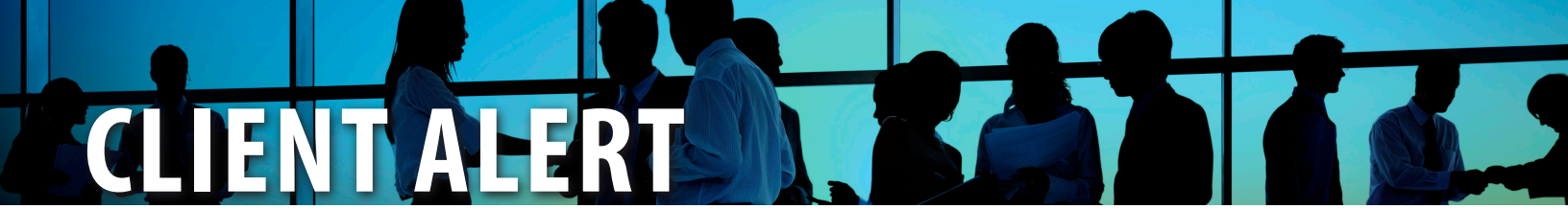

APPELLATE

EFFECT OF DENIALS OF LEAVE TO APPEAL "FOR LACK OF MERIT"

by Phillip J. DeRosier [1]

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 See, e.g., *Sidhu v Farmers Ins Exchange*, unpublished opinion per curiam of the Court of Appeals, issued Sept 11, 2008; 2008 WL 4180347, *1 (Docket No. 277472) (declining to address issue regarding timeliness of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 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.

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