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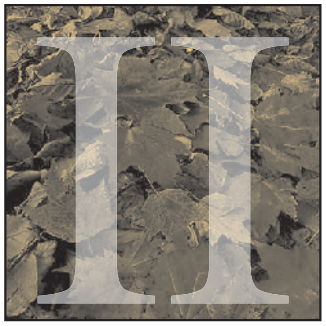

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Appellate Practice Report

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A Primer on the Michigan Supreme Court's "Mini Oral Argument On the Application" (MOAA)

While the procedure has been in use since 2003, many practitioners have not yet had occasion to participate in a Michigan Supreme Court "mini oral argument on the application," or MOAA (pronounced "mō-ah").

Overview of the MOAA Process

MCR 7.305(H)(1) provides that in response to an application for leave to appeal, the Supreme Court may "grant or deny the application for leave to appeal, enter a final decision, direct argument on the application, or issue a peremptory order." Of course, in the vast majority of cases the Court will deny the application. While the Court will sometimes grant relief by peremptory order, in only a handful of cases does the Court grant leave to appeal and order full briefing and argument.

In some cases, the Court needs additional assistance from the parties before making its determination, and will direct the court clerk "to schedule oral argument on whether to grant the application or take other action." As explained in the Supreme Court's Internal Operating Procedures, a MOAA "allows the Court to explore the issues in a case without the full briefing and submission that apply to a grant of leave to appeal." MSC IOP 7.305(G)[1]. The granting of a MOAA requires a majority vote, just like granting leave to appeal. *Id.*

Supplemental Briefs

When the Court orders a MOAA, it typically directs the filing of supplemental briefs, usually due 42 days after entry of the MOAA order. Oftentimes the order will identify specific issues that the Court wants the parties to address. MSC IOP 7.305(G)[1][a]. Supplemental briefs are subject to the same requirements as merit briefs, and "should address the issues specified by the Court in its order." *Id.*

The Court's "Guide for Counsel In Cases To Be Argued in the Michigan Supreme Court" advises practitioners to "keep in mind that if the Court has ordered a MOAA, it is likely interested in a specific issue that it considers important, but it is unsure whether that issue warrants a full grant." Thus, any such issues should be fully addressed, as they will "likely be regarded as controlling by the Court."

Because MOAAs are "usually scheduled relatively soon after the briefing period ends," the Court discourages motions to extend time to file supplemental briefs. MSC IOP 7.305(G)[1][b]. And because the Court contemplates the parties' supplemental briefs being filed at the same time, "[i]f one party moves to extend the filing date and it is granted, the Court's order will sua sponte provide the same extension to the other party, keeping with the mutual due date specified in the MOAA order." *Id.* Reply briefs are "rarely permitted," and are accepted "only upon order of the Court." *Id.*

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Amicus Briefs

While the court rules only address the filing of amicus briefs in calendar cases, the Supreme Court does permit them to be filed at the MOAA stage. MSC IOP 7.305(G)[1][c]. The Court applies the same deadlines as in calendar cases: "That is, an amicus brief, along with a motion to accept the brief if required by MCR 7.312(H), is due within 21 days after the last timely filed supplemental brief is submitted or the time for filing the supplemental briefs has expired, whichever is earlier." *Id.*

Oral Argument

MOAA cases are scheduled and argued alongside calendar cases, but there are important differences in how arguments in MOAAs are conducted, as explained in the Supreme Court's "Guide for Counsel":

> First, each side is limited to 15 minutes of argument. Second, counsel is given only two minutes of uninterrupted argument. As a practical matter, however, the Justices frequently begin questioning counsel prior to the expiration of the two minutes. In addition, while it is possible to reserve time for rebuttal, it will likely be a practical impossibility. Given the limited time for argument, it is imperative to be clear and concise when making your arguments and answering questions.

Decision

After the MOAA, the Court will consider "a range of options to address the case, including granting or denying leave to appeal, issuing a peremptory order, or issuing an opinion." See "Guide for Counsel," p 11. The Court's "Guide for Counsel" explains that it is "important to recognize that, in MOAA cases, the Court is less likely to issue a full opinion following argument." *Id.* Thus, practitioners should "[t]hink carefully about what you would like the Court to do" and be prepared to "discuss and defend" that position at oral argument. *Id.* If the goal is to obtain a peremptory order, it is important to "tell the Justices precisely what the order should accomplish." *Id.* On other hand, "[i]f your goal is to convince the Court to grant leave to appeal, tell the Court why denying leave or issuing a peremptory order is insufficient." *Id.*

The Absurd-Results Doctrine in Michigan

The absurd-results doctrine provides that a court may depart from a statute's plain language if following it would lead to an outcome the court views as ridiculous and inconsistent with the statute's overall purpose. For detractors, applying the absurd-results doctrine is nothing short of judicial mutiny against the Legislature. For the rule's proponents, it's an act of judicial mercy, to be dispensed when legislators inadvertently enact language contrary to their intent.

The debate over this doctrine has taken place in judicial conference rooms and in the pages of reporters for decades. Michigan's judiciary has included both proponents and detractors of the absurd-results rule. And, as a result, the doctrine has waxed and waned in Michigan jurisprudence over the years.

Because MOAAs are "usually scheduled relatively soon after the briefing period ends," the Court discourages motions to extend time to file supplemental briefs.

The Absurd-Results Doctrine Before *McIntire*

The doctrine was apparently in favor for much of Michigan's history. In *Salas v Clements* (1976),[1] for example, the Michigan Supreme Court called the doctrine a "fundamental rule of statutory construction[.]"[2] It explained "that departure from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question."[3]

The statute at issue in *Salas* applied to plaintiffs who were injured by an intoxicated dram-shop patron. For a plaintiff to sue a dram shop for selling alcohol to an intoxicated patron who injured the plaintiff, the plaintiff had to name the intoxicated patron in the lawsuit. She also had to keep that patron in the lawsuit until the conclusion of litigation.[4] The plaintiffs in *Salas* couldn't find the intoxicated patron who injured them and therefore couldn't satisfy the "name and retain" requirement.

