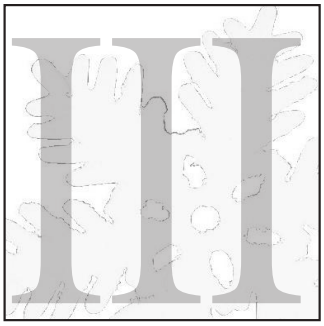
MICHIGAN DEFENSE
QUARTERLY

Volume 38, No. 2 - 2021



IN THIS ISSUE:

ARTICLES

- Common Law Fraud: A Sea Shanty Worth Reviving?

REPORTS

- Appellate Practice Report
- Insurance Coverage Report
- Legal Malpractice Update
- No-Fault Report
- Supreme Court Report
- Amicus Report
- Michigan Court Rules Update

PLUS

- Member News
- Schedule of Events
- Member to Member Services
- Welcome New Members

Appellate Practice Report

By: Phillip J. DeRosier and Trent B. Collier

Pitfalls in Questions Presented

The Michigan Supreme Court and Court of Appeals may decline to consider an issue that a party omits from their "Question Presented" section. This rule has been around for some time, yet it continues to snare the unwary. This article summarizes the basic rule and offers some practice guidelines for its application.

The Basic Rule

Michigan Court Rule 7.212(C)(5) states that an appellant's brief must contain, among other things, "A statement of questions involved, stating concisely and without repetition the questions involved in the appeal. Each question must be expressed and numbered separately and be followed by the trial court's answer to it or the statement that the trial court failed to answer it and the appellant's answer to it.'" MCR 7.212(C)(5).

Michigan's appellate courts have concluded that the mandatory phrasing of this rule means that failure to raise an issue in the Questions Presented section results in waiver. *English v Blue Cross Blue Shield of Mich,* 263 Mich App 449, 459; 688 NW2d 523 (2004); *Grand Rapids Employees Independent Union v Grand Rapids,* 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

Ad Hoc Exceptions

An appellate panel may sometimes conclude that it **could** skip an argument because it wasn't raised in the Questions Presented but consider the argument anyway. This practice rarely offers appellants much comfort; most opinions considering waived issues hold that the waived arguments lack merit in any event. See, e.g., *Copeland v Genoa Tp,* unpublished per curiam opinion of the Court of Appeals, issued June 30, 2011 (Docket No. 301442); *In re Hawkins,* unpublished per curiam opinion of the Court of Appeals, issued January 25, 2005 (Docket No. 255172); *People v Scott*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2002 (Docket No. 225944).

A panel may also look past an appellant's failure to raise an issue in its Questions Presented if the proper resolution of the case hinges on that question. See, e.g., *Tolbert v Isham,* unpublished per curiam opinion of the Court of Appeals, issued May 29, 2003 (Docket No. 231424); see also *Feyen v Grede II, LLC,* unpublished per curiam opinion of the Court of Appeals, issued April 19, 2012 (Docket No. 304137) ("Nevertheless, we overlook the presentation deficiency in the case at bar because a resolution of the issue is necessary for a proper determination of the outcome of the case.").

For example, in *Tolbert,* the trial court entered a default judgment against the defendant in an auto-negligence case. The defendant's attorney was unable to appear for trial because he had another trial scheduled that day and was unable to adjourn either proceeding. The primary issue on appeal was whether the trial court abused its discretion in entering a default judgment when the defense attorney wasn't at fault for his inability to appear at trial.

In their briefs and at oral argument, the parties also disputed whether the plaintiff had a "serious impairment of bodily function" sufficient to maintain an action for non-economic loss under Michigan's no-fault law. *Tolbert,* unpub op at 4. The appellant's Questions Presented didn't raise this issue. But after holding that the trial court abused its discretion in entering a default judgment, the Court of Appeals considered whether the plaintiff had a cause of action in the first place. The panel explained that it was appropriate to reach this question, despite its absence from the appellant's Questions

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.

Presented, because it was a question of law and the parties briefed and argued it. (Presiding Judge Cooper dissented in part because she saw no need to consider an issue that didn't appear in the Questions Presented).

