supreme Court had denied leave to appeal.[39]

In August 1995, however, the Supreme Court deleted MCR 7.215(D) in its entirety, leaving no way for either a party or a nonparty to request publication. Justice Cavanagh, dissenting from the Court's decision to delete that section, stated:

> I dissent from the Court's action in amending MCR 7.215. By eliminating the possibility of any request for publication after the opinion's date of issue, this Court has institutionalized the nonpublication of Court of Appeals decisions and unnecessarily increases the likelihood that significant issues will be buried and subsequently ignored by this Court. The Court of Appeals has not requested this revision, but only that the time for requesting publication be shortened from the present 182 days to 91 days. I would agree to such a revision.[40]

Effective April 1, 2001, the Supreme Court adopted a new MCR 7.215(D), which allowed "[a]ny **party**" to request publication within 21 days after release of the unpublished opinion or an order denying a motion for rehearing.[41] The staff comment states that the "new MCR 7.215(D) reestablishes a procedure under which a party may request publication of a Court of Appeals opinion that was not initially designated for publication. The former provision was deleted in 1995." The Comment is somewhat misleading, because the provision deleted in 1995 allowed any **person**, not just any party, to request publication. Justice Kelly dissented in part from the order adopting the proposed MCR 7.215(D) on exactly this ground:

> I would adopt proposed MCR 7.215(D) as published for comment, but modified to allow a request for publication to be filed by anyone within 42 days of release of the opinion and to permit 2 judges on the panel to grant the request.[42]

The limitation to "any party" (and as discussed below, the requirement of unanimous approval by the panel) continue in the present rule.

The 2001 amendment also reinstated MCR 7.215(D)(4), which like its 1987-1995 counterpart,[43] prohibits the Court of Appeals from granting a request for publication after

Continued on next page

Unpublished Opinions
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the Supreme Court has denied leave to appeal. The former rule, however, made more sense at least in terms of timing, since it allowed the court to act on a request for publication within 182 days from issuance of the opinion, rather than the 21days allowed by the 2001 amendment. As discussed above, the reason for this limitation is unclear, since denial of leave would seem to increase, not decrease, the value of the Court of Appeals opinion as precedent.[44]

As we have seen, from 1972 to 1995 and 2001 to the present, one judge has been able to direct publication of a per curiam opinion at the time it is first released.[45] From 1995 to 2001, a majority of the panel was required to direct publication at the time of release. The rule has always erected a higher hurdle for requests for publication received after an opinion is released as unpublished. From 1985 to 1995, the decision could be made by a majority of the panel.[46] From 1995 to 2001, the rule did not allow anyone to request publication. The April 2001 amendment reinstated the right of a party (but not a nonparty) to request publication, but a request for publication can be granted only "if the panel unanimously so directs." The 2001 amendment further provides that "[f]ailure of the panel to act [on such a request] within 21 days shall be treated as a denial of the request."[47] MCR 7.215(A), (C) and (D) have remained unchanged since 2001.

A Proposal. At its annual meeting in September 2011, the Appellate Practice Section hosted a panel discussion on unpublished opinions by Michigan Court of Appeals Judges Peter O'Connell, Michael Talbot, Kirsten Frank Kelley, and Elizabeth Gleicher.[48] During that discussion, members of the audience suggested that MCR 7.215 be amended to restore the ability of non-parties to request publication of Michigan Court of Appeals opinions. After that, the Council suggested such an amendment, but the judges declined because this could lead to an excessive number of publication requests.[49] Further, during the panel discussion, at least one of the judges suggested that requesting publication is an uphill battle because the court spends more time on opinions intended for publication than it does on opinions not for publication. Nevertheless, many unpublished opinions of the Court of Appeals are well reasoned and carefully written, deal with significant and recurring issues, and have potential application well beyond the parties. Limiting requests for publication to the parties, however, has obvious flaws: the losing party generally will not request publication, and the winner may be reluctant to request publication because it could increase the likelihood that the Supreme Court will grant leave to appeal.

There is a middle ground. Amending MCR 7.215(D) to allow State Bar sections to request publication would limit the number of requests, while giving a voice to non-parties who may have a broader view of the development of the law than do the parties. This is consistent with the Michigan Supreme Court's Practice of inviting State Bar sections to submit amicus curiae briefs on selected cases accepted for review. The present 21 day time limit for requesting publication is too short to allow action by State Bar sections, which typically meet monthly. Moreover, the time limit should be sufficient to allow interested non-parties to petition the sections. Thus, the time limit for a request for publication should be at least 56 days after release of the opinion. There is no good reason not to allow the same time for a request by the parties. The court should also reinstate the 1985-1995 rule that allowed the majority of a panel to grant a request for publication, rather than requiring that the panel be unanimous. Finally, MCR 7.215(D)(4), which disallows publication after the Supreme Court has denied leave to appeal, is an artifact that appears to serve no purpose, and should be repealed.

