Discretionary Review in the Court of Appeals

A Need for Guidance

By Adam D. Pavlik

*

FAST FACTS

Approximately half of the Court of Appeals' docket consists of discretionary appeals, but few standards exist to guide its exercise of discretion in choosing which cases to hear.

In the absence of standards, there is some risk of serious inconvenience to the parties, such as meritorious discretionary appeals that must go to the Supreme Court and be sent back to the Court of Appeals "for consideration as on leave granted" to be heard.

Providing better guidance to litigants for what a meritorious discretionary appeal in the Court of Appeals looks like would also be an opportunity to think through the purpose of discretionary review in an intermediate appellate court.

In Michigan, arguably the leading case articulating the law governing review of parole board decisions is *In re Parole of Elias*.[1] As the Court noted in its opinion, "[t]here is scant published caselaw analyzing the multipart mechanics of Michigan's current parole process. Consequently, circuit courts lack useful precedent when called upon to review the propriety of a parole decision. We take this opportunity to…offer guidance to circuit courts confronted with a parole-decision challenge."[2] However, the *Elias* opinion came very close to not being issued. When the case was first taken to the Court of Appeals, the application for leave to appeal was denied; this crucially important decision would not have been issued had the Supreme Court not remanded the case "for consideration as on leave granted."[3]

I suspect that unless you are an appellate specialist or have personally encountered this situation, the strange animal of remanding a case "for consideration as on leave granted" is foreign to you. If so, you might be surprised to learn how often it happens, and the significance of some of the cases. In a few dozen cases per year, the Michigan Supreme Court sends a case back to the Court of Appeals "for consideration as on leave granted" after the Court of Appeals has initially denied leave to appeal.[4] As was the case in *Elias*, such remands can produce opinions which are leading statements of the law. As another example, it was reported last year that the Court of Appeals has, on several occasions in the last few years, reversed certain trial court decisions regarding qualified domestic relations orders.[5] These cases have relied on *Neville v Neville*,[6] which was described as the "lynchpin" of the trend identified in the reporting.[7] Yet just as with *Elias*, *Neville* would not have happened had the Supreme Court not remanded the case "for consideration as on leave granted"[8] after the Court of Appeals had initially denied leave to appeal.

Given the significant amount of time added to the appellate process by requiring another round of briefing and consideration, frequent resort to this process imposes a considerable burden on the litigants affected. Why is it happening? In some situations, the Supreme Court sends the case back for evaluation in light of a significant change in the law during the pendency of the appeal.[9] In other situations, however, the Supreme Court's remand has the practical effect of treating the Court of Appeals' initial denial of leave to appeal as error. When the Court of Appeals denies leave to appeal "for lack of merit in the grounds presented"[10] and the Supreme Court sends it back, it seems reasonable to construe the Supreme Court's remand as a conclusion that there *was* sufficient merit in the grounds presented that the case deserved review in the Court of Appeals—regardless of the ultimate outcome

after remand. Perhaps, though, it should not surprise us that the Court of Appeals sometimes does not exercise its discretion consistently with the Supreme Court's preferences when we consider that neither the Court of Appeals nor litigants have any guidance on what makes for an appropriate discretionary appeal to an intermediate court. An evaluation of the role of the Court of Appeals and its discretionary docket is needed to reduce the incidence of this considerable burden on litigants.

The roles of our appellate courts

The role of the Court of Appeals since its inception has been to serve as an error-correcting court between our state's trial courts and the Supreme Court. The 1961–1962 Constitutional Convention described the proposed court as "an intermediate court of appeals between the circuit courts and the supreme court [which] would share part of the present work load of the supreme court."[11] It "functions as a court of review that is principally charged with the duty of correcting errors."[12] Although this paradigm has recently been called into question by reforms to the Court of Claims,[13] error correction has from the beginning been the intended purpose of the Court of Appeals. In rationalizing its existence, one convention delegate argued that the Supreme Court was burdened with "cases [not] of prime importance to anybody except the litigants involved," which "are not making rules that are to be followed throughout the state, but merely are important for that one case."[14] Such cases were to be given to the new Court of Appeals created by the Constitution of 1963.

