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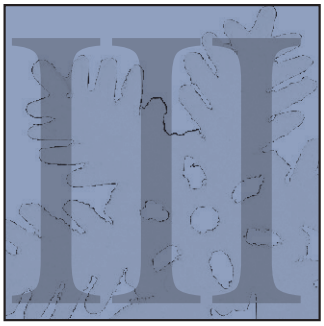

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Appellate Practice Report

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Can There Be More Than One "Final Order" for Purposes of Appeal?

As a general rule, the Michigan Court of Appeals' jurisdiction is limited to appeals of right from a "final judgment or final order." MCR 7.203(A)(1). In most cases, that will be the "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). But the court rules also provide for other types of "final" orders, including:

- "[I]n a domestic relations action, a postjudgment order affecting the custody of a minor," MCR 7.202(6)(a)(iii);
- "[A] postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule," MCR 7.202(6)(a)(iv); and
- "[A]n order denying governmental immunity to a governmental party, including a governmental agency, official, or employee," MCR 7.202(6)(a)(v).

The possibility of more than one "final" order in a case can be a trap for the unwary because MCR 7.203(A)(1) provides that "[a]n appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right." That serves as an important limitation on the general rule that "[w]here a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case." *Bonner v Chicago Title Insurance Co,* 194 Mich App 462, 472; 487 N W2d 807 (1992).

A recent decision from the Court of Appeals illustrates the consequences of failing to appreciate the need to file separate appeals from different "final" orders in the same case. In *Davis v Wayne County Clerk*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2018; 2018 WL 4339583 (Docket No. 339200), the trial court entered orders in October 2016 imposing sanctions against the plaintiffs. When the plaintiffs failed to pay, the trial court conducted additional proceedings resulting in the entry of a judgment against the plaintiffs on June 21, 2017. The plaintiffs filed a timely appeal as of right from the June 21, 2017 judgment.

On appeal, the plaintiffs raised several issues concerning the award of sanctions, including the trial court's determination that their complaint was frivolous. The Court of Appeals, however, held that those arguments were not properly before it because they arose from the trial court's October 2016 orders, which the plaintiffs had previously appealed, but the appeal was dismissed for failure to pay the necessary entry fees. The Court of Appeals held that although it had jurisdiction "with respect to any issues related to the June 21, 2017 judgment," *id*. at *2, it could not consider any arguments concerning the October 2016 orders. The Court explained that the plaintiffs had not properly perfected an appeal from those orders, and that MCR 7.203(A)(1) precluded the Court from reviewing anything other than the June 21, 2017 judgment:

> Here, appellants are attempting to use the appeal of the June 21, 2017 judgment as a means of challenging the October 2016 orders. Those October 2016 orders were also final orders inasmuch as they were also postjudgment orders granting attorney fees and costs, including setting the amount of the awards. By arguing that the trial court erred in determining that the complaint was frivolous, appellants are in effect challenging the substance of the October 2016 orders. "When a final order is entered, a claim of appeal from that order must be timely filed. A party cannot wait until the entry of a subsequent final order

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> to untimely appeal an earlier final order." *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007). In an appeal from the subsequent final order, issues relating to the earlier order are not properly before this Court. *Id.* [*Id.* at *1 (some citations omitted).]

Davis is not the first time a party has filed a timely appeal from a "final" order, only to learn that its appeal did not extend to earlier orders because those too were "final." For example, in *Tacco Falcon Point, Inc v Clapper*, unpublished opinion per curiam of the Court of Appeals, issued Oct 23, 2008; 2008 WL 4684088 (Docket No. 273635), the defendant filed a timely appeal from the trial court's order imposing prevailing party costs in favor of the plaintiff under MCR 2.625. In challenging the award of costs, however, the sole basis for the defendant's argument was that the trial court erred in granting the plaintiff's motion for summary disposition. *Id.* at *1. The Court of Appeals held that it did not have jurisdiction to consider that argument because the defendant had not appealed from the summary disposition order itself:

> [B]ecause [the defendant's] appeal is from a postjudgment order awarding costs under MCR 2.625, see MCR 7.202(6)(iv), and because the scope of such an appeal is limited to the portion of the order with respect to which there is an appeal of right, MCR 7.203(A)(1), [the defendant] may not attack the underlying summary disposition order as part of this appeal." [*Id.*]

Similarly, in *Jenkins v James F Altman & Nativity Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005; 2005 WL 1278478 (Docket No. 256144), the Court of Appeals held that the plaintiffs could not challenge the trial court's order granting summary disposition to the defendant because although the plaintiffs timely appealed from the trial court's postjudgment order awarding attorney fees and costs, the Court's jurisdiction was limited to that order and did not extend to the earlier summary disposition decision. *Id.* at *3.

