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Appellate Practice Report

STATEMENTS OF SUPPLEMENTAL AUTHORITY
Submitting Supplemental Authority in the Michigan Court of Appeals

As there can often be a delay of several months between the time that briefs are filed and oral argument is held, there are times when a party may want to supplement the authorities in its brief with a decision that came out after briefing was completed. MCR 7.212(F) provides the procedure for doing just that.

As the court rule explains, a party may submit "supplemental authority" by way of a one-page "communication," and may do so without leave of the court, so long as certain conditions are met. First, a supplemental authority must be for the purpose of calling to the court's attention "new authority released *after* the party filed its brief." MCR 7.212(F) (emphasis added). Second, a supplemental authority "may not raise new issues." MCR 7.212(F)(1). Third, it "may only discuss how the new authority applies to the case, and may not repeat arguments or authorities contained in the party's brief." MCR 7.212(F)(2). Finally, a supplemental authority "may not cite unpublished opinions." MCR 7.212(F)(3).

As further explained in the Court of Appeals' Internal Operating Procedures (IOPs):

> Such a filing may only cite and discuss new published authority released subsequent to the date the party filed its last brief or supplemental authority. New issues may not be raised in a supplemental authority. The body of the supplemental authority cannot exceed one page. The caption may be on a preceding page and the signature block alone may be on a subsequent page. But the *text* of the supplemental authority cannot exceed one page. If the body exceeds one page, it must be accompanied by a motion. [IOP 7.212(F)-1 (emphasis in original).]

If a party seeks to cite newly-discovered authority that was released *before* the party filed its brief, then a motion is required. "Unless accompanied by a motion," a supplemental authority will also "be returned if it (1) fails to comply with the requirement that it not exceed one page, (2) cites other than new published authority." *Id.*

Finally, the IOPs provide one last word of caution. A statement of supplemental authority must include *all* new authorities that the party wishes to raise. In other words, multiple supplemental authorities are not permitted, unless "a party files a supplemental authority after the filing of the brief, and then another *new* case is released after filing of the first supplemental authority." *Id.* (emphasis in original). In that case, "the subsequent supplemental authority will be accepted." *Id.* Otherwise, "all new authority the party wishes to raise should be contained in a single supplemental authority, rather than in multiple supplemental authorities," and "[t]he clerk will require a motion for leave to file a supplemental authority raising authority that could have been included in a prior or contemporaneously filed supplemental authority." *Id.*

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In *Quinto*, the Court refused to consider an affidavit that was not submitted in response to the defendant's motion for summary disposition, but was instead presented for the first time in the plaintiff's motion for reconsideration, holding that the affidavit "was not before the trial court."

MOTION FOR RECONSIDERATION
Is it Proper to Raise New Arguments or Submit New Evidence in a Motion for Reconsideration?

There may be times when a party facing an adverse summary disposition decision (whether it be the grant or denial of such a motion) wishes either to raise a new issue or submit new evidence in a motion for reconsideration under MCR 2.119(F). Is this proper? The weight of authority from the Michigan Supreme Court and Court of Appeals suggests a party proceed with caution, especially when it comes to new evidence.

With regard to submitting new evidence at the reconsideration stage, the Supreme Court's decision in *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), would seem to be controlling. In *Quinto*, the Court refused to consider an affidavit that was not submitted in response to the defendant's motion for summary disposition, but was instead presented for the first time in the plaintiff's motion for reconsideration, holding that the affidavit "was not before the trial court."

> The affidavit was filed with a motion for rehearing, *after* the trial court granted defendant's dispositive motion. In ruling on a motion for summary disposition, a court considers the evidence then available to it. . . . Accordingly, in ruling on the propriety of the trial court's grant of defendant's motion for summary disposition, we do not consider the second affidavit. [*Id.* at 366 n 5.]

Relying on *Quinto*, the Supreme Court reached the same result in *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999), holding that additional evidence submitted in a motion for reconsideration "was not properly before the [trial] court":

> Plaintiff offered the textbook passages for the first time in support of its motion for rehearing. In ruling on a motion for summary disposition, a court considers the evidence then available to it. Accordingly, in ruling on the propriety of the trial court's grant of defendant's motion for summary disposition, we do not consider the textbook evidence.

