BEST PRACTICES

The best things don't always come to those who wait

A STRATEGIC APPROACH TO INTERLOCUTORY CIVIL APPEALS

BY TIMOTHY A. DIEMER

My law partner and appellate guru John Jacobs used to raise eyebrows and blow minds when, after an adverse jury verdict or judgment had been issued, he would say, "Don't worry, it's only halftime." This confident expression in the power of the appellate system to correct a disastrous trial result was met with skepticism and viewed as controversial. But if recent trends are any guide, involving the appellate team at halftime may be too late.

LESS FREQUENT SUPREME COURT REVIEWS OF CIVIL JURY TRIALS

The Michigan Supreme Court has exhibited a preference for issuing major decisions in cases that do not arise out of civil jury verdicts. Instead, the overwhelming majority of significant civil law opinions recently issued by the Michigan Supreme Court arose out of summary disposition orders,[1] in limine rulings,[2] and a host of other non-jury trial proceedings.[3] One must go all the way back to 2017 to find a civil opinion from the Michigan Supreme Court arising out of a jury trial but even in that case, the issue on appeal was whether a jury or judge should decide the amount of attorney fees contemplated under a contract.[4]

There are many reasons why it has been five years since the Supreme Court issued a reversal of a civil case tried to verdict, including the conventional wisdom that people don't try cases any more[5] and a systemic focus on alternative dispute resolution, including arbitration and other procedures.[6] More recently, due to the COVID-19 pandemic, jury trials were put on hold for almost two years and even after a return to something resembling normal, courts across the state continue to suspend jury trials based on local conditions.

In this author's opinion, there may be another factor at play: a preference for the Supreme Court to make controlling legal policy in cases that do not require setting aside the results of a hard-earned trial victory that may include a significant damages award. This represents a break from the past, most notably the early 2000s, when Michigan appellate courts did not hesitate to reverse monetary judgments following full-blown civil jury trials.[7]

This trend away from appellate decisions stemming from civil jury trials is nowhere near as prevalent in the Michigan Court of

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Appeals[8] which, as the state's error correcting court, is vested with jurisdiction over appeals as of right and has to hear an appeal regardless of the nature of the trial court proceedings.[9] The Michigan Supreme Court, however, is a policy-making court and gets to pick and choose which cases to take.[10] The Court's recent reluctance to grant leave to appeal in civil cases that proceeded to verdict may be due, at least in part, to the negative feelings engendered by the reversal of jury verdicts, and it does not matter whether the Court makes policy following a jury trial or a summary disposition order.

WAITING TO APPEAL FROM A FINAL JUDGMENT: NOT ALWAYS AN OPTION

If this trend continues in the Supreme Court, pursuing appellate remedies in advance of trial presents an opportunity to raise a potentially dispositive legal defense in advance of a jury verdict's being attached to it, presenting a strategic advantage to proactive litigants. Indeed, many significant Supreme Court decisions arose out of appeals that were interlocutory when originally filed[11] and, in some of these cases, the Supreme Court granted leave to appeal after the Court of Appeals refused to do so.[12]

The preference for appeals from final orders is still found in Michigan's appellate court rules.[13] This approach that prefers one omnibus appeal from a single final order or judgment is codified in the court rules which provide an appeal as of right from a final order or judgment[14] but designate appeals from non-final orders as discretionary on leave granted.[15]

The federal system requirement of a final judgment before filing an appeal is virtually ironclad. In the federal appellate system, there must be a statute or court rule authorizing an interlocutory appeal[16] such as qualified immunity appeals under the collateral order doctrine,[17] appeals from class certification orders,[18] or where the district court's order specifically allows an appeal by permission.[19]

But Michigan's preference for one appeal from a final order is not nearly as strong. Under MCR 7.205(B)(1), an appellant must establish an error was committed and establish facts "showing how the appellant suffer[s] substantial harm by awaiting final judgment before taking an appeal" to satisfy the requirement for interlocutory review. Individual Michigan Court of Appeals judges have different perspectives on when both prongs for interlocutory review are met. Experience and anecdotal statements from appellate court judges and justices offer clues as to how the standards for interlocutory review are implemented. Every three years, the state's appellate lawyers and judges convene for the Michigan Appellate Bench Bar Conference, where practitioners and members of the court present on best practices and discuss ways in which the appellate system could better function. The range of answers from judges on when interlocutory review is warranted is striking. Some judges tend to align with the federal view that piecemeal appeals are warranted only in the most extreme circumstances. Others have stated that the substantial harm factor hardly weighs in the analysis and that if the appellant can show an error, that judge will vote in favor of granting the appeal.