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Endnotes

1 http://courts.mi.gov/Courts/COA/aboutthecourt/Pages/About.aspx (last accessed April 13, 2013).

2 MCR 7.215(B).

3 I am indebted to James M. Marquardt, Chair of the Land Title Standards Committee of the Real Property Law Section, for this idea.for this idea. I also appreciate the assistance of Penelope Damore and Shari Michel with the research for this article.

4 Michigan Court of Appeals Annual Report 2012, p. 3, http://courts.mi.gov/courts/coa/pages/default.aspx (last accessed April 13, 2013).

5 *Id.*

6 Administrative office of the United States Courts, Judicial Business of the United States Courts, 2012 Annual Report of the Director, Detailed Statistical Tables, U.S. Courts of Appeal, Table S-3, http://www.uscourts.gov/Statistics/JudicialBusi-

ness/2012.aspx (last accessed April 13, 2013).

7 Twelve months ended September 30, 2011.

8 Annual Statistical Report for the Texas Judiciary 2012, p. 30, http://www.courts.state.tx.us/pubs/AR2012/toc.htm#appellate (last accessed April 14, 2013).

9 *Id.*, p. 30 n. 2.

10 The Wisconsin Court of Appeals disposed of 2,744 cases in the 12 months ended November 2012. Wisconsin Court of Appeals Annual Report 2012, pp. 2-3, http://www.wicourts.gov/other/appeals/statistical.jsp (last accessed April 13, 2013).

11 The Court of Appeals of Indiana disposed of 3,950 cases in 2011, the latest reported year available. Court of Appeals of Indiana, 2011 Annua1 Report, p. 5, http://www.in.gov/judiciary/appeals/2336.htm (last accessed April 13, 2013).

12 Indeed, the Rule expressly contemplates that unpublished opinions can be cited. A "party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears." MCR 7.215(C)(1).

13 MCR 7.215(C)(1), (2).

14 MCR 7.215(C)(2). This rule changed prior case law. See MCR 7.215, Staff Comment to 1987 Amendment.

15 MCR 7.215(F)(1)(a).

16 MCR 7.215(A).

17 *Id.*

18 MCR 7.215(A).

19 MCR 7.215(B). MCR 7.215(B)(1) through (7) were included when the Michigan Court Rules were adopted in 1985. MCR 7.215(B)(8) was added in May 2002. See MCR 7.215, 1985 Staff Comment and Staff Comment to 2002 Amendment.

20 (Emphasis added).

21 MCR 7.215(D)(3).

22 MCR 7.215(D)(3).

23 MCR 7.215(D)(4).

24 In most cases, a party has 42 days after the Court of Appeals decision to **file** an application for leave to appeal to the Supreme Court, and the adverse party has at least 21 days to respond. See MCR 7.302(A)(2), (C)(2), (D)(1).

25 MCR 7.215(J)(1).

26 MCR 7.215(J)(3)-(6).

27 MCR 7.215(J)(2).

28 MCR 7.215(J)(7).

29 Mich Const 1963, Art. 6, § 1.

30 Michigan Court of Appeals, Annual Report 2102, p. 1.

31 See J. Honigman and C. Hawkins, 6 Mich Ct R Ann 224 (2d ed 1972). Similarly, all of the Michigan Supreme Court's opinions are published. See MCR 7.317(B).

32 When the legislature amended the Revised Judicature Act to recognize the creation of the Court of Appeals, it apparently assumed that all opinions of the Court of Appeals would be published "Decisions of the Court of Appeals shall be in writing" and shall "be printed pursuant to the Rules of the Supreme Court." MCL 600.313(1), added by 1964 PA 281. MCL 600.313 has never been amended. However, Mich Const 1963, Art 6, § 10 provides that "[t]he jurisdiction of the court of appeals shall be provided by law [but] the practice and procedure therein shall be prescribed by rules of the Supreme Court."

33 The changes in the language carried over to MCR 7.215(A) from GCR 821.1 were non-substantive, including substituting the word "published" for "printed".