The Michigan Supreme Court concluded that applying the "name and retain" requirement to a plaintiff who couldn't identify the patron would be silly.[5] It based this conclusion on the belief that the statute was designed to prevent plaintiffs from entering into collusive settlements with the intoxicated patron, and then suing the dram shop with the patron's paid-for assistance. The Court wrote, "To suggest that an injured plaintiff 'name and retain' as defendant an intoxicated person whose identity he does not know in order to prevent collusion … is patently absurd."[6] The Court therefore limited the "name and retain" requirement to plaintiffs who knew the identity of the intoxicated patron.

McIntire Calls the Doctrine into Doubt

Salas represented the general state of the absurd-results doctrine until *People v McIntire*, a 1999 opinion from the Michigan Supreme Court.[7] The defendant was granted immunity in exchange for testimony before a grand jury in a murder investigation. Later, the prosecutor determined that the defendant was actually the murderer.[8] He charged the defendant with murder, arguing that the defendant's immunity was "void" because the defendant lied to the grand jury.[9]

Over a dissent from then-Judge Robert Young, the Court of Appeals held that the prosecution could proceed despite the defendant's immunity. The Court of Appeals majority opined that it wouldn't make sense to apply immunity when the defendant gave untruthful testimony: "In our judgment, … a requirement of truthful testimony is compelled by the

language of this statute when viewed in its obvious context."[10]

Then-Judge Young rejected the majority's decision as an improper interference with the legislature's lawmaking authority. Although the majority didn't actually claim to apply the absurd-results doctrine, Judge Young took that doctrine (and the majority) to task in an extended footnote. He rejected the doctrine as "'nothing but an invitation to judicial lawmaking.'"[11]

By the time the Michigan Supreme Court considered *McIntire*, Judge Young was Justice Young. He recused himself, and the Supreme Court adopted his Court of Appeals dissent.

For Michigan jurists, *McIntire* was a fatal blow to the absurd-results doctrine.

Return of the Doctrine

Yet *McIntire* didn't quite spell the end of the absurd-results doctrine. In *Cameron v Auto Club Insurance Association* (2006),[12] three dissenting justices and one concurring justice spoke favorably of the doctrine. To be fair, Justice Markman's concurrence made it clear that he didn't think the doctrine would apply to the majority's conclusion in *Cameron*. That left three justices who rejected the absurd-results doctrine entirely, three who would have applied the doctrine in *Cameron*, and one who accepted the doctrine in general but wouldn't apply it to *Cameron*.

Two years later, in *Detroit International Bridge Company v Commodities Export Co* (2008),[13] the Court of Appeals concluded that *Cameron*'s three-dissents-and-a-concurrence consensus represented the re-adoption of the absurd-results rule. (Judge Murray observed in March 2010 that the *Detroit International* court was a bit too enthusiastic about *Cameron*.[14]) But the Michigan Supreme Court seemed to give the doctrine a renewed thumbs-up in *People v Tennyson* (2010),[15] where Justice Markman's majority opinion stated that "statutes must be construed to prevent absurd results."[16]

Since *Tennyson*, the goal of avoiding absurd results seems to be an accepted part of statutory interpretation.[17] That said, the doctrine has a second-class status at times; the suggestion that a court tacitly relied on the doctrine is not likely to be taken as a compliment by most judges.[18]

In some cases, the Court needs additional assistance from the parties before making its determination, and will direct the court clerk "to schedule oral argument on whether to grant the application or take other action."

Strategy for Advocates

What all this means for appellate advocates in Michigan is that the absurd-results doctrine is a possible but not especially attractive line of argument. Invoking the doctrine is essentially an admission that the statute at issue is contrary to your client's position. It's an act of throwing yourself on the mercy of the court. And some judges are deeply convinced that they lack the power to exercise that kind of mercy.

Until a future Michigan Supreme Court majority gives us another *McIntire*, the absurd-results doctrine can be used—but it should be used sparingly.

Endnotes

1 *Salas v Clements*, 399 Mich 103; 247 NW2d 889 (1976).

2 *Id.* at 109.

3 *Id.* at 109.

4 *Id.* at 106, citing MCL 436.22 (repealed).

5 *Salas*, 399 Mich at 109.

6 *Id.*

7 *People v McIntire*, 461 Mich 147, 155-162 n2; 599 NW2d 102 (1999).

8 *Id.* at 148.

9 *Id.*

10 *People v McIntire*, 232 Mich App 71, 92; 591 NW2d 231 (1998).

11 *McIntire*, 461 Mich at 156, n 8, quoting Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p 21.

12 *Cameron v Auto Club Insurance Association*, 476 Mich 55, 110-112; 718 NW2d 784 (2006).

13 *Detroit International Bridge Company v Commodities Export Co*, 279 Mich App 662; 760 NW2d 565 (2008).

14 *Progressive Michigan Insurance Co v Smith, 287* Mich App 537; 791 NW2d 480 (2010).

15 *People v Tennyson*, 487 Mich 730; 790 NW2d 354 (2010).

16 *Id.* at 742 (cleaned up).

17 See, e.g., *Elahham v Al-Jabban*, 319 Mich App 112; 899 NW2d 768 (2017), citing *Rogers v Wcisel*, 312 Mich App 79, 87; 877 NW2d 169 (2015)

18 *Ray v Swager*, __ Mich __, *23; __ NW2d __ (July 31, 2017) (Wilder, J. dissenting).