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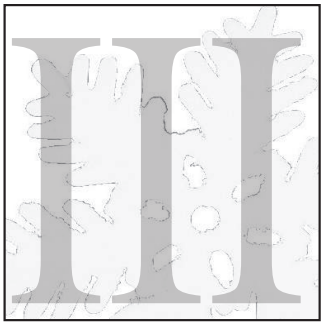

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Appellate Practice Report

By: Phillip J. DeRosier and Trent B. Collier

Conflicts in the Michigan Court of Appeals

The Michigan Court of Appeals generally decides cases through panels of three of its twenty-five judges. Naturally, there will be differences of opinion among those jurists. The Michigan Court Rules anticipate that differences will arise and provide a procedure for resolving them.

The Court of Appeals is only required to follow a published opinion "issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court or a special panel of the Court of Appeals." MCR 7.215(J)(1). Although published opinions issued after November 1990 are binding, subsequent panels are not necessarily required to agree with them.

If a panel disagrees with a precedential opinion and follows it only because it's required to do so under MCR 7.215(J), it "must" indicate its disagreement and cite MCR 7.215(J)(2) in a published opinion. MCR 7.215(J)(2). That statement triggers the conflict resolution process in MCR 7.215.

Generally, within 28 days after the publication of an opinion citing a conflict under MCR 7.215(J)(2), the Court of Appeals' chief judge polls the other judges "to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of addressing the conflict that would have been created but for" the obligation to follow precedent. By requiring judges to ensure that issues are "outcome determinative" before wading into a potential conflict, the Michigan Court Rules ensure that the Court refrains from addressing conflicts in dicta.

If a special panel is convened, seven judges—excluding those who originally heard the case—are selected "by lot." MCR 7.215(J)(4). The conflict panel must "limit its review to resolving the conflict that would have been created but for" the requirement that the court follow published, post-November 1990 opinions. MCR 7.215(J)(5). Litigants may file supplemental briefs "and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument." *Id.* The resulting decision is, of course, binding on future panels.

For appellate lawyers, the key point is to be aware of the potential for a conflict and to specifically ask the Court beforehand—that is, in the merits briefing—to convene a conflict panel when appropriate.

Supreme Court Orders as Binding Precedent

The Michigan Supreme Court has a well-known practice of issuing peremptory orders on pending applications for leave to appeal that decide the application without actually granting leave. Consider this order in *DiLuigi v RBS Citizens NA*:[1]

On order of the Court, the application for leave to appeal the September 9, 2014 judgment of the Court of Appeals is considered and, pursuant to MCR 7.30[5](H)(1),[2] in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals. The Court of Appeals erred in holding that a genuine issue of material fact existed regarding notice. To the extent that the Court of Appeals rested its holding on the proposition that MCL 600.3204(4)(a), as amended by 2009 PA 29, requires a borrower to receive actual notice of his or her right to seek a home loan modification, see MCL 600.3205a to MCL 600.3205d [repealed by 2012 PA 521], the Court of Appeals is mistaken. As Judge Riordan's dissenting opinion correctly observes, MCL

Phillip J. DeRosier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the area of appellate litigation. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Justice Robert P. Young, Jr. He is a past chair of the State Bar of Michigan's Appellate Practice Section. He can be reached at pderosier@dickinsonwright.com or (313) 223-3866.

Trent Collier is a member of the appellate department at Collins Einhorn Farrell P.C., in Southfield. His practice focuses on the defense of legal malpractice, insurance, and general liability claims at the appellate level. His e-mail address is Trent.Collier@CEFLawyers.com.

600.3205a(3) simply requires that notice be given "by regular first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower, both sent to the borrower's last known address." Because it is undisputed that defendants complied with the statutory requirements by providing plaintiffs with both forms of mailed notice, summary disposition in favor of defendants was proper. For these reasons, we REINSTATE the May 31, 2012 judgment of the St. Clair Circuit Court that granted the defendants' motion for summary disposition.

If a panel disagrees with a precedential opinion and follows it only because it's required to do so under MCR 7.215(J), it "must" indicate its disagreement and cite MCR 7.215(J)(2) in a published opinion. MCR 7.215(J)(2). That statement triggers the conflict resolution process in MCR 7.215.

Does a peremptory order issued by the Supreme Court constitute binding precedent in the same manner as a full-blown opinion? The answer depends on whether the order contains a rationale that can be understood.