34 449 Mich xcvi-xcvii.

35 See MCR 7.215, Staff Comment to 2000 Amendment.

36 See MCR 7.215, 1985 Staff Comment ("Subrules (B), (C) and (D) are new, covering the standards for publication of opinions, the precedential force of opinions, and the procedure by which a party can request publication.").

37 Michigan Court Rules of 1985, MCR 7.215(D) (West 1984).

38 428 Mich clx-clxi.

39 MCR 7.215(D)(4)(b), effective April 1, 1987, 428 Mich clxi.

40 449 Mich xcvii.

41 463 Mich clxiv-clxvi.

42 463 Mich clxvi.

43 MCR 7.215(D)(4)(a), (b), 428 Mich clx-clxi.

44 See text at note 23, supra.

45 MCR 7.215(A), as amended April 1, 2001, 463 Mich clxiv.

46 MCR 7.215(D) provided that "the panel that filed the opinion shall decide the request" to publish. See Michigan Court Rules of 1985 (West 1984).

47 MCR 7.215(D)(3), as amended April 1, 2001, 463 Mich clxv.

48 See State Bar of Michigan, Appellate Practice Section Minutes dated September 15, 2011, http://www.michbar.org/appellate/minutes.cfm (last accessed April 15, 2013); Philip J. DeRosier, "Appellate Practice Section Annual Meeting: To Publish or Not to Publish," Michigan Appellate Practice Journal, Fall 2011, Vol. 15 No. 4.

49 See State Bar of Michigan, Appellate Practice Section Minutes dated October 21, 2011 and November 18, 2011, http://www.michbar.org/appellate/minutes.cfm (last accessed April 15, 2013; conversation with Beth Wittman, March 15, 2013.

Cases Pending Before the Supreme Court After Grant of Oral Argument on Application

by Linda M. Garbarino

This is an ongoing column which provides a list of cases pending before the Supreme Court by order directing oral argument on application. The descriptions are intended for informational purposes only and cannot and do not replace the need to review the cases.

***Addison Twp v Barnhart*, SC 145144, COA 301294**

Zoning: Whether the Court of Appeals erred in *Addison Twp v Barnhart*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 272942) (*Barnhart I*), when it held that, "to the extent that there was testimony to suggest that defendant's operation of a shooting range was for business or commercial purposes, MCL 691.1542a(2)(c) does not provide freedom from compliance with local zoning controls."

***Admire v Auto-Owners Ins Co*, SC 142842, COA 289080**

No Fault: Whether the defendant insurer is obligated to pay personal protection insurance benefits under the No Fault Act, MCL 500.3101 *et seq* for handicap-accessible transportation.

***Huddleston v Trinity Health Michigan*, SC 146041, COA 303401**

Medical Malpractice: Whether the plaintiff suffered a compensable injury; whether the Court of Appeals misapplied *Sutter v Biggs*, 377 Mich 80 (1966); and whether the Court of Appeals decision is contrary to *Henry v Dow Chemical Co*, 473 Mich 63 (2005).

***People v Harris*, SC 145833, COA 296631**

Criminal: Whether the defendant was prejudiced by the admission of the physician's diagnosis that the complainant was the victim of child sexual abuse and whether the defendant is entitled to a new trial.

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Selected Decisions of Interest to the Appellate Practitioner

By Victor S. Valenti

***Thomas M. Cooley Law School v Doe*, _ Mich App _ (No 307426, 4/4/13)**

Plaintiff law school alleged that defendant, a former student, defamed it in a weblog post that used a pseudonym. Defendant sought to quash a subpoena that ordered disclosure of his identity from the website host, but before the trial court resolved the motion to quash, the host disclosed defendant's user information to the law school. The trial court then denied defendant's motion to quash and declined to enter a protective order and allowed the law school to use the identity information in its lawsuit. Defendant was granted leave to appeal. Reversed.

Appellate Consideration of Moot Issue, Public Significance – Even if a matter is moot as a practical matter, an appellate court may consider a legal issue that is one of public significance and is likely to reoccur, yet evades judicial review. Even if the disclosure of defendant's identity to a handful of attorneys and court officials was sufficient to render the issue moot, it was likely to reoccur and evade judicial review.

***Duncan v State of Michigan*, _ Mich App _ (No 307790, 4/2/13)**

Plaintiffs challenged the sufficiency of the state's indigent criminal defense system, and sought injunctive relief through

class action. Defendants previously sought summary disposition which was denied and the class was certified. The Court of Appeals affirmed. 284 Mich App 246 (2009). After several orders, the Supreme Court ultimately affirmed as to the summary disposition denial, but vacated and remanded for reconsideration on the class certification 488 Mich 957 (2010).

