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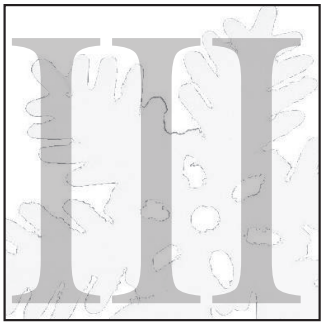

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Appellate Practice Report

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Effect of Denials of Leave to Appeal "For Lack of Merit"

For some time now, a subject of discussion among appellate practitioners has been the effect of orders from the Michigan Court of Appeals denying applications for leave to appeal "for lack of merit in the grounds presented," and the extent to whether they are (or should be) controlling in a subsequent appeal under the law of the case doctrine. Until recently, the issue hadn't been fully addressed in a published opinion. But that has now changed with the Court of Appeals' decision in *Pioneer State Mut Ins Co v Michalek*, ___ Mich App ___; ___ NW2d ___; 2019 WL 4891871 (2019).

An Historical Perspective

As a general rule, the denial of an application for leave to appeal does not amount to a decision on the merits, and thus isn't the law of the case. See *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW2d 901 (1953) ("The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent of an affirmation of the decree sought to be reviewed.") (citations and internal quotations omitted).

But over the years, the Court of Appeals has, fairly consistently, applied the law of the case doctrine to orders denying applications for leave to appeal "for lack of merit in the grounds presented," including in appeals from interlocutory orders. See, e.g., *Sidhu v Farmers Ins Exchange*, unpublished opinion per curiam of the Court of Appeals, issued Sept 11, 2008; 2008 WL 4180347, *1 (Docket No. 277472) (declining to address issue regarding timeliness of action by insurer to recover mistakenly paid no-fault benefits because the Court had previously denied leave to appeal from the trial court's partial grant of summary disposition against the insurer).

The Court has done so despite there being at least some question as to whether such a practice is consistent with the court rules. In relevant part, MCR 7.205(E)(2) provides that the Court of Appeals may "grant or deny [an] application; enter a final decision; [or] grant other relief." It is not clear whether this language really allows for an order that "denies" an application but yet purports simultaneously to decide the merits of the arguments presented. In addition, MCR 7.215(E)(1) provides that "[a]n order denying leave to appeal is not deemed to dispose of an appeal."

Yet some Court of Appeals panels have concluded that orders denying leave "for lack of merit" are not only authorized by the court rules, but that they provide a sufficient expression of "an opinion on the merits of the case" such that the law of the case doctrine should apply. See, e.g., *Contineri v Clark*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2003; 2003 WL 21771236, *2 (Docket No. 237739) ("Despite case law holding that orders denying leave to appeal do not express an opinion on the merits of the case, Michigan courts have not held that this case law applies to orders denying leave to appeal 'for lack of merit.'").

The *Pioneer* Decision

In *Pioneer*, the Court of Appeals took the issue head on. The defendants in *Pioneer* had failed to timely appeal a final judgment in the plaintiff's favor, and so were required to file a delayed application for leave to appeal. The Court of Appeals denied the application "for lack of merit on the grounds presented." Thereafter, the trial court

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awarded attorney fees to the plaintiff. As part of their appeal from the attorney fee order, the defendants also sought to challenge the underlying judgment.

In rejecting the defendants' challenge to the judgment, the Court of Appeals found two problems. **First**, the Court held that it lacked jurisdiction because appeals as of right from postjudgment orders awarding attorney fees are limited to the attorney fee issue. MCR 7.202(6)(a)(*iv*). **Second**, the Court concluded that even if it had jurisdiction, the law of the case doctrine would preclude review of the underlying judgment.

