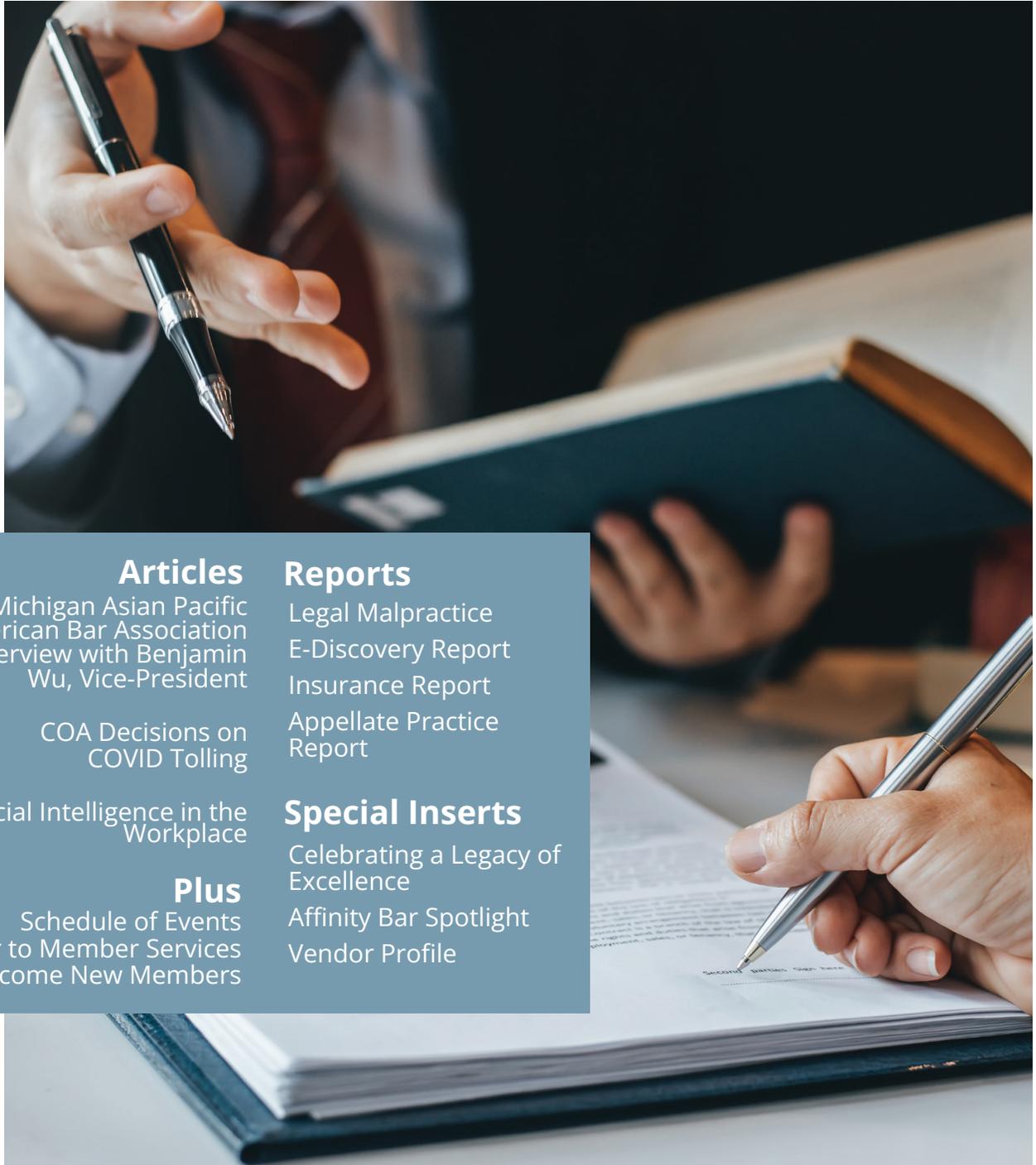


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Appellate Practice Report

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Michigan Court of Appeals Clarifies Application of the “Plain Error” Rule

One of Michigan’s more well-established appellate doctrines is that a claim of error generally won’t be considered on appeal unless it is preserved in the trial court. That isn’t necessarily the case in criminal appeals, where the “plain error” rule provides the opportunity for relief under certain circumstances. Until recently, there was some confusion about whether the “plain error” rule applies in civil cases. But the Michigan Court of Appeals has now clarified that it does not.