The Supreme Court, by contrast, is charged with a substantially broader function. This has been described as a "law-making" function rather than mere error correction.[15] It deals with the other side of the coin—cases which *do* involve "rules that are to be followed throughout the state." "Generally speaking, the Michigan Supreme Court is not an error-correcting court; its role is to address jurisprudentially significant legal issues of great importance to Michigan and its citizens and to maintain uniform Michigan law."[16] This is consistent with the rest of the Supreme Court's portfolio, which includes appointment of an administrator for the state courts, general superintending control over all state courts, and regulating practice and procedure in state courts.[17] Its "energies should be devoted to reviewing important matters and policing the administration of the judicial system, rather than be dissipated in attempts to correct every possibility of error in the decisions of the lower courts."[18] As a result of the Supreme Court's particular role in our legal system, its

docket is almost entirely discretionary. "[O]nly through the wise exercise of the Supreme Court's discretion in its determinations of which cases will be formally heard by the court" can it maintain its focus on the broad questions for which it is responsible.[19]

Notwithstanding this apparent division of labor, however, the Court of Appeals undoubtedly has a law-making function similar to that of the Supreme Court. Its published decisions have precedential effect and are binding on lower courts and on all subsequent panels of the Court of Appeals.[20] In fact, it *must* publish certain sorts of law-making cases.[21] Consequently, even though half of the Court of Appeals' caseload consists of appeals by right,[22] it exercises a law-making function without the luxury of the Supreme Court's ability to control which cases it hears.

*

The role of the Court of Appeals since its inception has been to serve as an error-correcting court between our state's trial courts and the Supreme Court.

*

To some extent, this is balanced by the fact that the Court of Appeals gets to choose which cases it publishes while all Supreme Court decisions are published.[23] By this process, the Court of Appeals can exert some control over when it exercises its law-making function;[24] but even so, it speaks to a sort of middle ground between error correction and law making that the Court of Appeals occupies.

Michigan's belt-and-suspenders approach to appellate articulation of the law—with both the Court of Appeals and Supreme Court pronouncing rules to be followed statewide—draws attention to the contrast between the standards governing the discretionary dockets of the Court of Appeals and Supreme Court. When filing an application for leave to appeal with the Supreme Court, "[t]he application *must* show" one or more of six different, fairly weighty bases for Supreme Court review.[25] Since the Supreme Court believes that careful management of its docket is essential to the discharge of its law-making functions, it requires that appellants demonstrate an accepted and important reason for the Court to take the case.

Very little such guidance is provided when filing an application for leave to appeal in the Court of Appeals, beyond a requirement that interlocutory appeals show "how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal."[26] I am not aware of secondary sources providing much in the way of advice on this subject either. A recent panel discussion presented by the SBM Appellate Practice Section touched on this issue, and the advice provided was that "[i]n an application for leave, there should be something important and urgent. Why are you here? What wrong has been done to your client?"[27] A *Michigan Bar Journal* article noted that it was especially important for discretionary appellants to "strive to catch the reader's attention at the outset [of the application] by succinctly explaining the injustice or unfairness of the result to follow."[28] The nebulous character of this advice speaks to how little direction the bench and bar have for what makes for a good discretionary appeal to what is supposed to be an error-correcting court.

An application for leave to appeal has been described as "a full appeal brief on the merits coupled with the reasons why the court should exercise its discretion to grant leave."[29] Yet in the absence of guidance about *when* that discretion should be exercised, it is difficult to distinguish the merits of the case from the question of whether the court should exercise its discretion to hear it. Small wonder, then, that a few dozen times per year, the Supreme Court effectively concludes that the Court of Appeals should have exercised its discretion when it did not, and remands a case "for consideration as on leave granted."

Potential steps forward

I began this discussion by noting that litigants are, in my view, too frequently inconvenienced with what should be an unnecessary additional layer of appellate consideration before getting their cases heard in the Court of Appeals. This problem, however, is an invitation for the bench and bar to rethink discretionary review in the lower state courts from the ground up. A variety of steps can be taken to facilitate this process.

First, further research would be helpful about when and under what circumstances the Supreme Court is most likely to remand cases "for consideration as on leave granted." Are there circumstances in which this is particularly likely to happen, setting aside situations outside the Court of Appeals' control (as when subsequent caselaw in the Supreme Court has prompted the remand)? This would seemingly require a systematic evaluation of each case in which such an order was entered, and review by academics or dedicated research staff to identify trends and tendencies.

Second, the Court of Appeals has authority to make internal rules of practice and procedure that are not inconsistent with the Supreme Court's rules.[30] The manner in which this has been implemented has been the Court of Appeals' "internal operating procedures."[31] The Court has wide-ranging flexibility to make changes to these procedures.[32] Signaling what the Court is looking for would require a thoughtful consideration of what the Court wants, and could make the process more precise and predictable.

