Order

Michigan Supreme Court
Lansing, Michigan

December 21, 2022

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ADM File No. 2021-35

Proposed Amendment
of Rules 7.202 and 7.209
of the Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering amendments of Rule 7.202 and 7.209 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 7.202 Definitions

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i)-(iv) [Unchanged.]

~~(v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity.~~

(b) [Unchanged.]

Rule 7.209 Bond; Stay of Proceedings

(A)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1)-(6) [Unchanged.]

~~(7) If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the proceedings shall be stayed during the pendency of the appeal, unless the Court of Appeals directs otherwise.~~

Staff Comment (*ADM File No. 2021-35)*: The proposed amendments of MCR 7.202 and MCR 7.209 offer an alternative to the proposal published for comment on June 22, 2022. The proposed amendments would eliminate certain orders denying governmental immunity to a governmental party from the definition of a "final judgment" or "final order" for purposes of subchapter 7.200 of the Michigan Court Rules, thereby eliminating the need for a stay of proceedings in those cases under MCR 7.209(E)(7).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by April 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-35. Your comments and the comments of others will be posted under the chapter affected by this proposal.

CAVANAGH, J. (*concurring*).

I agree with the Court's order publishing for comment proposed amendments to remove MCR 7.202(6)(a)(v) and MCR 7.209(E)(7) from the court rules. I write to provide some context for these provisions and to identify specific issues to facilitate public comment.

In 2002, this Court amended the court rules to provide for an interlocutory appeal of right and an automatic stay of trial court proceedings if a party appeals a trial court's denial of governmental immunity. ADM File No. 2001-07, 466 Mich xc (2002). In most

other contexts, a party must file an application for leave to appeal an order that does not entirely dispose of that party's claims,[1] with the Court of Appeals having discretion to either resolve the issue raised at that time or decline to do so until proceedings in the trial court are complete.[2] Similarly, a party seeking interlocutory appellate review in the Court of Appeals is generally not entitled to an automatic stay of trial court proceedings, but rather is required to file a motion in the trial court or the Court of Appeals requesting a stay.[3] The justification for treating denials of governmental immunity differently was that "the government *is* different" because "[u]nlike other litigants, the government cannot be sued, unless, by legislation, it has affirmatively allowed a particular type of suit to proceed. This immunity . . . is of considerably diminished value when the government, i.e., the taxpayer, must incur the costs of extended litigation before being able to invoke the principle of immunity." ADM File No. 2001-07, 466 Mich at xciv (TAYLOR, J., concurring).

With the benefit of 20 years of experience, I believe it is appropriate to reevaluate with the input of the bench and the bar whether the unique interests identified by Justice TAYLOR justify retaining these amendments. Stated broadly, the issue the Court needs to consider is whether, in practical application, these rules have struck the proper balance between protecting taxpayers from the expense of unnecessary litigation and ensuring prompt and efficient resolution of claims against governmental entities that are not barred by governmental immunity. Public comment on the following specific issues would assist the Court in making this determination:

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[1] See generally MCR 7.203 (distinguishing an "appeal of right," which may be brought after entry of "a final judgment or final order," from an "appeal by leave," which may be brought after entry of "a judgment or order . . . that is not a final judgment appealable by right"); MCR 7.202(6) (defining " 'final judgment' or 'final order' ").

[2] See MCR 7.205(E) (providing the Court of Appeals the authority to "grant or deny the application [for leave to appeal], enter a final decision, grant other relief, or request additional material from the record"). In practice, when the Court of Appeals denies an application or leave to appeal, it does so either "for lack of merit in the grounds presented" or "for failure to persuade the Court of the need for immediate appellate review." A denial "for lack of merit" resolves the issue raised in the application, and the appellant is generally precluded from raising that same issue in any subsequent appeal. See, e.g., *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 144 (2019). By contrast, a denial for "failure to persuade" is a nonsubstantive disposition that "'does not foreclose the parties from pursuit of the same or related issues on later appeals of right.'" *Rott v Rott*, 508 Mich 274, 289 (2021), quoting *People v Willis*, 182 Mich App 706, 708 (1990).

[3] See MCR 7.209(A); MCR 7.209(D).

- Michigan's court rules currently allow litigants to file an interlocutory application for leave to appeal a nonfinal order. See MCR 7.203(B). In such an application, the appellant must "set[] forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal[.]" MCR 7.205(B)(1)(d). In the absence of MCR 7.202(6)(a)(v) and MCR 7.209(E)(7), would the ability to file an application for leave to appeal (and a motion to stay trial court proceedings pending appeal) adequately protect a governmental entity's interest in the swift dismissal of claims barred by governmental immunity? In other words, could the government's unique interest in preserving taxpayer dollars be adequately considered by the Court of Appeals on a case-by-case basis through the "substantial harm" requirement of MCR 7.205(B)(1)(d)?

