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Appellate Practice Report

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Effect of a Change in the Law on Appeal

On occasion, a development in the law while a case is pending on appeal may present an additional argument to raise. Although the general rule is that an appellant cannot raise issues for the first time on appeal, Michigan and federal courts have recognized an exception for changes in the law.

As a general matter, an issue that is not preserved in the trial court will not be considered on appeal.[1] As the Michigan Supreme Court explained in *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008), "[u]nder our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court," such that "a failure to raise an issue waives review of that issue on appeal." *Id.* at 386. See also *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84; 490 NW2d 322 (1992) ("Issues and arguments raised for the first time on appeal are not subject to review."); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149; 792 NW2d 749 (2010) (explaining that to preserve an issue for appeal, a party must specifically raise it before the trial court). The rule is the same in federal court. See *American Bank, FSB v Cornerstone Community Bank*, 733 F3d 609, 615 (CA 6, 2013) ("For the first time on appeal, Cornerstone adds several new theories . . . . But this is too late and too little. It is too late because Cornerstone did not raise these arguments below. Cornerstone thus forfeited the arguments.").

At the same time, however, the Supreme Court has said that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when necessary to a proper determination of a case." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations and internal quotations omitted). The Sixth Circuit expressed the same view in *Golden v Kelsey–Hayes, Co*, 73 F3d 648, 657–658 (CA 6, 1996):

We will deviate from [the rule requiring issues to be raised in the trial court] only in exceptional circumstances, such as when following the rule would cause a miscarriage of justice, and particularly where the question is entirely legal and has been fully briefed by both parties. We have also made exceptions when the proper answer is beyond doubt, no factual determination is necessary, and injustice might otherwise result.

The exception permitting issues to be raised for the first time on appeal appears to include a change in the law affecting the outcome of the case.[2] In *Morris v Radley*, 306 Mich 689; 11 NW2d 291 (1943), the Michigan Supreme Court addressed whether a governmental entity that was not entitled to immunity at the time the case was tried should be able to take advantage on appeal of a new decision recognizing the availability of immunity to the claim at issue. The Court began by reciting the general rule: "It is axiomatic that an objection not properly and timely presented to the court below will be ignored on review. . . ." *Id.* at 699 (citation and internal quotation marks omitted). The Court noted, however, that "in the exercise of supervisory control over all litigation, appellate courts have long asserted the right to consider manifest and serious errors although objection was not made by the party who appeals." *Id.* (citation and internal quotation marks omitted). Finding that it would be "remiss in doing justice" if it allowed the judgment to stand, the Court set it aside. *Id.* at 700.

The United States Supreme Court has likewise recognized that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary

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to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.'" *Carpenter v Wabash Ry Co*, 309 US 23, 27 (1940) (citation omitted).

So while appellants should always be wary of making arguments that were not raised in the trial court, changes in the law occurring after the judgment has been entered can provide an appropriate basis for doing so.

Endnotes

1 This discussion is limited to issue preservation in civil cases, as the rules differ somewhat when it comes to criminal cases, particularly when a claimed constitutional violation is at issue.

2 This necessarily assumes, of course, that the change in law can validly be applied as a matter of substantive law. At least in civil cases, judicial decisions are typically given full retroactive effect. See *Harper v Virginia Dept of Taxation*, 509 US 86, 94 (1993) ("'[B]oth the common law and our own decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.'"), quoting *Robinson v Neil*, 409 US 505, 507; 93 S Ct 876; 35 L Ed 2d 29 (1973); *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002) (observing that "the general rule is that judicial decisions are given full retroactive effect"). On the other hand, determining retroactive application of statutes can be tricky. See generally *Landgraf v USI Film Prods*, 511 US 244, 264 (1994) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *Allstate Ins Co v Faulhaber*, 157 Mich App 164, 166; 403 NW2d 527 (1987) ("Generally, a statute is presumed to operate prospectively unless the Legislature either expressly or impliedly indicates an intention to give the statute retroactive effect.").

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