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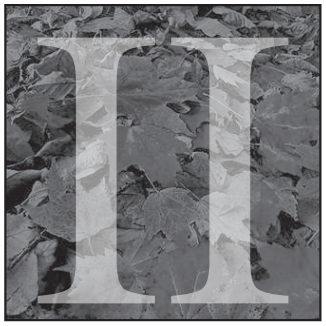

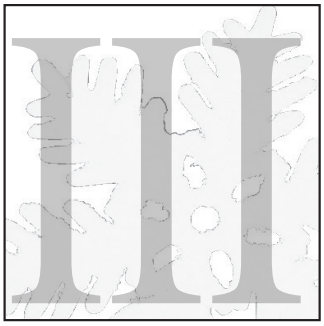

IN THIS ISSUE:

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Appellate Practice Report

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Raising Unpreserved Issues on Appeal

One of the more well established appellate doctrines in Michigan (and elsewhere) is that an issue that isn't preserved in the trial court won't be considered on appeal. But are there exceptions? Let's find out.

General Rule of Issue Preservation

As the Michigan Supreme Court explained in *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008), "[u]nder our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court," such that "a failure to timely raise an issue waives review of that issue on appeal." *Id*. at 386. See also *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84; 490 NW2d 322 (1992) ("Issues and arguments raised for the first time on appeal are not subject to review."); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149; 792 NW2d 749 (2010) (explaining that to preserve an issue for appeal, a party must specifically raise it before the trial court).

This includes constitutional claims. In *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993), the Supreme Court observed that it had "repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims." *Id*. at 234 n 23. Applying that general rule, the Court declined to address the University of Michigan Board of Regents' argument that "application of the [Open Meetings Act] to governing boards of public universities in the manner prescribed by the Court of Appeals violates the autonomy vested in such bodies by the Michigan Constitution. Const 1963, art 8, § 5," because "the issue was neither presented to nor evaluated either by the trial court or the Court of Appeals." *Id*. at 234. See also *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 351; 793 NW2d 246 (2010) (refusing to address various constitutional claims because they "were not raised before, addressed, or decided by the Court of Claims").

On the other hand, "appellate consideration is not precluded merely because a party makes a more developed or sophisticated argument on appeal." *Mueller v Brannigan Bros Restaurants & Taverns LLC*, 323 Mich App 566, 585; 918 NW2d 545 (2018).

Can Unpreserved Issues Ever Be Raised?

Even when an issue hasn't been properly preserved for appeal, the Supreme Court has said that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when necessary to a proper determination of a case." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations and internal quotations omitted). A good example of this was in *Mack v City of Detroit*, 467 Mich 186; 649 NW2d 47 (2002). One of the issues in *Mack* was whether the governmental tort liability act (GTLA), MCL 691.1407, preempted the Detroit City Charter, which purported to recognize a private cause of action for sexual orientation discrimination. *Id*. at 206. Although neither party had raised the preemption issue, the Supreme Court decided the case on that basis, holding that "[i]f the charter creates a cause of action for sexual orientation discrimination, then it conflicts with the state law of governmental immunity." *Id*. In response to the dissent's assertion that the Court shouldn't have decided the case on an issue that was never raised, the *Mack* majority said that it "absolutely oppose[d]" the notion that "although a controlling legal issue is squarely before this Court, in this case preemption by state law, the parties' failure or refusal to offer correct solutions to the issue limits this Court's ability to probe for and provide the correct solution." *Id*. at 207. "Such an approach," the majority reasoned, "would seriously curtail the ability of this Court to function effectively." *Id*.

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So, when is an unpreserved issue most likely to be considered? The Court of Appeals recently observed that "we may overlook the preservation requirements in civil cases 'if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *George v Allstate Ins Co*, 329 Mich App 448; 942 NW2d 628 (2019). Thus, in *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2006), vacated in part on other grounds 480 Mich 6 (2008), the Court of Appeals addressed whether the Michigan Tax Tribunal had jurisdiction or authority to grant the relief requested by the plaintiff. In *Fisher v WA Foote Mem'l Hosp*, 261 Mich 727; 683 NW2d 248 (2004), the Court of Appeals reached the unpreserved issue of whether MCL 333.21513(e) creates a private cause of action.

On the other hand, the Court of Appeals has declined to address issues that, although they involved questions of law, required further factual development. For example, in *Royce v Chatwell Club Apartments*, 276 Mich App 389; 740 NW2d 547 (2007), the defendant argued that it could not be held liable for a statutory violation relating to its alleged failure to keep its premises in reasonable repair because it had no actual or constructive notice of the black ice that caused the plaintiff's fall. *Id.* at 398. The Court of Appeals, however, declined to address the issue because it wasn't raised in the trial court and because the necessary facts hadn't been presented. *Id.* at 399.