On remand, before any discovery on the class certification issue, the State renewed its motion for summary disposition which the trial court denied on the basis that it was bound to follow the appellate rulings. The Court of Appeals granted leave and affirmed.

Remand Order – On remand, trial court is required to comply with a directive from an appellate court.

Law of the Case – Whether law of the case doctrine applies is a question of law reviewed de novo on appeal.

Law of the Case – Generally, the law of the case doctrine provides that an appellate court's decision will bind a trial court on remand and the appellate court in subsequent appeals. Where a case is taken on appeal to a higher appellate court, the law of the case announced by the higher appellate court supersedes that set forth in the intermediate appellate court. However, rulings of the intermediate appellate court remain the law of the case insofar as they are not affected by the higher appellate court's review.

Law of the Case, Applicability – Law of the case doctrine should be applied when there has been no material change in the facts and no intervening change in the law. Even if the prior decision was erroneous, that alone is insufficient to avoid application of the law of the case.

Law of the Case, Change of Laws – Although law of the case does not necessarily apply when there has been an intervening change of law, where Supreme Court was surely aware of the change of law when it affirmed the Court of Appeals decision, the law of the case doctrine does apply.

Stare Decisis – Court of Appeals is bound to follow decisions of the Supreme Court.

***Edge v Edge*, _ Mich App _ (No 308633, 12/27/12)**

In a hotly contested child custody case, Court of Appeals held that circuit court abused its discretion by awarding appellate costs and attorney fees incurred as a result of defendant's decision to appeal circuit court's custody determination.

Appellate Costs – Under MCR 7.219 (A), "except as the Court of Appeals otherwise directs, the prevailing party in a civil case is entitled to costs." Under MCR 7.219 (I), the Court of Appeals "may impose costs on a party or an attorney when in its discretion they should be assessed for violation of these rules."

Appellate Costs, Trial Court Jurisdiction – A trial court does not have jurisdiction to tax costs incurred on an appeal to the Court of Appeals.

Vexatious Appeal Sanctions – Under MCR 7.216(C), on its own initiative or the motion of any party, the Court of Appeals may assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or because a pleading, motion, argument, brief, document or record filed in the case or any testimony presented in the case was grossly lacking in the requirement of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.

Prevailing Party, Appeal Cost – Under MCL600.2445, costs on appeal to the Court of Appeals, "shall be awarded in the discretion of the court." "The appellant may be awarded the costs on appeal if he improves his position on appeals." And "(t)he appellee may be awarded damages for the delay and vexation caused by the appeal, to be assessed in the discretion of the court, in addition to costs on appeal, if the appellant does not improve his position on appeal."

Appellate Attorney Fees, Circuit Court Authority – neither court rule nor statute authorizes a circuit court to grant appellate attorney fees and costs on the basis of a frivolous appeal to the Court of Appeals. Although Court of Appeals awarded taxable costs to plaintiff for having fully prevailed on appeal, plaintiff failed to seek damages for a vexatious appeal at the Court of Appeals, and the circuit court did not have authority to grant plaintiff's appellate attorney fees and costs motion.

Trial Court Authority Costs, Pending Appeal – MCR 7.208 (I), authorizes a trial court to grant a request for sanctions despite the pendency of an appeal, it does not authorize a trial court to grant a request for sanctions made under a court rule or statute that is not a proper basis for the court to grant sanctions.

***People v Kodlowski*, _ Mich App _ (No 301774, 12/4/12)**

Defendant appealed by leave granted from circuit court orders: (1) affirming a district court judgment convicting him of resisting arrest in violation of a Westland ordinance, and (2), denying his motion for reinstatement of oral argument. The Court of Appeals affirmed both orders.

Appeal, Filing Fees – For an appeal of right, an application for leave to appeal, or an original proceeding, a fee of $375 must be paid to the Clerk of the Court of Appeals and may be taxed as costs if allowed by order of the Court. The fee need be paid only once for appeals taken by multiple parties for the same lower court order or judgment and can be consolidated MCL 600.321(1)(a).

