MICHIGAN DEFENSE
QUARTERLY
Volume 41, No. 1 | 2024

Promoting Excellence in **Civil Litigation**

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright*
pderosier@dickinsonwright.com

Effect of Approving the "Form and Content" of Orders

It is well-established that consent judgments and orders are not appealable, so parties should always be cautious when stipulating to the entry of orders. *Cam Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 556; 640 NW2d 256 (2002) ("[O]ne may not appeal from a consent judgment, order or decree."). At the same time, merely approving the "form and content" of an order that embodies a trial court's ruling from the bench does not mean that the aggrieved party has waived appellate review unless the circumstances show that the parties actually consented to the order.

There was a time when an order approved as to "form and substance" was considered "unreviewable" as having been entered with "consent." *Trupski v Kanar*, 366 Mich 603, 607; 115 NW2d 408 (1962); see also *Wold v Jeep Corp*, 141 Mich App 476, 479; 367 NW2d 421 (1985) (finding order approved as to "content and form" to be "the equivalent of a consent judgment" such that it could not be "attacked or altered absent proof of a mistake, inadvertence, surprise or excusable neglect").

The Michigan Supreme Court, however, changed all of that in *Ahrenberg Mechanical Contracting, Inc v Howlett*, 451 Mich 74; 545 NW2d 4 (1996). There, the Court rejected the idea that merely using the words "content" or "substance" could convert a stipulated order prepared in accordance with "the announced decision of the court" into a "consent decree." *Id*. at 77 (cleaned up). The Court found the "better rule" to be that "[w]here there is no indication that the parties have stipulated to the outcome," approving an order as to "form and content" does not waive appellate review. *Id*. at 77-79. In other words, where a proposed order merely comports with a court's ruling, and the aggrieved party has "vigorously litigated its position . . . then acted promptly to perfect an appeal," it cannot be said that approval of the "form and content" of a trial court's order "signaled [the party's] agreement with the trial judge's ruling." *Id*. at 78.

Since *Ahrenberg*, the Michigan Court of Appeals has consistently rejected arguments that approval of an order's "form and content" constitutes "consent." For example, in *Trahey v City of Inkster*, 311 Mich App 582; 876 NW2d 582 (2015), the trial court found that the City of Inkster had overcharged residents for water and sewer services and ordered the city to issue a refund not only to the plaintiff, but also to other city residents. While the city's appeal was pending, the plaintiff filed

Phillip J. DeRosier

Phil DeRosier has more than 20 years' experience representing industry-leading corporations, banks, insurance companies, and individuals in the Michigan Supreme Court, Michigan Court of Appeals, and U.S. Courts of Appeals. Phil has briefed and argued a wide variety of appeals, ranging from commercial contracts to insurance to business torts. He also devotes a significant part of his practice to briefing dispositive motions and working with trial counsel on pre- and post-trial motions, jury instructions, and preserving issues for appeal.

Phil is a past Chair of the Governing Council of the State Bar of Michigan's Appellate Practice Section, and is consistently recognized in Best Lawyers and Michigan Super Lawyers in the area of appellate practice. Phil is co-chair of the Michigan Appellate Bench Bar Conference and a contributing author to the Institute for Continuing Legal Education's *Michigan Appellate Handbook*. Before joining the firm, Phil served as a law clerk for former Michigan Supreme Court Chief Justice Robert P. Young, Jr., and was a staff attorney at the Michigan Court of Appeals.

MDTC Quarterly Archives

Click here

a motion to show cause why the city was not complying with certain aspects of the trial court's judgment. The trial court determined that although the city had credited the plaintiff's own water and sewer account, it did not "issue the appropriate credits to the city's residents in light of the reduced water and sewer rates previously ordered by the court." *Id.* As a result, the trial court ordered the city "to credit each of the 8,425 resident water and sewer accounts at issue $303.78, based on a total credit amount of $2,559,321.63," and entered a postjudgment order that the City approved for "form and content." *Id.* at 590, 592. The city sought leave to appeal, and in the meantime issued the credits required by the trial court's order.

Though the Court of Appeals granted the city's application for leave to appeal the trial court's postjudgment order, the plaintiff argued that the city's appeal was moot because the city had approved the order's "form and content," and had also complied with it. The Court of Appeals disagreed. The Court acknowledged the city's "form and content" approval of the order, but concluded that it "[did] not signal the city's agreement with the trial court's finding of unreasonableness or its decision that residents were entitled to refunds." *Id.* at 592. Presumably this was because the entire case and appeal centered on those issues, such that it would not have been reasonable to conclude that the city had consented to the trial court's order. As for the city's issuance of the refunds while its appeal was pending, the Court of Appeals held that this did not preclude the city's appeal either because the city issued the refunds "only after [the] plaintiff sought to invoke the trial court's contempt power." *Id.* at 592-593. The city's satisfaction of the order was thus "compelled," and not voluntary. *Id.* at 593.

There was a time when an order approved as to "form and substance" was considered "unreviewable" as having been entered with "consent."

The Court of Appeals reached the same result in *Sulaica v Rometty*, 308 Mich App 568; 866 NW2d 838 (2014). In that case, after the trial court awarded attorney fees to the defendant, the parties submitted an order that was approved "as to content and form." *Id.* at 587. When the plaintiff sought to challenge the attorney fee award on appeal, the defendnat argued that the plaintiff's approval of the order "as to 'content and form' was the equivalent of the parties entering into a consent decree." *Id.* Citing *Ahrenberg*, the Court of Appeals disagreed. The Court observed that the plaintiff had both challenged the trial court's decision to award fees at the hearing and then moved for rehearing. As a result, there was "no indication that the parties stipulated with regard to an outcome regarding the attorney fees," and thus "nothing to suggest that plaintiff's counsel's approval of the order at issue as to 'content and form' illustrated counsel's intent to enter into a consent order." *Id.* at 588.

There, the Court rejected the idea that merely using the words "content" or "substance" could convert a stipulated order prepared in accordance with "the announced decision of the court" into a "consent decree." *Id.* at 77 (cleaned up).

Of course, while these cases confirm that approving an order's content or substance is not necessarily fatal to its appealability, the easiest way for a party to avoid uncertainty may be to simply indicate approval of an order's "form" only, or to note in the stipulation that the party is not consenting to the relief being ordered.