Finally, the Supreme Court could amend the court rules to provide guidance for the Court of Appeals' exercise of its discretion that compares to the guidance provided for when the Supreme Court will exercise its discretion to hear cases. This would be the most effective solution; the Court, after all, knows best what it wants. A formal court rule would provide the strongest form of guidance. We know which types of cases should receive calendar priority and which opinions should be published;[33] the Supreme Court could articulate a similar list of discretionary appeals which merit particular attention.

Moreover, the exercise of figuring out the purpose of discretionary review in the Court of Appeals and potentially amending the court rules has uses beyond that court. The circuit court, too, has appellate jurisdiction, including discretionary appellate review,[34] yet litigants and courts have the same near-absence of guidance as the Court of Appeals about when that discretion should be exercised.[35] A specific evaluation of the purpose of discretionary review could also provide guidance to the circuit courts, which need not be the same as the guidance provided to the Court of Appeals. Given the uniquely intimate relationship circuit courts have with their lower trial courts,[36] one can imagine circuit courts being urged to clear up some disputes (e.g., proposed jury instructions) on discretionary appeal which the Court of Appeals, with its slower and more removed process, might not need to hear in the same time frame.

Conclusion

In a few dozen cases per year, the Supreme Court remands a case to the Court of Appeals "for consideration as on leave granted." In many such circumstances, this is effectively a conclusion that the Court of Appeals did not exercise its discretion to take an appeal which the Supreme Court thinks it should have taken. Adding an additional layer of appellate review which does not get at the merits of the case imposes substantial costs on litigants—attorney fees, of course, but also the sheer inconvenience of waiting even longer for a result—and should be avoided if possible. Specific consideration of the purpose of discretionary review and how to reconcile that with the Court of Appeals' error-correction function is necessary to provide greater guidance for the Court of Appeals' management of its discretionary docket. ■

Adam D. Pavlik is the deputy court administrator of the Tuscola County Trial Courts, where (among other projects) he tracks cases on appeal from Tuscola County. Previously, he was the law clerk to Chief Judge Michael G. Mack of the 26th Circuit Court in Alpena and Montmorency counties. He has bachelor's degrees from James Madison College at Michigan State University and a law degree from MSU College of Law.