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Selected Decisions of Interest
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Appeal Filing Fees, Multiple Orders – When multiple orders on the merits are appealed, the entry fee is $375 for each order being appealed.. Only a single fee is required when the application for leave to appeal is from a final order that could have been appealed of right and when the application seeks review of the multiple orders entered at the same time or prior to the final order. Rather than requiring separate applications challenging each separate order with a fee for each one, the Court of Appeals allows one application to challenge multiple orders for administrative convenience. However, the MCL 600.321 statutory fee requirement remains intact and must be paid for each order being appealed. Here, defendant was convicted of resisting arrest and appealed the judgment of conviction to the circuit court which denied oral argument on the appeal and affirmed the conviction. His application for leave to appeal both orders was granted, but defendant refused to pay two filing fees. Because defendant was appealing two separate orders, he was required to pay two filing fees. MCR 7.202 (6)(a)(a); IOP% 205 (B)(7)-1.

Appeal, Filing Fees Inadequate Amount – If the Clerk's office determines that an inadequate entry fee was submitted, the outstanding amount will be requested by letter. Fee payment may be made by personal or corporate check or by money order. IOP 7.205 (B)(7)-1.

Standard of Review, Court Rule Construction – The interpretation and application of a court rule is reviewed de novo on appeal.

Appeal to Circuit Court, Right to Oral Argument – Before the court rule on appeals to the circuit court was amended effective May 1, 2012 to permit the circuit court to dispense with oral arguments under certain circumstances, an party who filed a timely circuit court brief on appeal and requested oral argument was entitled to oral argument. It was improper for the circuit court to deny defendant oral argument; however, the failure to provide oral argument does not require reversal or remand since the Supreme Court did not provide a sanction or remedy for the violation which the Court of Appeals held was harmless error.

***Hunt v Drielick,* _ Mich App _**
(No 299405, 299406, 299407, 11/12/12)

Garnishee appellant appealed from trial court order overruling objections to garnishment. Court of Appeals reversed.

Statement of Questions Presented, Failure to Include Issue – Insurance carrier made a passing reference that motion for reconsideration was improperly denied. However, the issue was not raised in the statement of questions presented and therefore was not properly presented for appeal.

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Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

This issue's book reviews include a judicial biography, a practice treatise on handling business emergencies, and a book of quotations from Steve Jobs.

An Independent Life: John Paul Stevens Bill Barnhart and Gene Schlickman (Northern Illinois Univ Press 2010)

A retired lawyer (Gene Schlickman) and a columnist and editor for the *Chicago Tribune* (Bill Barnhart) have teamed up to write a fascinating and highly readable account of Justice Stevens, both as a person and as a justice. If you, like me, enjoy learning judicial history by looking at the technical issues through the lens of personal history, you should most certainly pick up a copy of this book – or download it on your Kindle.

Justice Stephens came from Chicago, and served as a member of the Seventh Circuit before his elevation by President Ford to a seat on the United States Supreme Court. And the authors do a good job of recounting how his early years shaped his later thinking. In doing so, they offer stories from those who knew him and quotations from oral argument transcripts and opinions. For example, Justice Stevens dissented in the famous flag burning case, *Texas v. Johnson*, a case in which the majority accepted the argument presented by the infamous liberal attorney, William Kunstler, to uphold regulations designed to prohibit flag burning. Justice Stevens

"flag-burning dissents are biographical, as are his references to military service by himself, and although unspoken, his son." He unsuccessfully urged the Court to treat "the U.S. flag as a license, badge, or trademark of free thought" and thus concluded "[i]f those ideas are worth fighting for – and history demonstrates that they are – it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration."

The authors provide an account of the steps Stevens took that led him to appointment on the Court, and his luck in getting there. As part of this, they describe his being hired as a Supreme Court law clerk for Justice Rutledge at the recommendation of a Northwestern law professor. Using memos he wrote while he served at the Court, the authors portray Stevens as a confident, bright lawyer willing to advocate for change in the law, including urging his justice to attack *Plessy v. Ferguson* in ruling on a motion filed by Thurgood Marshall in one of the early discrimination cases. Although Rutledge did not go as far as Stevens urged, he did follow Stevens' advice to include language that was critical of the doctrine of segregation.

The book provides a fascinating account of the judicial selection process that President Ford employed to choose a nominee, including his looking to Donald Rumsfeld to figure out who to nominate for Attorney General. Rumsfeld suggested Edward H. Levi, president of the University of Chicago, and when the time came to make a nomination for the Court, Levi was put in charge, Richard Cheney was in the background trying to figure out how to set up his own parallel candidate review process, and Betty Ford was pushing for a woman. Levi was Stevens champion, and he was ultimately successful in persuading Ford to nominate Stevens, an outcome secured by the ABA Standing Committee on the Federal Judiciary, which endorsed Stevens as a judicial moderate. George Will called the choice "timid" while Rowland Evans and Robert Novack expressed concern about appointing so many justices from the federal bench, which they feared would create judicial "blandness."