The Court began by recognizing its options in "exercising the discretion afforded it when reviewing an application for leave to appeal." *Pioneer*, 2019 WL 4891871, *2. "[I]t can grant the application and hear the case on the merits, deny the application, enter peremptory relief, or take any other action deemed appropriate." *Id.*, citing MCR 7.215(E)(2). The Court then explained that when it denies an application for leave to appeal for lack of merit in the grounds presented, "the order means what it says—it is on the merits of the case." *Id.* Thus, even if the Court had jurisdiction to consider the defendants' merits challenge to the underlying judgment, "we would not address those issues under the law of the case doctrine." *Id.*

The Court did, however, distinguish between the defendants' challenge to what was a **final** order, and an interlocutory application for leave to appeal from a nonfinal order. *Id.* The Court noted that in the latter case, "the Court generally does not express an opinion on the merits." *Id.* In a footnote, the Court went on to explain how it "typically" handles applications for leave to appeal from interlocutory orders:

> If a panel decides to deny an application challenging an interlocutory nonfinal order, it typically uses language indicating that the application was denied because the Court was not persuaded that immediate appellate review was necessary. There is no merits language in those denial orders because no merits determination was made; instead, the panel has simply determined appellate intervention was not necessary at the time. As a result, parties are still free to challenge these interlocutory orders when appealing the final order. [*Id.* at *2, n 6.]

While this may be the Court's usual practice, there are plenty of unpublished opinions (like the previously-mentioned *Sidhu* and *Contineri* decisions, to name a couple) in which law of the case effect was given to denials of leave to appeal from interlocutory nonfinal orders because the denials were "for lack of merit in the grounds presented." Thus, it seems that parties would be well-advised to take heed of the following word of caution from the concurring opinion in *Hoye v DMC/WSU*, unpublished opinion per curiam of the Court of Appeals, issued Jan 28, 2010; 2010 WL 334833, at *6 n 3 (Docket No. 285780) (Gleicher, J., concurring), in which the law of the case doctrine was applied to an order denying leave, "for lack of merit," from an application challenging an interlocutory order:

> The well-advised litigant seeking interlocutory review should think carefully before invoking this Court's jurisdiction by leave, since a request for appellate consideration before final judgment may result in only a one-sentence decision, forever foreclosing the right a future opportunity to full, or even memorandum-style, legal analysis.

As a general rule, the denial of an application for leave to appeal does not amount to a decision on the merits, and thus isn't the law of the case.

The New Science of Brief Writing

Everyone has their own biases about legal writing. Write short sentences. Write shorter briefs. Use contractions (or do not use contractions). Put all of your citations in footnotes—or don't put anything in footnotes. More em dashes and more parentheticals but no string citations. Write informally—but, no, wait, not **that** informally.

Although we're usually happy to coast along with our biases, some legal academics have started to test the received wisdom about legal writing with statistical analyses. This empirical research suggests that much of the conventional wisdom is on target—though there are some surprises, too. Here's a brief dive into recent research on three critical issues for brief-writing.

1. **Judges prefer simple writing, but have mixed opinions on how informal legal writing should get.** Most legal-writing experts today will tell you to write simply: short sentences, short words, clear transitions. There's some empirical support for this view. Sean Flammer sent surveys to federal and state judges to gauge their preference for "plain English" writing.[1] He found that most judges preferred simpler writing.[2] Another study concluded that judges "found the plain English briefs more convincing and thought that legal briefs came from less prestigious firms and ineffective appellate advocates."[3] Flammer's results didn't vary from trial to appellate courts or from federal to state courts.[4] Nor was a judge's age a factor in how much they liked simple legal writing over more formal legal writing.[5] So the empirical research here confirms the conventional wisdom. Simpler writing is better. Things got a little more complicated when judges considered informal writing. Many judges—especially older, rural judges—thought that some briefs were too informal.[6] Contractions can get divisive.
2. **Better writing—measured according to plain-language metrics—may contribute to better results.** Judges may prefer simpler writing but does it matter? Does better writing translate to better results? To address this question, Adam Feldman analyzed brief quality and outcomes at the United States Supreme Court.[7] He concluded that there is a correlation between high-quality briefs and favorable outcomes: "The likelihood of winning a case increases by approximately 20% by moving from the low end of the brief quality spectrum to the high end."[8] Similarly, Feldman and Shaun Spencer's 2018 analysis of summary-judgment briefing found a similar

connection between readability and positive outcomes.[9] That said, the conclusion isn't universal. Lance Long and William F. Christensen's 2011 study found no statistically significant correlation between readability and case outcomes in a sample of 882 state and federal cases.[10]

