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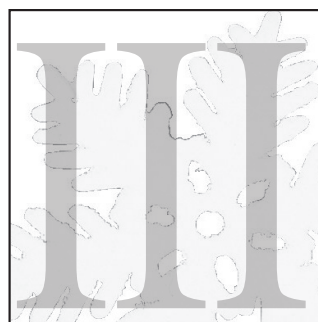
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# MICHIGAN DEFENSE QUARTERLY

Volume 38, No. 4 - 2022

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# Appellate Practice Report

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By: Phillip J. DeRosier and Trent B. Collier

## Appellate Costs in the Michigan Court of Appeals

Under the Michigan Court Rules, the prevailing party—meaning a party that prevails on all issues in a civil appeal—may be entitled to tax costs against the non-prevailing party.<sup>1</sup> A prevailing party has this right automatically and without any specific order from the Court of Appeals. But the Court of Appeals may eliminate that right if it chooses by stating in an opinion that costs are not recoverable.<sup>2</sup> For example, the Court has stated that costs are not taxable if an appeal “presents an issue of significant public importance[.]”<sup>3</sup>

To obtain costs in the Court of Appeals, the prevailing party must file a certified or verified bill of costs “[w]ithin 28 days after the dispositive order, opinion, or order denying reconsideration is mailed.”<sup>4</sup> The objecting party may file a response within 7 days after service of the bill of costs.<sup>5</sup> The clerk must “promptly” verify the prevailing party’s costs and tax as appropriate.<sup>6</sup>

If either party wants to challenge the clerk’s action, they may file a motion “within 7 days from the date of taxation.”<sup>7</sup> The Court’s review, however, is limited to “those affidavits or objections which were previously filed with the clerk...”<sup>8</sup>

What costs are taxable? Under the Michigan Court Rules, the prevailing party may collect only “reasonable costs incurred in the Court of Appeals.”<sup>9</sup> These include the cost of (1) printing briefs, (2) an appeal or stay bond, (3) transcripts, (4) documents necessary for the appeal record, and (5) fees paid to court clerks.<sup>10</sup> If the prevailing party wishes to tax any additional costs, it must connect the right to do so to an applicable statute or court rule.<sup>11</sup>

This list of taxable costs isn’t long. In many appeals—particularly those in which the prevailing party incurred no expenses related to a bond—there’s a strong possibility that the expenses necessary to prepare a costs application will exceed the recoverable costs. That’s especially true if collecting those costs might require some effort. Nevertheless, the costs in some appeals may be large enough to justify their pursuit.

When you receive an order allowing a client to tax costs incurred in an appeal, it’s best to give your client a realistic picture of the likely expense of pursuing costs along with the likely recovery. Engaging in these calculations upfront allows a client to make an informed judgment about whether pursuing costs is worthwhile.

An application for costs may look something like the following (with apologies to *Arrested Development* for supplying names):

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

STAN SITWELL

*Plaintiff/Appellee*, v.

THE BLUTH COMPANY,

*Defendant/Appellant*.

Court of Appeals No. 12345

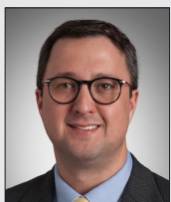
Oakland County Circuit Court

No. 2022-12345-AV



**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.

## The Bluth Company's Verified Bill of Costs

Appellant The Bluth Company was the prevailing party in this appeal. It submits the following verified bill of costs under MCR 7.219 for the Clerk of the Court to tax.

### Bill of Costs

<i>Filing Fees:</i>	Entry Fee for Application for Leave	\$375.00	
<i>Briefs:</i>	Appellant's Brief on Appeal	29 original pages @ \$1.00/page	\$29.00
		85 exhibit pages @ \$.10/page	\$8.50
	Appellant's Reply Brief on Appeal		
	16 original pages @ \$1.00/page		\$16.00
<i>Transcript</i>			
	August 1, 2018		\$85
<i>Misc</i>			
	Cost Because Matter Was a Calendar Case		\$50
<b>Total Taxable Costs</b>			<b>\$563.50</b>

### Verification

STATE OF MICHIGAN )

) ss.

COUNTY OF OAKLAND )

Bob Loblaw, being first duly sworn, states as follows:

1. He is appellate counsel for appellant The Bluth Company in this cause of action.
2. He has read the preceding bill of costs, and each item of costs is correct and necessarily incurred.

Robert Loblaw (P54321)

Subscribed and sworn to before me this 6<sup>th</sup> day of March 2022.

### NOTARY PUBLIC

Wayne County, Michigan (Acting in Oakland County, Michigan)

My commission expires: 2/10/2020

The Law Offices of Bob Loblaw

By: /s/ *Bob Loblaw*

ROBERT LOBLAW (P54321)

1234 Tobias Road, Detroit, MI 42222

(248) 222-2222 • [Bob@loblawlaw.com](mailto:Bob@loblawlaw.com)

*Appellate Counsel for Appellant*

Dated: March 6, 2022

## Scope of Cross-Appeals in the Michigan Court of Appeals

In the Michigan Court of Appeals, when a party files an appeal as of right (or the Court of Appeals grants leave to appeal), the appellee is entitled to file a cross-appeal. MCR 7.207(A)(1) (“When an appeal of right is filed or the court grants leave to appeal any appellee may file a cross appeal.”). But what is the proper scope of a cross-appeal? Is it limited to the judgment or order being appealed? Can a cross-appeal raise issues involving parties unaffected by the original claim of appeal?