The authors present a compelling account of Stevens' years on the Court, the key decisions he authored, and the back story to many of them. The book is well worth your time if you are an avid Court watcher as I am.

Handling the Business Emergency: Temporary Restraining Orders and Preliminary Injunctions
Thomas E. Patterson
(ABA Publishing 2009)

One of the most challenging jobs an appellate lawyer can have is to handle appeals arising out of a business emergency. The stakes are usually high, decisions need to be made with a great deal of speed, and the initial strategy can be, and often is, outcome determinative. Appellate practice as it relates to temporary restraining orders and preliminary injunctions requires judgment, energy, and knowledge. This book offers help - at least in terms of knowledge.

Patterson's book starts with a primer in the law of injunctive relief, including a discussion of when injunctive relief is typically sought, the rules, factors, and standards that govern its issuance, and some of the choice-of-law considerations that may affect the outcome. Patterson offers a checklist of steps to take when preparing a case in which injunctive relief is sought, that includes everything from drafting the complaint and the proposed order for injunctive relief to consulting with the client and witnesses to filing the papers and giving notice to the other side. He details the kind of hearings that may be held, and warns about the kind of evidence that should be included with the complaint and be available at the hearing.

Opposing such emergency filings is also difficult work. And the lawyer hired to defend against such claims has even less time to research, think about the strategy and prepare papers in opposition. Patterson's book offers valuable suggestions for navigating this process. In a chapter on bonds and damages, Patterson lays out the principles governing the issuance of security for injunctive relief as set forth in Federal Rule of Civil Procedure 65(c). He makes clear that the bond requirement is important to both sides. The party requesting the injunction is forced to think through how broad the relief should be; the party opposing the injunction can obtain protection from the harm caused by an erroneous order. Patterson also offers an overview of state court rules governing such security. And Patterson provides a discussion of grounds for excusing the bond, as well as arguments that can be used by either side in presenting their position.

One of the critically important decisions in an emergency involving injunctive relief is how to word the order. Make it too broad, and it may not pass muster on appeal. Make it too narrow, and it may not accomplish what the requesting party needs from a real-world standpoint. Make it vague or ambiguous, and both sides may end up mired in additional hearings over disputes about its meaning. Patterson offers tips illustrated with real-world examples of past orders.

Patterson includes a chapter on enforcement that includes an overview of contempt proceedings, both criminal and civil. Patterson discusses the scope of contempt, and when injunctions can be applied to nonparties. He sets forth a number of defenses to contempt including compliance, impossibility, and the argument that the order was ambiguous or that the defending party lacked notice of what was required.

Patterson also offers a chapter addressing efforts to reconsider, modify, or appeal an order granting injunctive relief. While this is a key chapter for appellate lawyers, this is an area in which clients would greatly benefit from having

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an appellate lawyer involved from the outset. And Patterson follows along with a chapter noting considerations of strategy that can be vitally important. Any appellate lawyer advising a client in a business emergency will benefit from reading it – and will be better equipped to think through the all-important strategic choices to be made.

The second half of the book includes a series of chapters looking at injunctive relief in a number of specific legal contexts including asset preservation, copyright infringement, trademark infringement, patent infringement, trade secret misappropriation, restrictive covenants, and shareholder remedies. These substantive law chapters take the general principles governing injunctive relief and apply them to the most frequent areas of emergency. The illustrations are helpful, with useful case law and examples.

This book should be on the shelf of any appellate lawyers who may encounter business emergencies requiring quick action to obtain or oppose injunctive relief. With Patterson's guide in hand, lawyers will be able to quickly think about the strategy and steps needed to protect their clients. I highly recommend the book.

Mary Massaron Ross *currently serves as President of DRI - The Voice of the Defense Bar. She is a fellow in the American Academy of Appellate Lawyers, and has served as chair of DRI's Appellate Advocacy Committee, the Appellate Practice Section of the State Bar of Michigan, the ABA Council of Appellate Lawyers (CAL), a division of the Appellate Judges Conference, and the ABA TIPS Appellate Advocacy Committee. She serves as co-chair of the Michigan Appellate Bench Bar Conference Foundation, an organization of Michigan appellate judges and lawyers.*