Advocacy Questions

Is it advisable to argue that an opposing party raised an issue in the body of their brief without also citing that issue in its Questions Presented? The Court of Appeals has noted and agreed with parties' criticisms of opposing parties' Questions Presented. *Russo v Shurbet Partners, Inc,* unpublished per curiam opinion of the Court of Appeals, issued October 6, 2011 (Docket No. 298090) ("We agree with defendant that plaintiffs have not raised any appealable issue in their brief. An issue not raised in an appellant's questions-presented section is considered waived on appeal."). So it appears that there's no rule against challenging an opposing party's Questions Presented, even if this issue is typically one that the court itself raises.

The more difficult advocacy question is how to avoid waiving issues by omitting them from the Questions Presented. Although there are no hard and fast rules, a review of the relevant case law suggests three key practices.

First, make sure that your Questions Presented section addresses every order from which your client is seeking relief. *See United Elec Supply Co, Inc v Terhorst & Rinzema Const Co,* unpublished per curiam opinion of the Court of Appeals, issued March 13, 2008 (Docket No. 276290) (declining to consider order granting a motion for summary disposition where the Questions Presented focused only on a motion to reconsider). In other words, you need to consider not just the relevant legal issues but also the context in which they arose.

Second, consider including a separate "question presented" for each discrete legal error or basis for reversal. It may be tempting to combine related issues into a single question—for example, "Should this Court reverse the $2 million verdict and remand for further proceedings where the trial court admitted numerous statements in violation of the Michigan Rules of Evidence?" That kind of statement may have the virtue of efficiency but it has little else to offer. It doesn't identify any specific errors and therefore creates a risk that a panel will conclude that you've waived certain claims of evidentiary error.

Third, don't miss an opportunity to address the underlying merits when an appeal focuses—at least at first blush—on a procedural issue. *Tolbert* highlights the importance of addressing both threshold legal issues (in *Tolbert,* whether the trial court abused its discretion in entering a default judgment) **and** dispositive legal issues (in *Tolbert,* whether the plaintiff stated a tenable no-fault claim at all).

The more difficult advocacy question is how to avoid waiving issues by omitting them from the Questions Presented

More Isn't Always Merrier

There's one final consideration for appellants: the risk of raising **too many** issues. Adding another Question Presented is not costless. Most experienced appellate lawyers know that the more questions an appellant raises, the weaker each question looks. Even the United States Supreme Court observed that additional questions have a way of diluting the strength of other questions: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible or at most on a few key issues." *Jones v Barnes,* 463 US 745, 751-52 (1983). As Justice Robert Jackson put it, "…[R]eceptiveness declines as the number of assigned errors increases." Jackson, *Advocacy Before the Supreme Court,* 25 Temple L.Q. 115, 119 (1951), quoted in *Jones,* 463 US at 752.

Every new question makes the other questions a little weaker. So it's a bad idea to adopt a "better safe than sorry" theory and include a lengthy list of every possible question the court might consider. With the diluting effect of each new question, that strategy may hurt your client more than help. The raise-or-waive rule leaves appellate attorneys with the same basic tasks: figuring out the best arguments, making sure they appear in the Question Presented section, and getting a client's permission to drop the weak arguments.

Lawyers are awfully fond of sports metaphors but music might provide a better one here. If you don't know which instruments your audience prefers, you might write a piece that has a little of everything: piano, tuba, accordion, kazoo, and a beat from a Roland TR-808 drum machine. The result is likely to be an annoying racket. Better to be selective and pick the instruments that work best for your composition.

And sometimes—just sometimes—you might be lucky enough to have a single compelling, dispositive issue. In those cases, you might take a page from Bach's unaccompanied cello suites and let that instrument sing alone.

Effect of a Stipulated Dismissal "Without Prejudice" on Appellate Jurisdiction

On occasion, a plaintiff faced with te dismissal of one or more, but not all, of its claims may wish to pursue an immediate appeal without losing the ability to pursue its remaining claims later on. A similar situation arises when a court dismisses a plaintiffs' claims in their entirety, but the defendant has counterclaims that remain pending. Since an order dismissing less than all of the claims of all of the parties is not "final" for the purpose of bringing an appeal as of right in either the Michigan Court of Appeals or the Sixth Circuit, it is tempting to consider stipulating to the dismissal of the remaining claims or counterclaims "without prejudice" or with some other language preserving the ability to reinstate those claims in the event of an appellate reversal. It would be wise to resist that temptation.