See also *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474 n 6; 776 NW2d 398 (2009) ("Attached to the motion for reconsideration, plaintiff submitted several affidavits in support of its assertion that that the individuals listed on Exhibit A were elected to Innovative AFC's board of directors in 1999. The circuit court properly declined to consider these affidavits, which were presented for the first time in support of plaintiff's motion for reconsideration."). Thus, under *Quinto* and *Maiden*, a strong argument can be made that under no circumstances can new evidence properly be presented in a motion for reconsideration.

The rule is not as clear cut, however, when it comes to raising a new legal issue or argument. To be sure, the Court of Appeals has long recognized that a trial court does not abuse its discretion by refusing to consider arguments raised for the first time in a motion for reconsideration. *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) ("We find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order."). See also *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 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.").

At the same time, an argument can be made that while the Supreme Court's decisions in *Quinto* and *Maiden* preclude reliance on new *evidence* at the reconsideration stage, the same cannot necessarily be said about new *issues* or *arguments*. For example, in *Sutton v City of Oak Park*, 251 Mich App 345; 650 NW2d 404 (2002), which involved a statutory issue raised for the first time in a motion for reconsideration, the Court of Appeals recognized the discretion of trial courts to consider such a new argument:

> Initially, we address the position of plaintiff and the trial court regarding the motion for reconsideration that defendants' reliance on MCL 15.243(1)(s)*(ix)* was improper because it was not relied on in defendants' motion for summary disposition and that the trial court was therefore required to deny defendants' motion for reconsideration. This is not an accurate statement of the law because defendants' motion for reconsideration was brought under MCR 2.119(F), which, by its

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terms, does not restrict the discretion of the trial court in ruling on the motion. See MCR 2.119(F)(3). Clearly, whether MCL 15.243(1)(s) *(ix)* applies to the records at issue to exempt them from disclosure was presented both by the city council and defendants in their motion for reconsideration. [*Id*. at 348-349.]

The *Sutton* Court further recognized the Court of Appeals' own discretion to consider a legal issue on appeal even though it was raised for the first time in a motion for reconsideration:

> More importantly, the issue on appeal is a question of law, brought under MCR 2.116(C)(8), and the facts necessary for its resolution are before this Court. *Michigan Twp Participating Plan v Federal Ins Co,* 233 Mich App 422, 435-436; 592 NW2d 760 (1999) (An issue not addressed by the trial court may nevertheless be addressed by the appellate court if it concerns a legal issue and the facts necessary for its resolution have been presented). [*Id*. at 349.]

Relying on its discretion, the Court ended up reversing the trial court's decision based on the belatedly-raised statutory issue. In a separate concurrence, Judge Kurtis Wilder further expanded on what he viewed as an arguable distinction between submitting new evidence in support of a motion for reconsideration and making new arguments:

> [W]hile a party may be precluded from submitting new *evidence* to the trial court in support of a motion for reconsideration, see *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999); *Quinto v Cross & Peters*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996) (in ruling on a motion for summary disposition, a court considers *the evidence then available to it*), a party raising a newly asserted *basis* for dismissal in a motion for reconsideration does not necessarily run afoul of *Maiden* and *Quinto* in the appropriate circumstances. [*Id*. at 351 (Wilder, J., concurring).]

Of course, while it is theoretically *possible* to successfully raise an issue for the first time in a motion for reconsideration, a review of recent decisions from the Court of Appeals suggests that this is not the norm, and that parties should certainly not assume that it can be done. See, e.g, *Gollman v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2011; 2011 Mich App LEXIS 390 (Docket No. 293744) ("Plaintiff did not calculate the $209,491 that he cites on appeal. He made the further calculations only in a motion for reconsideration, after the trial court had made its summary-disposition ruling. Accordingly, plaintiff did not present his argument properly in the trial court."); *Spaulding v Brewer-Sharpton*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2011; 2011 Mich App LEXIS 262 (Docket No. 294933) ("Defendant also argues on appeal that the statute of limitations would bar the entry of a QDRO in this case because plaintiff waited 16 years before moving the court to enter any order. This issue was first raised in defendant's motion for reconsideration, and was not addressed by the trial court before its initial ruling; therefore, it was not properly preserved for review.").

GOVERNMENTAL IMMUNITY
Supreme Court to Decide Whether State and its Departments Are Exempted from Liability Under MCL 691.1402(1) for Maintaining a Trailway that is Not Adjacent to Any Vehicular Highway

Duffy v Dep't of Natural Resources, Docket No. 289644, March 9, 2010 (unpublished), lv gtd ___ Mich ___ (Docket No. 140937, September 15, 2010). In a case which the Michigan Court of Appeals characterized as one of "purely statutory interpretation," the Michigan Supreme Court has granted leave to determine whether the state and its departments are exempted from liability under MCL 691.1402(1) for maintaining a trailway that is not adjacent to any vehicular highway.