3. **There's no correlation in general between brief length and success—although the picture may be more complicated for appellants.** What about brief length? We all know that judges are busy and that many judges express a preference for shorter briefs. Does writing a longer brief hurt your arguments? The answer seems to be "no." Steven Morrison's recent study of cases in the Eighth Circuit Court of Appeals found that longer briefs were not less successful than their more succinct companions.[11] An earlier study from Gregory Sisk and Michael Heise complicates this picture.[12] Sisk and Heise found that longer *appellant* briefs fared better—up to about 14,000 words.[13] Briefs between 10,000 and 14,000 words did better than average. Sisk and Heise cautioned, however, that no one should take their research as an excuse to pad an appellant brief with excess words and issues.[14] Their takeaway was that "the kind of civil cases in which reversal is most warranted may also be of the sufficiently complicated variety to justify a more extended treatment in the appellant's brief."[15]

This very brief review of recent research suggests that conventional wisdom does pretty well at tracking what works. Judges often tell us that they prefer simpler writing and that appears to correlate with positive outcomes. There's no magic size for a successful brief but, as the Sisk and Heise research indicates, cases that warrant reversal often require lengthier briefing.

If that overview confirms your brief-writing preferences, there are some surprises in store, too. For example, one study determined that attorneys who have been disciplined have a 50% higher rate of "careless errors" in briefing—that is, errors in grammar, spelling, and usage.[16] In other words, there seems to be a correlation between sloppiness in minor things like grammar and sloppiness in major things like professional ethics. Too many typos in a brief may serve the same function as brown M&Ms in Van Halen's dressing room—a sign that there are bigger problems afoot.[17]

So stay tuned to the emerging empirical research on appellate briefing, even if it confirms your biases so far. You may find some surprises.

Endnotes

1 Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English,* 16 Legal Writing: J Legal Writing Inst 183, 186 (2010).

2 *Id.*

3 Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them,* 6 J. Ass'n Legal Writing Directors, 1, 5-6 (2009). See also *John Campbell, Writing That Wins: An Empirical Study of Appellate Briefs,* Colo Law 85,87 (2017).

4 Flammer, *supra* at 186.

5 *Id.*

6 *Id.* at 211.

7 Adam Feldman, *Counting on Quality: The Effects of Merits Brief Quality on Supreme Court Decisions,* 94 Denv L Rev 43, 63 (2016).

8 *Id.* at 63.

9 Pam Keller, *Some Science Supporting Style,* J. Kan. BA 16, 17 (2019) (citing Shaun B. Spencer & Adam Feldman, *Words Count: The Empirical Relationship Between Brief Writing and Summary Judgment Success*, 22 Legal Writing 61, 61 (2018)).

10 Lance N. Long, William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?* 12 J App Prac & Process 145, 145–46 (2011).

11 Steven R. Morrison, *Testing—and mostly Rejecting—the Folk Wisdom of the Effective Appellate Brief,* Champion 57, 57-58 (2019).

12 Gregory C. Sisk and Michael Heise, *"Too Many Notes"? An Empirical Study of Advocacy in Federal Appellate Procedure,* 12 Journal of Empirical Legal Studies 578 (2015), available at: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2564&context=facpub (last visited October 19, 2019).

13 *Id.* at 597.

14 *Id.* at 600.

15 *Id.* at 597.

16 Keller, *supra,* at 17.

17 Steve Jones, *No Brown M&Ms: What Van Halen's Insane Contract Clause Teaches Entrepreneurs,* Entrepreneur, March 24, 2014 (available at: https://www.entrepreneur.com/article/232420).