State Court

The Michigan Court of Appeals has repeatedly cautioned against dismissing claims "without prejudice" in order to try and achieve finality. As the court explained in *City of Detroit v Michigan*, 262 Mich App 542, 545; 686 NW2d 514 (2004), voluntarily dismissing claims without prejudice creates the possibility of "piecemeal" appeals, which the court rules are designed to prevent:

> The parties' stipulation to dismiss the remaining claims without prejudice is not a final order that may be appealed as of right; it does not resolve the merits of the remaining claims and, as such, those claims are "not barred from being resurrected on that docket at some future date." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 136; 624 NW2d 197 (2000). The parties' stipulation to dismiss the remaining claims was clearly designed to circumvent trial procedures and court rules and obtain appellate review of one of the trial court's initial determinations without precluding further substantive proceedings on the remaining claims. This method of appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the "final judgment" rule.

In *MLive Media Group v City of Grand Rapids*, 321 Mich App 263; 909 NW2d 282 (2017), the Court of Appeals found *City of Detroit* to be distinguishable because the dismissal without prejudice at issue in *MLive* was involuntary. *Id.* at 268. But the court reiterated Michigan's firmly established rule that "[p]arties cannot create a final order by stipulating the dismissal of remaining claims without prejudice after a trial court enters an order denying a motion for summary disposition addressing only some of the parties' claims." *Id.*

Federal Court

The Sixth Circuit likewise views attempts to manufacture finality with disfavor. In fact, the court just recently addressed the issue in *Rowland v Southern Health Partners, Inc*, 4 F4th 422 (CA 6, 2021). After the district court granted partial summary judgment to the defendants on the plaintiff's federal claims, leaving her state-law claims remaining, the parties told the district court that their "preferred method of moving forward" was dismissal of the plaintiff's remaining state-law claims "without prejudice" so that the plaintiff could pursue an appeal on her federal claims and have her dismissed state-law claims reinstated if she prevailed on appeal. *Id.* at 424. The Sixth Circuit held that the maneuver deprived it of jurisdiction over the plaintiff's appeal.

The court explained that, with limited exceptions, "the finality requirement establishes a one-case, one-appeal rule." *Id.* at 425. Because the plaintiff's state-law claims could "spring back to life" if summary judgment were reversed on any of her federal claims, this "contravene[d] purpose of the finality requirement, which is intended to prevent parties from pausing the litigation, appealing, then resuming the litigation on a 'half-abandoned claim if the case returns.'" *Id.* at 426 (citation omitted). See also *Page Plus of Atlanta, Inc v Owl Wireless, LLC*, 733 F3d 658, 659-660 (CA 6, 2013) (dismissing an appeal for lack of jurisdiction where the parties—after the district court granted summary judgment to the defendant on the plaintiff's claims as well as on the defendant's counterclaim (except as to damages)—stipulated to an order dismissing the entire case on condition that the defendant could re-raise its counterclaim if the order granting summary judgment on the plaintiff's claims was reversed).

One noteworthy aspect of the Sixth Circuit's approach to finality is that the court does appear to recognize two potential rationales that might establish finality notwithstanding a stipulated dismissal being "without prejudice." One is that "the voluntary dismissal comes at a cost," with the party "assum[ing] the risk that the statute of limitations, any applicable preclusion rules or any other defenses might bar recovery on the claim." *Id.* at 427 (citation and internal quotations omitted). The other is if the "claim voluntarily dismissed without prejudice must be re-filed in a separate action," in which case there would be "no risk that the same case will produce multiple appeals raising different issues." *Id.* at 427-428 (citation and internal quotations omitted).

Conclusion

Although it appears theoretically possible to construct a voluntary dismissal without prejudice that meets the Sixth Circuit's view of finality, it should be approached with extreme caution. As far as Michigan goes, the practice should be avoided completely, or else face the very real—if not likely—prospect of the appeal being dismissed.