The plaintiff was injured while riding an all-terrain vehicle on the Little Manistee Trail, which is operated by the Michigan Department of Natural Resources ("DNR"). The trial court denied the motion filed by the state and the DNR for summary disposition based on governmental immunity, finding that MCL 691.1402(1) imposed liability on the state and its departments. The trial court further determined that the following limitation of liability did not apply to these entities: "The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside the improved portion of the highway designed for vehicular travel."

The Michigan Supreme Court has granted leave to determine whether the state and its departments are exempted from liability under MCL 691.1402(1) for maintaining a trailway that is not adjacent to any vehicular highway.

The trial court held that the state and the DNR were not exempted from liability under this language because the phrase "the state and the county road commissions" applied only to the state road commission and the county road commissions.

Reversing, the Court of Appeals held that the trial court's interpretation of this phrase was erroneous. It noted that the trial court's interpretation would have granted immunity to a non-existent governmental agency, since there is no "state road commission" in Michigan. The Court of Appeals further held that the trial court's interpretation was erroneous because it ignored the word "the" immediately preceding "county road commissions." Properly interpreted, the Court of Appeals held, this phrase limited the liability of the state, as well as the county road commissions. Because the definition of "state" in MCL 691.1401(c) includes the state's departments and agencies, this limitation of liability was applicable to both the state and the DNR.

The Court of Appeals then proceeded to an issue not considered by the trial court: "whether the limited duty nonetheless extends to trailways as long as they are not 'outside of the improved portion of the highway designed for vehicular travel.'" In other words, whether the statute exempts the state from liability for *all* trailways, sidewalks and crosswalks, or whether it exempts the state from liability for only those trailways, sidewalks and crosswalks that are "outside of the improved portion of the highway designed for vehicular travel." The Court of Appeals first noted that the statute is "confusingly worded," as the Supreme Court previously noted in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 167; 615 NW2d 702 (2000). It next held that "[t]here can be no real dispute that this is a trailway and that 'trailways' are included in the definition of 'highway' provided by MCL 691.1401(e)." The pivotal issue upon which the parties disagreed was "whether the phrase 'outside of the improved portion…' modifies only 'other installations' or if it modifies each of the preceding items: 'sidewalks, trailways, and crosswalks.'"

The Court of Appeals held that the phrase "outside of the improved portion" modified only the phrase "other installations," and not "sidewalks, trailways [and] crosswalks." Accordingly, the state is exempt from liability for all sidewalks, trailways and crosswalks under this statute, whether they are inside or outside of the "improved portion" of the highway. To reach this conclusion, the Court of Appeals relied on two arguments. First, it applied the "last antecedent" rule of statutory construction, which provides that "a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." Applying that rule to MCL 691.1402(1), the court held that "*all* sidewalks, crosswalks, and trailways are excluded from the scope of defendants' duty, as well as any other installation outside of the improved portion of the highway."

Second, the Court of Appeals held that its interpretation was consistent with the Supreme Court's interpretation of the governmental immunity statute in *Suttles v Dep't of Transportation*, 457 Mich 635; 578 NW2d 922 (1998). Although *Suttles* was decided prior to the inclusion of the word "trailways" in 1999, it held that the highway exception to governmental immunity "no longer allowed liability for the state and county for injuries incurred in three specific areas: (1) sidewalks, (2) crosswalks, or (3) any other installation outside the improved portion of the highway designed for vehicular travel." *Id.* at 644. The Court of Appeals found it instructive that *Suttles* therefore assumed that the state was exempt from liability for *all* crosswalks and sidewalks (and, necessarily, "trailways" as added in 1999), not merely those outside of the improved portion of the highway.

In response to the Court of Appeals' decision, the plaintiff filed an application for leave to appeal with the Supreme Court on April 15, 2010, which the Supreme Court granted in an order entered on September 15, 2010. The case is significant not only for the issues of governmental immunity, but also because the Supreme Court's determination will invoke and clarify issues of statutory interpretation with potentially broad applicability.

Michigan Defense Quarterly
Publication Schedule

Publication Date	Copy Deadline
January	December 1
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July	June 1
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