In *Costa v Community Emergency Medical Services, Inc*, 263 Mich App 572; 699 NW2d 712 (2004), aff'd 475 Mich 403 (2006), the Court of Appeals confirmed that “[t]he language of MCR 7.207 does not restrict a cross-appellant

from challenging whatever legal rulings or other perceived improprieties occurred during the trial court proceedings.” *Id.* at 583-584. In *Costa*, the defendants appealed as of right from the trial court’s order denying their motion for summary disposition based on governmental immunity. The plaintiffs cross-appealed from the same order, which had also denied the plaintiffs’ motion for summary disposition. The defendants argued that the Court of Appeals did not have jurisdiction to consider the plaintiffs’ cross-appeal because the portion of the order denying the plaintiffs’ motion for summary disposition was not appealable as of right (whereas the denial of governmental immunity was appealable as of right under MCR 7.202(6)).

In rejecting the defendants’ argument, the Court in *Costa* acknowledged that

the defendants’ initial appeal was limited to the governmental immunity issue per MCR 7.203(A)(1), which “explicitly prescribes the scope of an appellant’s appeal as of right from a final order under MCR 7.202(6)(a)(iii)-(v), such as an order denying summary disposition on the issue of governmental immunity, and limits an appellant’s right to appeal under these circumstances ‘to the portion of the order with respect to which there is an appeal as of right.’” *Id.* at 583. The Court observed, however, that MCR 7.207(A)(1) does not “similarly restrict the scope of cross-appeals”:

[T]he court rule governing cross-appeals to this Court, MCR 7.207, does not contain any language of limitation. Instead, the clear and unambiguous terms of MCR 7.207(A)(1) authorize any appellee

to file a cross-appeal whenever an appellant has either filed an appeal as of right, or when this Court has granted an appellant's application for leave to appeal. The language of MCR 7.207 does not restrict a cross-appellant from challenging whatever legal rulings or other perceived improprieties occurred during the trial court proceedings. Indeed, MCR 7.207(D) states that even "[i]f the appellant abandons the initial appeal or the court dismisses it, the cross appeal may nevertheless be prosecuted to its conclusion." See *In re MCI*, 255 Mich App 361, 364-365; 661 NW2d 611 (2003). [*Costa*, 263 Mich App at 583].

The Court of Appeals recently reaffirmed *Costa's* analysis in *123.net, Inc v Serra*, unpublished opinion per curiam of the Court of Appeals, issued Dec 2, 2021; 2021 WL 5750626 (Docket No. 353075), concluding that a cross-appeal provides the Court "jurisdiction to hear . . . challenges to matters falling outside the scope of the final order appealed." *Id.*, 2021 WL 5750626, \*10.

Although *Costa* and *123.net* happened

to involve cross-appeals filed in response to a claim of appeal as of right, MCR 7.207(A) also applies to cross-appeals filed after the Court of Appeals has granted leave to appeal. See *Bancorp Group, Inc v Meister*, 459 Mich 944; 590 NW2d 65 (1999) (holding that the was "no basis" for limiting a cross-appeal to issues relating to the specific order appealed by the appellant by leave granted).

Finally, it does not matter whether the cross-appeal involves parties that were not affected by the original claim of appeal. MCR 7.207(A)(2) provides that "[i]f there is more than 1 party plaintiff or defendant in a civil action and 1 party appeals, any other party, whether on the same or opposite side as the party first appealing, may file a cross appeal against all or any of the other parties to the case." As explained in the Michigan Appellate Handbook, § 4.45 (ICLE 3d ed, 2013), this gives rise to important strategic considerations when deciding whether to file an appeal in the first instance:

The filing of a cross-appeal entitles the filing appellee (who becomes a cross-appellant) to seek relief against not only the appellant, but also any other appellee, including one who was unaffected by the




original claim of appeal. MCR 7.207(A)(2). There is no requirement that a cross-appeal be limited in scope as a result of, or that it address the same issues as, the direct appeal . . . This is an important strategic nuance that every party must consider when analyzing the pros and cons of claiming an appeal (or filing an application for leave to appeal): the appeal automatically entitles all other parties in the case to file a cross-appeal. Even a defendant who has deliberately forgone an appeal of right can reconsider that decision, and change its mind, if the plaintiff claims an appeal.

**Endnotes**

- 1 MCR 7.219. See also MCR 7.318 (Michigan Supreme Court); *Bowman v Walker*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Case No. 355561, Feb. 10, 2022).
- 2 MCR 7.219(A).
- 3 *Gavrilides Mgmt Co, LLC v Michigan Ins Co*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Case No. 354418, Feb. 1, 2022).
- 4 MCR 7.219(B).
- 5 MCR 7.219(C).
- 6 MCR 7.219(D).
- 7 MCR 7.219(E).
- 8 *Id.*
- 9 MCR 7.19(F).
- 10 *Id.*
- 11 See MCR 7.219(F)(6)-(7).




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## CONSTRUCTION EXPERT

Mr. Tyson reviews litigation matters, performed onsite inspections, interviews litigants, both plaintiff and defendant. He researches, makes drawings and provides evidence for court including correct building code and life safety statutes and standards as they may affect personal injury claims, construction, contracts, etc. and causation. Specializing in theories of OSHA and MIOSHA claims. Member of numerous building code and standard authorities, including but not limited to IBC [BOCA, UBC] NFPA, IAEL, NAHB, etc. A licensed builder with many years of tradesman, subcontractor, general contractor (hands-on) experience and construction expertise. Never disqualified in court.

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