CONCLUSION

These comments from the members of the bench indicate that it is a mistake to assume Michigan follows the federal view that interlocutory appeals are rarely appropriate. The objective data contained in the cases where the Supreme Court granted interlocutory review refutes this notion.

There has not been a change to the court rule[20] governing when it is appropriate for the Michigan Supreme Court to grant leave to appeal that explains this change. Instead, one basis of this change, purely in this author's opinion, is that there is a judicial hesitation to be viewed, rightly or wrongly, as a tort reform warrior. The previous approach where civil jury verdicts were overturned with regularity caused discord between lawyers as well as between lawyers and the judges and justices in the appellate system.[21]

With a return to normal in the civil justice system across the state, jury trials are on the rise to clear the backlog of cases amassed during the nearly two-year hold caused by the pandemic. Undoubtedly, many of these trials will raise significant legal issues in need of resolution by the appellate system and it is a matter of when, not if, civil jury trial appeals make their way back into Supreme Court review. But recent jury trials will not proceed to the Supreme Court for at least two to three years.

In the meantime, these structural forces lead me to believe that getting your legal issue into the appellate system before there is a substantial dollar amount attached to the case is the best method for adapting to the reigning appellate trends that do not appear to be transitory. Awaiting final judgment may be too late.

This article is based on a webinar hosted by the Michigan Defense Trial Counsel and presented by the author and Beth Wittmann of the Kitch law firm. The webinar can be found on the MDTC YouTube page at <www.youtube.com/watch?v=A08YnAj2kel>

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ENDNOTES

1. *Bowman v St John Hosp & Med Ctr*, — Mich —; — NW2d — (2021) (appeal from denial of statute of limitations in a medical malpractice case); *Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan*, 507 Mich 498; — NW2d – (2021).
2. *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016).
3. *Omer v Steel Techs, Inc*, 507 Mich 492; — NW2d – (2021) (appeal from Workers' Disability Compensation Bureau); *Lichon v Morse*, 507 Mich 424; — NW2d – (2021) (enforceability of an arbitration clause in an employment agreement).
4. *Barton-Spencer v Farm Bureau Life Ins Co of Michigan*, 500 Mich 32; 892 NW2d 794 (2017).
5. In 2017, for example, cases were 16 times more likely to be decided by the court than by bench or jury verdict. <http://courts.mi.gov/education/stats/Caseload/reports/statewide.pdf>.
6. The case evaluation procedure under MCR 2.403(O) imposes hefty sanctions on parties who do not accept unanimous case evaluation awards to encourage the amicable resolution of claims.
7. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004) (reversal of $21 million jury verdict); *Pellegrino v AMPCO Sys Parking*, 486 Mich 330; 785 NW2d 45 (2010) (reversal of $15 million jury verdict); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278; 602 NW2d 854 (1999) (same).
8. *Goodwin v Nw Michigan Fair Assn*, 325 Mich App 129; 923 NW2d 894 (2018) (reversal of $1 million jury verdict); *Silas v Secura Ins Companies*, unpublished opinion of the Court of Appeals, issued Oct. 10, 2017 (reversal of $7 million jury verdict).
9. See *Burns v Detroit (on remand)*, 253 Mich App 608, 615, 660 NW2d 85 (2002) ("the Michigan Court of Appeals 'functions as a court of review that is principally charged with the duty of correcting errors'"...).
10. The grounds for a grant of leave to appeal in the Michigan Supreme Court includes an appeal presenting an issue of "significant public interest" or "the issue involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(3).
11. E.g., *Dye v Esurance Prop & Cas Ins Co*, 504 Mich 167; 934 NW2d 674 (2019) (interlocutory appeal from denial of summary disposition); *Wigfall v City of Detroit*, 504 Mich 330; 934 NW2d 760 (2019) (same).
12. E.g., *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018).
13. *McCarthy & Assoc, Inc v Washburn*, 194 Mich App 676, 680; 488 NW2d 785 (1992) (referring to piecemeal appeals as "an unnecessary waste of judicial resources.")
14. MCR 7.203(A)(1).
15. MCR 7.203(B).
16. FRAP 5(a)(2).
17. *Mitchell v Forsyth*, 472 US 511; 105 S Ct 2806; 86 L Ed 2d 411 (1985).
18. FRCP 23(f).
19. FRAP 5(a)(3); 28 U.S.C. § 1292.
20. MCR 7.305(B)(3).
21. The verbal sparring between the majority and dissenting opinions in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005) is but one example of this discord.