Note that these cases all happened to involve situations in which a failure to appeal the first of two final orders prevented the Court of Appeals from entertaining an appeal from the earlier order. The same problem arises, however, if a party timely appeals the first order, but not the second one. In *B&S Telcom, Inc v Michigan Bell Tel Co*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2013; 2013 WL 1632006 (Docket No. 304030), the plaintiff appealed the trial court's order granting summary disposition to the defendant. On appeal, the plaintiff also sought to challenge the trial court's subsequent order awarding the defendant attorney fees and costs as sanctions. *Id.* at *5. The problem is that the plaintiff never filed a separate appeal from the sanctions order. As a result, the Court of Appeals' jurisdiction was limited to review of the summary disposition order:

> [P]laintiff asserts that the trial court erred in awarding defendant attorney fees and costs. However, plaintiff only appealed the trial court order granting summary disposition, and did not appeal the subsequent order awarding sanctions. . . . [B]oth orders are final orders; by failing to appeal from the order awarding costs and fees, plaintiff failed to invoke this Court's jurisdiction with respect to that order and we decline to address this aspect of plaintiff's argument. [*Id.*]

The lesson of these cases, and others like them, is that it is critical to carefully evaluate the issues to be raised on appeal and determine whether the existence of multiple "final" orders may require the filing of more than one claim of appeal.

One-Note Advocacy

The National Law Journal reported a telling moment from the U.S. Supreme Court's December 6, 2018 oral argument in *Gamble v United States*.[1]

Gamble concerned the "separate sovereigns" doctrine—the rule that federal and state authorities can prosecute the same person for the same crime without violating the prohibition against double jeopardy. Gamble's attorney argued that the separate-sovereigns doctrine "is inconsistent with the text and original meaning of the Double Jeopardy Clause."[2] And much of his argument focused on this question of original understanding. After Justice Gorsuch prodded Gamble's attorney to consider *stare decisis*, Justice Kagan pointedly directed Gamble's attorney away from original understanding:

> [M]y main question, which actually goes back to Justice Gorsuch's question, because Justice Gorsuch has been trying to lead you away from something, and I'm a little bit also confused as—as to why your argument seems, frankly, a little bit one note.
>
> You know, your—your brief and now your argument is just all about the original jurisdiction [sic; understanding]. And there are some people on this bench that think that that is the alpha and omega of every constitutional question.
>
> But there are other people on this bench who do not . . .[3]

The National Law Journal interpreted Justice Kagan's comment about "one note" arguments as a dig at "her originalist colleagues."[4] That's doubtful. Justice Kagan asked this question as a follow-up to inquiries from Justice Gorsuch—who is, by most accounts, one of "her originalist colleagues." And the key lesson from Justice Kagan's comment isn't that it invites speculation about internal Supreme Court drama. Rather, Justice Kagan was making an important point for appellate advocates.

Most appellate advocates have a guess before oral argument about what each judge is likely to think about the case. That's part of our job. Clients often hire appellate specialists precisely because these specialists know a court well enough to make educated guesses. And it would be foolish not to use these educated guesses in preparing arguments.

But educated guesses can be a trap, too. That's what Justice Kagan was getting at.

Educated guesses can trap lawyers in two ways. The first trap is the kind of "one note" advocacy that Justice Kagan cited in *Gamble*. Advocates spring this trap by coming up with a theory that seems to fit the judicial philosophy of a majority on the court. They focus so much on

selling an argument that fits the would-be majority's view that they forget about the other judges—the ones who don't share the majority's judicial philosophy. Once this trap is sprung, you may get the kind of pushback Justice Kagan expressed in *Gamble*—something to the effect of, "Hey, there are other justices on this Court, too."

Most attorneys could live with comments like Justice Kagan's "one note" remark if it meant winning their cases. But offending judges in the minority isn't the only risk. One-note advocacy poses a second trap: undermining the complexity of a putative majority's judicial philosophies.

Justice Gorsuch may be an originalist but he was clearly interested in *stare decisis* and judicial humility in *Gamble*. Counting a majority too soon can mean over-simplifying the majority's approach and missing these other concerns. In its worst form, this second trap leads to the dreaded Argument Only a Lawyer Could Love—a construction of a statute or court rule or case so focused on technical issues that it misses major conceptual and contextual points.

There's a way to avoid these traps: approaching every argument with every judicial tool available. Have a winning plain-text argument? Great. Make sure you put in the context of a compelling story. Have a powerful take on caselaw? Fine—but don't forget about relevant statutory schemes. Think you know the original understanding of the controlling constitutional clause? Consider *stare decisis,* too. The best arguments work on multiple levels, speaking to judges with varied judicial philosophies and inviting judges to consider an issue from different angles.

Aside from avoiding conceptual traps, there's a very practical reason to approach appellate arguments this way. At intermediate appellate courts, you don't know which judges are assigned to your panel until briefing is complete. So you might have a slam-dunk argument for textualists, only to discover your case is assigned to judges who can say "textualism" only with a wrinkle of the nose.

This article isn't meant to be a criticism of Gamble's attorney. Justice Kagan's characterization may or may not have been fair, and Gamble's original-understanding argument may yet carry the day. We've all gotten questions that seem harsh, only to learn that the court ruled in our client's favor. If we're honest, we've all fallen into the trap of one-note advocacy sometimes.

Still, Justice Kagan's comment about one-note advocacy is a reminder that it's not enough to hit the right notes. We need melody, too.