ENDNOTES

1. *In re Parole of Elias*, 294 Mich App 507; 811 NW2d 541 (2011). Its companion case, *In re Parole of Haeger*, 294 Mich App 549; 813 NW2d 313 (2011), is also frequently cited.
2. *Elias*, 294 Mich at 510–511.
3. *In re Parole of Elias*, 488 Mich 1034 (2011); see also *People v Haeger*, 488 Mich 1033 (2011).
4. I do not have access to official statistics, but a Westlaw search for Supreme Court cases with the phrase "as on leave granted" in the same sentence as "we remand" returns 216 hits from 1/1/2008 to 12/31/2014, or 30.9 per year over that seven-year span. This is fewer than was issued in prior years, but not wildly inconsistent. See Note, *Does the Michigan Supreme Court Need a Midnight Visit from the Ghost of Chief Justice William Howard Taft?*, 86 U Det Mercy L R 303, 319 n 101 (2009) (noting an average of 45.7 such orders from 2005–2007).
5. Gentilozzi, *Reversals of Fortune: QDRO Rulings Consistently Are Being Overturned on Appeal*, Mich Lawyers Weekly (April 28, 2014), p 1.
6. *Neville v Neville*, 295 Mich App 460; 812 NW2d 816 (2012) (per curiam).
7. *Reversals of Fortune*, p 1.
8. *Neville v Neville*, 488 Mich 899 (2010).
9. See, e.g., *People v Juntikka*, 497 Mich 852 (2014).
10. For a discussion of the implications of this wording, see DeRosier, *Interlocutory and Other Discretionary Review in the Court of Appeals*, in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed), § 6.24, p 172.
11. 2 Official Record, Constitutional Convention 1961, p 3384. Before the creation of the Court of Appeals, the Supreme Court "had the dual function of correcting errors to prevent injustice in the particular case, as well as creating law and clarifying precedent." *Does the Michigan Supreme Court Need a Midnight Visit*, 86 U Det Mercy L R at 309.
12. *Mich Up & Out of Poverty Now Coalition v State*, 210 Mich App 162, 168; 533 NW2d 339 (1995).
13. See MCL 600.6401 through MCL 600.6475 (conferring certain trial responsibilities on the Court of Appeals); Gentilozzi, *A Change at Lightning Speed: Court of Claims Move to the Court of Appeals is Going to Be Complete Disaster, Attorneys Say*, Mich Lawyers Weekly (November 11, 2013), p 1.
14. 1 Official Record, Constitutional Convention 1961, p 1303.
15. See, e.g., *Does the Michigan Supreme Court Need a Midnight Visit*, 86 U Det Mercy L R at 309–312. Jurisprudential philosophies differ over whether the Court "makes" law or "discovers" it.
16. Bursch, *Applications for Leave to Appeal in the Supreme Court*, in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed), § 13.2, p 366; see also *Halbert v Michigan*, 545 US 605, 607; 125 S Ct 2582; 162 L Ed 2d 552 (2005) ("Michigan's Supreme Court…sits not to correct errors in individual cases, but to decide matters of larger public import."). But see Bursch, § 13.2, p 366 ("[T]he court in recent years has been engaged in error correction more frequently by issuing peremptory orders at the application stage."); *Does the Michigan Supreme Court Need a Midnight Visit*, 86 U Det Mercy L R at 319–324 (criticizing the Supreme Court's recent recourse to error-correcting orders).
17. Const 1963, art 6, §§ 3 through 5.
18. 6 Longhofer, Michigan Court Rules Practice (5th ed), § 7302.1, p 504.
19. *Id.*
20. MCR 7.215(C)(1) and (J)(1).
21. MCR 7.215(B).
22. Michigan Court of Appeals, *Michigan Court of Appeals Annual Report 2013* <http://courts.mi.gov/Courts/COA/aboutthecourt/Documents/Annual%20Report%202013.pdf>, p 4 (accessed February 17, 2015).
23. See *Detroit v Qualls*, 434 Mich 340, 360 n 35; 454 NW2d 374 (1990) ("[I]t is only opinions issued by the Supreme Court and published opinions of the Court of Appeals that have precedential effect….") Compare MCR 7.215(A) (describing under what circumstances Court of Appeals decisions are published) with MCR 7.321(1) (requiring no qualifications on which Supreme Court decisions are published).
24. Cf. *Duck Lake Riparian Owners Ass'n v Fruitland Twp*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2014 (Docket No. 312295) ("[T]his Court disfavors reliance on unpublished opinions even as persuasive precedent and strongly discourages the bench and bar from relying on them in any way."). But see Gentilozzi, *Death of the Unpublished Opinion?: Appeals Panel Discourages Use, Even for Persuasion*, Mich Lawyers Weekly (March 17, 2014), p 1 (noting that less than 10 percent of Court of Appeals decisions are published and discussing the bar's reliance on unpublished decisions).
25. MCR 7.302(B) (emphasis added).
26. MCR 7.205(B)(1).
27. Donofrio, *Motions that Move the Court of Appeals*, 18 Mich App Prac J 9, 10 (Winter 2014).
28. Morita & Massie, *What Judges Say About How to Brief That Arcane Appeal (and Practically Everything Else)*, 92 Mich B J 38, 42 (February 2013) (citing remarks of Judge Ronayne Krause).
29. DeRosier, § 6.3, p 158.
30. MCL 600.305.
31. Mengel, *Authority, Organization, and Operation of the Court of Appeals*, in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed), § 3.4, p 59 (IOPs are "essential to understanding how the court of appeals implements the appellate court rules.").
32. See Rose, *Appeals of right in the Court of Appeals*, in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed), § 4.3, p 68 (IOPs "are updated intermittently without public notice.").
33. MCR 7.213(C) and MCR 7.215(B).
34. Const 1963, art 6, § 13; MCL 600.631, MCL 600.863, and MCL 600.8342; MCR 7.101 through MCR 7.123.
35. Interlocutory appellants are directed to set forth facts "showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." MCR 7.105(B)(1)(d). A hint of circumstances meriting discretionary review is at MCR 7.105(B)(5), which requires that transcripts be provided to substantiate certain issues on appeal.
36. Cf. *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566–569; 640 NW2d 567 (2002) (comparing broader, constitutional power of superintending control vested in Supreme Court and circuit courts with narrower superintending authority vested by statute and court rule in Court of Appeals).