- Over the years, Michigan appellate courts have considered the proper scope and application of MCR 7.202(6)(a)(v).[4] Has this rule been easy to interpret and

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[4] See, e.g., *Watts v Nevils*, 477 Mich 856, 856 (2006) (resolving a conflict between published Court of Appeals decisions and holding that a denial of summary disposition under MCR 2.116(C)(10) instead of (C)(7) triggered an appeal as of right where "the circuit court order denied governmental immunity to these defendants"); *Star Tickets v Chumash Casino Resort*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2015 (Docket No. 322371), p 5 n 7 (noting that whether a denial of tribal immunity triggers a right to an interlocutory appeal under this rule is an "intriguing question" but declining to resolve it and instead treating defendant's claim of appeal as an application for leave and granting it); *Hart v Michigan*, 506 Mich 857, 858 (2020) (CLEMENT, J., concurring) (questioning whether the Court of Appeals has the authority to treat an improper claim of appeal as if it were an application for leave to appeal and whether a state defendant that invoked *sovereign* immunity is entitled to an appeal as of right under the rule); *Roberts v Kalkaska Co Rd Comm*, unpublished order of the Court of Appeals, entered September 23, 2020 (Docket No. 354228) (holding that " 'governmental immunity' is a term of art referring to the general immunity of governmental actors from tort liability" and that "a claim of immunity from non-tort property law claims under MCL 600.5821(2) does not constitute a claim of governmental immunity within the meaning of MCR 7.202(6)(a)(v)"); *Tyrrell v Univ of Mich*, 335 Mich App 254, 264-265 (2020) (holding that the defendants were not entitled to an appeal as of right where the claim of governmental immunity was based on the plaintiff's failure to comply with MCL 600.6431 when filing a claim in circuit court under Michigan's Persons with Disabilities Civil Rights Act); *Krieger v Dep't of Environment, Great Lakes, and Energy*, unpublished order of the Court of Appeals, entered November 8, 2021 (Docket No. 358076 and others) (dismissing a claim of appeal where "the gravamen of defendants' motion for summary disposition . . . was not a claim of immunity . . . but rather an assertion that plaintiffs did not adequately plead" their claims under MCR 2.116(C)(8)).

apply in practice? Or have courts and litigants been required to expend significant resources litigating whether a particular order falls within the scope of this rule?

- How have these rules affected the resources expended by litigants in claims brought against governmental entities? Have these rules actually resulted in expedited resolution of claims barred by governmental immunity and a decreased cost to taxpayers? Conversely, what effect have these rules had on private litigants filing claims against the state when governmental immunity did not bar the claim (either as a matter of law or because there were questions of fact that precluded summary disposition)?

- How frequently have trial court decisions denying claims of governmental immunity been reversed on appeal? Have governmental entities used these rules for gamesmanship? For example, as has been suggested, have governmental entities been filing unmeritorious claims of appeal simply to delay proceedings and increase the litigation costs to plaintiffs, or in the hope that after the appeal is resolved the case will be presided over by a different Court of Claims judge that the governmental entity views as more favorable to its position?

- In practice and in theory, how do these rules apply in the context of an unmeritorious motion to dismiss on governmental immunity grounds? Does the denial of such a claim automatically trigger these provisions?[5] If so, is the rule susceptible to possible abuse, given that a clearly unmeritorious claim for governmental immunity that is barred by binding precedent could be used to delay proceedings? If not, would it be problematic to require the Court of Appeals to assess in some respect the merits of an assertion of governmental immunity to determine whether it is required to hear the appeal as of right under MCR 7.202(6)(a)(v)?

- How have these rules affected the administration of claims against governmental entities in the Court of Claims? For example, given that the right to appeal and an automatic stay applies only to denials of governmental immunity, have trial courts regularly been required to parse claims and divide them up by issue or party such that claims in which governmental immunity is asserted are not litigated pending appeal while other claims are permitted to proceed? If so, does

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[5] See *Tyrrell*, 335 Mich App at 264-265 (holding that there was no appeal of right because the defendants' argument for dismissal was not premised on a statute conferring governmental immunity); *Christie v Wayne State Univ*, 508 Mich 1003 (2021) (directing oral argument on the issues addressed in *Tyrrell*).

this unduly hamper trial courts in efficiently and effectively adjudicating the cases pending before them?

- Similarly, how have these rules affected the Court of Appeals' administration of appeals arising from claims against governmental entities? For example, is it common for litigants in such cases to file multiple appeals stemming from one lawsuit, either because not all the claims raised are subject to governmental immunity or because there is uncertainty as to whether a particular order falls within the scope of MCR 7.202(6)(a)(v)?[6] If so, to what extent does this create administrative difficulties for the Court of Appeals?

- How does the Court of Appeals administratively consider whether a claim of appeal falls within the scope of MCR 7.202(6)(a)(v)? If the Court of Appeals determines that a claim of appeal is not properly filed under this rule, how does it treat that appeal? As previously noted by Chief Justice CLEMENT, the Court of Appeals has at times dismissed an appeal as of right for lack of jurisdiction if it determines that the order is outside the scope of MCR 7.202(6)(a)(v). See *Hart*, 506 Mich at 861 (CLEMENT, J., concurring), citing *Pierce v City of Lansing*, 265 Mich App 174, 182 (2005). However, more recently it appears that the general practice has been to "assert[] discretion to treat an improper claim of appeal as an application, and then grant[] this constructive application in order to reach the legal questions presented in the name of judicial economy." *Hart*, 506 Mich at 863 (CLEMENT, J., concurring). Is this practice a reflection of the administrative difficulties in distinguishing between final orders under MCR 7.202(6)(a)(v) and nonfinal orders and in enforcing that distinction?

- If there are inefficiencies with the current process, are there amendments this Court could adopt, short of a complete elimination of these provisions, that would mitigate these problems while continuing to advance the interests underlying these provisions? Do other jurisdictions provide preferential rights of appellate review for denials of governmental immunity? If so, are there any lessons we can take from their experiences to improve our own court rules?

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[6] See, e.g., *Roberts v Kalkaska Co Rd Comm*, 508 Mich 894 (2021) (addressing defendant's appeal as of right that was dismissed by the Court of Appeals for lack of jurisdiction); *Roberts v Kalkaska Co Rd Comm*, 508 Mich 893 (2021) (addressing defendant's application for leave to appeal the same trial court order.)

I look forward to the public comment addressing these and other issues.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 21, 2022

Clerk