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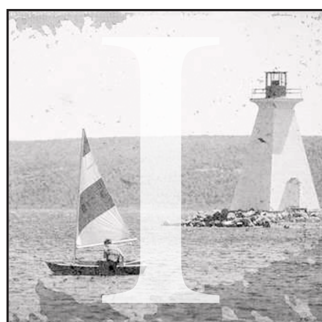

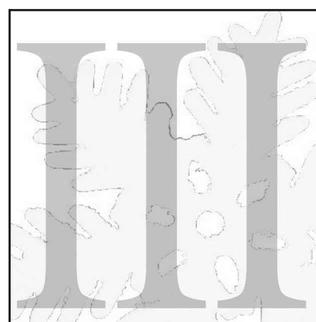

IN THIS ISSUE:

ARTICLES

- Feeling Blue: Federal Court Blue-Pencils Non-Compete Agreement and
- Enforces Modified Version
- Qualified Immunity vis-à-vis Fourth Amendment Use of Force Claims

THE OP-ED(ISH) COLUMN

REPORTS

- Appellate Practice Report
- Legal Malpractice Update
- Medical Malpractice Report
- Legislative Report
- Insurance Coverage Report
- Amicus Report

PLUS

- Member to Member Services
- Member News
- Schedule of Events
- Welcome New Members

P R O M O T I N G   E X C E L L E N C E   I N   C I V I L   L I T I G A T I O N

Appellate Practice Report

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Taxation of Costs in Michigan Appeals

The winning party in a civil appeal may be entitled to tax costs against the non-prevailing party. See MCR 7.219 (Court of Appeals); MCR 7.318 (Michigan Supreme Court). Although the prevailing party can generally seek costs with or without an express invitation in the Court's opinion, it's common for the Court of Appeals to include language noting that the winner can seek costs. Costs are off the table only if the Court of Appeals expressly states that a prevailing party is not entitled to costs. MCR 7.219(A).

To obtain costs, the prevailing party must file a certified or verified bill of costs "[w] ithin 28 days after the dispositive order, opinion, or order denying reconsideration is mailed." MCR 7.219(B). The objecting party may file a response within seven days after service of the bill of costs. MCR 7.219(C). The clerk must "promptly" verify the prevailing party's costs and tax as appropriate. MCR 7.219(D). Any party who wishes to challenge the clerk's action may file a motion "within 7 days from the date of taxation." MCR 7.219(E). Review, however, is limited to "those affidavits or objections which were previously filed with the clerk...." *Id.*

As this procedural outline indicates, it can take some time to put together an application for costs. The application must be verified and capable of withstanding an objection. It must also preserve all the arguments necessary for motion practice if the clerk's award is deficient in some way.

The scope of taxable costs is limited under the Michigan Court Rules. The prevailing party may collect only "reasonable costs incurred in the Court of Appeals." MCR 7.219(F). These include the cost of (1) printing briefs, (2) an appeal or stay bond, (3) transcripts, (4) documents necessary for the appeal record, and (5) fees paid to court clerks. *Id.* If the prevailing party wishes to tax any additional costs, it must connect the right to do so to a statute or court rule. See MCR 7.2119(F)(6)-(7).

This list of taxable costs is not long. In some appeals, recoverable costs are less than the attorney fees for compiling a bill of costs—which means that pursuing costs isn't worthwhile economically. Still, costs in some appeals may be large enough to justify their pursuit.

When an attorney receives an order allowing a client to tax costs incurred in an appeal, they should provide their client with a realistic picture of the likely expense of pursuing costs, and the possible recovery before pursuing an order taxing costs. Doing these calculations upfront allows a client to make an informed judgment about whether the pursuit of costs is worthwhile.

Tips for Filing Interlocutory Appeals in the Michigan Court of Appeals

Most appeals in the Michigan Court of Appeals are appeals of right after the entry of a final judgment or order. But occasionally, a party may wish to challenge an interlocutory order – such as a discovery order, an order denying summary disposition, or an order regarding a pretrial motion in limine. With limited exceptions (such as an order denying governmental immunity), such orders are appealable only by leave of the court.

MCR 7.205 governs applications for leave to appeal. To be timely, an application for leave to appeal must be filed within 21 days after entry of the order being appealed, or within 21 days after the entry of an order denying a timely motion for reconsideration or other relief from the order being appealed. MCR 7.205(A)(1), (2). Depending on

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the circumstances, such as an impending trial, it may not be advisable to wait until the last day to file the application. When time truly is of the essence, the application should be filed as soon as possible. If action is required within 56 days, the application should be designated an “emergency.” See MCR 7.205(F)(1). A motion for immediate consideration should be filed if the order being appealed will have consequences within 21 days of the filing of the application. MCR 7.205(F)(2).

It is important to remember that unlike a claim of appeal, an application for leave to appeal is a full appeal brief on the merits.

It is important to remember that unlike a claim of appeal, an application for leave to appeal is a full appeal brief on the merits. This means that it must comply with the rules applicable to an appellant’s brief (see MCR 7.212(C)) and should explain as concisely as possible why leave to appeal should be granted.

MCR 7.205 also requires an application for leave to appeal from an interlocutory order to set forth “facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal.” See MCR 7.205(B)(1). In other words, why should the appeal be heard immediately as opposed to waiting until the end of the case? Some orders, such as orders involving preliminary injunctions or those denying discovery or the admission of critical evidence, lend themselves more readily to an argument that an immediate appeal is necessary. But interlocutory appeals are certainly not limited to such orders. In the appropriate case, it might make sense to seek leave to appeal from an order denying summary disposition, such as if the motion raised a statute of limitations issue or some other legal issue that would dispose of the case in its entirety and avoid the need for discovery and a time-consuming and expensive trial.

In seeking leave to appeal from an interlocutory order, parties should also keep in mind that the Court of Appeals has authority to enter a final decision at the application state instead of granting leave to appeal. See MCR 7.205(E)(2) (“The court may grant or deny the application; enter a final decision; [or] grant other relief.”). As a result, a party might consider making a specific request that the Court enter a peremptory order (e.g., granting summary disposition) as an alternative to granting leave to appeal.

Finally, it is important to remember that filing an application for leave to appeal, like claiming an appeal of right, does not automatically stay proceedings in the lower court. Again, there are exceptions, such as in appeals from orders denying governmental immunity. But in most cases, a party seeking a stay must first request it from the trial court, and then from the Court of Appeals if the trial court denies a stay.

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