Const 1963, art 6, § 6 provides that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision." The seminal Supreme Court decision construing this provision is *People v Crall*.[3] In *Crall*, the Supreme Court held that the Court of Appeals erred in rejecting a Supreme Court order as "not binding precedent."[4] The order, issued in *People v Bailey*,[5] found that "[t]he defendant waived the issue of entrapment by not raising it prior to sentencing." Finding "no basis" for the Court of Appeals' conclusion that the order in *Bailey* was not binding precedent, the Supreme Court in *Crall* observed that "[t]he order in *Bailey* was a final Supreme Court disposition of an application, and the order contains a concise statement of the applicable facts and the reason for the decision."[6] Thus, the *Crall* Court held that the Court of Appeals should have followed *Bailey* and rejected a similarly unpreserved entrapment issue.[7]

Numerous Court of Appeals decisions since *Crall* have variously stated that a peremptory Supreme Court order constitutes binding precedent if the Court of Appeals "can determine the applicable facts and the reason for the decision,"[8] if the order "can be understood,"[9] or if the order contains "an understandable rationale."[10]

This also includes situations where the Supreme Court's "rationale" is contained in **another** decision incorporated into the order by reference. In *DeFrain v State Farm Mut Auto Ins Co*,[11] the Supreme Court confirmed that the requirements of Const 1963, art 6, § 6 "can be satisfied by referring to another opinion."[12] The Court of Appeals has recognized this as well. In *Mullins v St Joseph Mercy Hosp*,[13] the Court of Appeals observed that it "consistently has adhered to the principle that the Michigan Supreme Court's summary disposition orders constitute binding precedent when they finally dispose of an application and are capable of being understood, even by reference to other published decisions."[14]

Sometimes a Supreme Court order may even reference a Court of Appeals dissenting opinion—as in *DiLuigi*. Such orders constitute binding precedent as well. As the Supreme Court explained in *DeFrain*, when the Court references a Court of Appeals dissent, it has "adopted the applicable facts and reasons supplied by the dissenting judge as if they were its own."[15] Thus, in *Evans & Luptak, PLC v Lizza*,[16] the Court of Appeals relied on an analysis of an ethical rule contained in a Court of Appeals dissent because the Supreme Court's order reversing the Court of Appeals majority's decision expressly stated that it "agree[d] with the Court of Appeals dissent's discussion of [the] principles pertaining to [the ethical rule]."[17]

In sum, so long as the Supreme Court's rationale for a decision can be understood and applied beyond the circumstances of the particular case, it is binding precedent regardless whether the decision takes the form of an order or an opinion.

Endnotes

1 See *DiLuigi v RBS Citizens N A*, 497 Mich 1042; 864 NW2d 146 (2015).

2 Formerly MCR 7.302(H)(1).

3 *People v Crall*, 444 Mich 463; 510 NW2d 182 (1993).

4 *Id*. at 464 n 8.

5 *People v Bailey*, 439 Mich 897; 478 NW2d 480 (1991).

6 *Crall*, 444 Mich at 464, n 8.

7 *Id*.

8 *Weschler v Wayne Co Road Comm'n*, 215 Mich App 579, 591 n 9; 546 NW2d 690 (1996), remanded on other grounds 455 Mich 863 (1997). See also *Dykes v Wm Beaumont Hosp*, 246 Mich 471, 483; 633 NW2d 440 (2001) ("An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent.").

9 *People v Edgett*, 220 Mich App 686, 693 n 7; 560 NW2d 360 (1996). See also *People v Phillips (After Second Remand)*, 227 Mich App 28, 38 n 11; 575 NW2d 784 (1997) ("Supreme Court peremptory orders are binding precedent when they can be understood."); *Brooks v Engine Power Components, Inc*, 241 Mich App 56, 61; 613 NW2d 733 (2000) (same), overruled on other grounds *Kurtz v Faygo Beverages, Inc*, 466 Mich 186; 644 NW2d 710 (2002).

10 *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006) (rejecting reliance on a Supreme Court order because it could not be "understood as expressing an opinion on how the issue should be decided").

11 *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359; 817 NW2d 504 (2012).

12 *Id*. at 369.

13 *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006), rev'd on other grounds 480 Mich 948 (2007).

14 *Id*. at 508; see also *People v Ackley*, ___ Mich App ___; ___ NW2d ___; 2021 WL 1150195, at *2 (2021) ("Peremptory orders from our Supreme Court constitute binding precedent to the extent they can be comprehended, even if that comprehension must be achieved by seeking out and analyzing other opinions."), citing *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018).

15 *DeFrain*, 491 Mich at 369.

16 *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002).

17 See *Abrams v Susan Feldstein, PC*, 456 Mich 857 (1997). See also *Love v City of Detroit*, 270 Mich App 563, 566; 716 NW2d 604 (2006) (relying on a peremptory Supreme Court order that in turn had adopted the Court of Appeals dissent).