Most rare would appear to be cases where "manifest injustice" would result if an unpreserved issue isn't addressed. The Court of Appeals has said that "a litigant in a civil case must demonstrate more than a potential monetary loss to show a miscarriage of justice or manifest injustice." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 194; 920 NW2d 148 (2018). Cf. *Mitchell v Mitchell*, 296 Mich App 513, 522; 823 NW2d 153 (2012) ("In this case, because the issue deals with child custody and parenting time for defendant, failure to consider it could result in manifest injustice, so this Court will overlook the issue of preservation.").

A final word of caution: timing matters when raising issues in the trial court. It can be tempting to use a motion for reconsideration to present a new issue—and sometimes, it may be the only option. That practice, however, is disfavored and runs the risk of the issue being disregarded on appeal. See *Vushaj v Farm Bureau General Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009) ("Where an issue is first presented in a motion for reconsideration, it is not properly preserved.").

Conclusion

Seeking to raise an issue for the first time on appeal is always an uphill battle, but there is authority from both the Michigan Supreme Court and the Court of Appeals for considering unpreserved issues that go to the heart of the case and that do not require factual development, or where a miscarriage of justice would result if the issue isn't addressed.

Oral Argument in the Time of COVID-19

The conventional wisdom is that oral argument should be a conversation. The advocate makes an initial statement, begins their argument, and then judges shape the discussion by voicing their questions and concerns. Advocates respond to those questions the way they would respond to an inquisitive colleague: calmly, conversationally, explaining their position and reacting to their interlocutor's position. A good oral argument is a lively conversation.

This conversational format offers great benefits to litigants. When judges' questions lead the discussion, advocates gain insight into each judge's concerns and, as a result, have an opportunity to address them. When this exchange occurs in person, a good advocate can adjust their strategy based on nonverbal cues like facial expressions, posture, body language, and so on.

However, with the COVID-19 pandemic, the era of conversational arguments may be over—or at least on hiatus. Courts are holding many appellate arguments online—often via Zoom, a service that allows users to appear in individual boxes onscreen, with other participants in their individual boxes.

One of the primary effects of this new technology is a shift from conversational argument to a more rigid—and less interactive—procedure. An advocate speaks, largely uninterrupted, for a certain period of time. Then the chief judge asks each member of the panel if they have questions.

The advocate responds to those questions serially—sometimes subject to time limits—before yielding the floor. This process can work very well. And it is certainly a welcome device for keeping cases moving while social distancing remains a necessary public-health measure. But it should prompt some changes in oral-argument strategy, especially for those used to active benches.

Zoom challenges the pre-COVID wisdom that advocates should avoid making speeches. Advocates find that they have lengthy periods of uninterrupted time to fill and they cannot count on judges' questions to steer the discussion. In other words, they have to give something very much like a speech.

With a period of speaking time to fill, it can be tempting to simply repeat the arguments in one's brief. After all, those are presumably the strongest arguments for a favorable ruling. That temptation, however, is one to resist. Apart from brief introductory comments to orient the discussion, telling the court what it already read in your brief is a wasted opportunity, even on Zoom. Similarly, raising issues that were *not* in one's brief is likely to produce unhappy judges. In the Court of Appeals, the usual adage is: "If it was in your brief, we don't need to hear it. And if it wasn't in your brief, then it's not properly before the court." Those restrictions pose few problems with an active bench. But they can be more difficult when an advocate cannot count on the bench for direction.

One way to use this time well is to think about what's missing on Zoom: questions that probe the weak parts of one's case. Judges may have a few minutes to ask questions at the end of one's argument. But briefly addressing weak areas in response to a series of short questions is rarely a good substitute for the kind of deep-dive that occurs during in-person oral arguments. But each advocate can accomplish the same goal by anticipating and addressing the court's likely concerns.

Instead of simply rehashing the strong arguments that judges have already read, an advocate can dig into the issues that might bother the judiciary. Attacking these issues may turn a Zoom argument from a rote exercise into a forum for speaking directly to a court's likely concerns.

This strategy does more than just assist the court in thinking through all the angles. For an appellant, it is a way to take the wind out of the appellee's sails. Think of the final rap battle between Eminem and his rival in *8 Mile,* where Eminem anticipates everything his opponent is likely to say about him, addresses those shortcomings, and leaves his opponent speechless. (The lyrics are a bit too spicy for the Michigan Defense Quarterly, but they're available online.) That, in a nutshell, is the idea.

An appellee cannot tackle their opponent's arguments in the same *8 Mile* fashion, since the appellant argues first. But the appellee can respond to the appellant's actual arguments *and* address the court's likely questions about those arguments. With enough care, an appellee often anticipates the appellant's arguments before the discussion even begins. Arguing in this manner turns a Zoom argument from a perfunctory exercise in repeating one's brief into an opportunity to clear obstacles to a favorable ruling.

There is risk here, of course. In theory, one could raise problems that the court or an opponent would never have perceived on their own. That is the common refrain from advocates who hope to avoid addressing the weaknesses in their case: "I don't want to help the opposition by acknowledging weaknesses." But a skilled advocate would never raise a potential problem in their case without having a plan for resolving it. And acknowledging weaknesses builds credibility. Noting obvious problems and offering solutions can strengthen one's case and increase the odds of a favorable ruling.