General Rule of Issue Preservation in Civil Cases

As the Michigan Supreme Court explained in *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008), “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).

Although the Court of Appeals does have discretion to consider unpreserved issues in civil cases, the Court “exercises its discretion sparingly and only when exceptional circumstances warrant review.” *In re Conservatorship of Murray*, 336 Mich App 234, 241; 970 NW2d 372 (2021). The Court may review an unpreserved issue in a civil case only “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).

The “Plain Error” Rule in Criminal Cases

By contrast, the “plain error” rule applies in criminal cases. Under the plain error rule, appellate courts have an obligation to review unpreserved errors (both constitutional and nonconstitutional) if the defendant can show “(1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected [the] defendant’s substantial rights.” *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011), citing *People v Carines*, 460 Mich 750, 753; 597 NW2d 130 (1999). The third requirement “generally requires a

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showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Carines*, 460 Mich at 753. If these requirements are met, reversal is warranted “if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

The Plain Error Does Not Apply in Civil Cases

Ever since the Supreme Court in *Carines* adopted the plain error rule for both constitutional and nonconstitutional errors in criminal cases, there has been confusion about whether it also applies in civil cases. For example, in *Henderson v Dep’t of Treasury*, 307 Mich App 1; 858 NW2d 733 (2014), the Court of Appeals applied the plain error rule in reviewing whether the Michigan Tax Tribunal’s refusal to allow the petitioner to conduct discovery deprived it of procedural due process, an issue that the petitioner failed to preserve before the Tax Tribunal. *Id.* at 9.

Several decisions subsequently relied on *Henderson* in applying the plain error rule to unpreserved claims of error in civil cases. See, e.g., *Charter Twp of Canton v 44650, Inc*, ___ Mich App ___; ___ NW2d ___; 2023 WL 2938991, at *6 (2023); *Mr Sunshine v Delta College Bd of Trustees*, ___ Mich App ___; ___ NW2d ___; 2022 WL 12073432, at *1 (2022); *Total Armored Car Serv, Inc v Dep’t of Treasury*, 325 Mich App 403, 412; 926 NW2d 276 (2018).

As the Court of Appeals’ decision in *Tolas Oil* now makes clear, the “plain error” rule does not apply in civil cases. Instead, parties in a civil case are bound by the longstanding “raise or waive” rule, under which appellate review is wholly discretionary and granted sparingly.

The Court of Appeals recently clarified, however, that the plain error rule does not apply to civil cases. In *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, ___ Mich App ___; ___ NW2d ___; 2023 WL 4034786 (2023), the Court of Appeals observed that the Supreme Court had long distinguished between civil and criminal cases. The Court cited *Napier v Jacobs*, 429 Mich 222; 414 NW2d 862 (1987), in which the Supreme Court reaffirmed that failure to preserve an issue in the trial court waived any claim of error on appeal. *Id.* at 227-228. In doing so, the *Napier* Court noted that the situation is different in a criminal case, where the defendant

is “faced with imprisonment” such that “appellate review might well be the only remedy” because “[a] malpractice claim based upon ineffective assistance of counsel, for example, could hardly compensate a wrongfully convicted person for undeserved imprisonment in a state prison.” *Id.* at 233 and n 2.

The Court of Appeals in *Tolas Oil* also pointed to the Supreme Court’s continued application of the “raise or waive” rule in *Walters*, 481 Mich 377, in which the Court declined to consider a statute of limitations-tolling issue because it was not raised in the trial court. *Id.* at 389. Given *Napiers* and *Walters*, the *Tolas Oil* Court held that the waive or raise rule must be applied in civil cases, not the plain error rule of *Carines*. *Tolas Oil*, ___ Mich App ___; 2023 WL 4034786, *3.

Conclusion

As the Court of Appeals’ decision in *Tolas Oil* now makes clear, the “plain error” rule does not apply in civil cases. Instead, parties in a civil case are bound by the longstanding “raise or waive” rule, under which appellate review is wholly discretionary and granted sparingly.