



STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER M. MURRAY
JUDGE

June 12, 2015

Ms. Anne M. Boomer
Administrative Counsel
Michigan Supreme Court
PO Box 30052
Lansing, MI 48909

Re: ADM File No. 2014-09 Proposed Amendments to MCR 7.215

Dear Ms. Boomer:

Please accept this as my personal letter of support for the proposed amendments to MCR 7.215 submitted by the Court of Appeals and that are contained in Administrative File No. 2014-09. I strongly encourage the Court to adopt all of the proposed amendments to MCR 7.215, as they reflect a very reasonable and prudent approach to several problems that we continue to experience in the Court of Appeals. I am limiting my comments to the proposed amendment to MCR 7.215(C)(1), as that part of the package seems to have garnered the most attention.

As you know, reevaluation of the contents of MCR 7.215 commenced after the issuance of *Duck Lake Riparian Owners Assoc v Fruitland Township*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2014 (Dkt No 312295)¹ which contained comments critical of the citation to unpublished opinions. Our Rules Committee subsequently addressed this and other issues which resulted in the proposed amendments to MCR 7.215. During the course of the committee meetings concern was expressed about the continual citation by parties to unpublished opinions for very simple and well-settled propositions. For example, briefs have been submitted where unpublished opinions have been cited as "authority" for (1) the summary disposition standard, (2) the standards for child custody determinations, and (3) simple propositions such as that a court is to look at the language of a will to determine the intent of the settlor. I have attached to this correspondence several recent examples of such citations. The citation to unpublished opinions for well-established propositions is simply absurd

¹ The irony that this issue has arisen in part from an unpublished opinion cannot be ignored!

and should not be tolerated by any court, yet we see it in many briefs each year. Published authority exists in each of those areas, and those decisions are what should always be cited. Unpublished cases are not controlling law, and no one has suggested changing that principle found in MCR 7.215(A)(1).

But that is not the only concern. For each monthly case call, there are a significant number of briefs that cite to unpublished opinions (and if we are lucky, they are attached as required by MCR 7.215(C)(1)) simply because there may be one fact or perhaps several facts that are similar to the case being argued. These cases are not being cited because there is a dearth of published case law or a lack of statutory guidance; instead, lawyers (who are simply trying to represent their clients the best they can) scour the unpublished opinions trying to find the closest one to their case in hopes that a subsequent panel will follow the earlier unpublished decision. As a result, we are deluged with citations to unpublished opinions in virtually every area of the law.²

As a result of the foregoing, the committee – and then a unanimous Court – agreed to propose amending MCR 7.215(C)(1) to clarify that unpublished opinions should only be used if it directly relates to the case on appeal and published authority is insufficient to address the issue on appeal. When a party believes that is the situation and therefore feels the need to cite unpublished opinions, all that the proposed rule would require is a simple explanation (by footnote or otherwise) as to how the unpublished case directly relates to the case on appeal and why published authority is insufficient to address the issue. It hardly seems overly burdensome for a party to take that small extra step when citing an opinion that has no precedential value whatsoever. Indeed, the Appellate Practice Section has recognized that “good appellate advocates already cite unpublished authority sparingly, and explain why they are doing so.”³ If the good ones are engaging in that practice, is it unreasonable to ask all attorneys practicing before our Court to do the same?

Contrary to what is said in many of the letters submitted in opposition to this proposed rule, *nothing* in the proposed amendment precludes the use of unpublished opinions, so long as they are used in accordance with the proposed amendment.⁴ Nothing

² For example, oftentimes we receive briefs that will cite unpublished opinions addressing one factor under the child custody best interest factors. But because that opinion is non-precedential, and is addressing a decision from a *different* judge deciding the case regarding a *different* family and is being decided under an abuse of discretion standard, that opinion is less helpful than is a straightforward argument of the facts as applied to the statutory requirements.

³ May 21, 2015 Appellate Practice Section correspondence, p. 2.

⁴ For example, several prosecuting attorneys argue against the rule because it would, in their view, limit their ability to use persuasive unpublished case law. The proposed amendment would do no such thing, and in fact allows for use of unpublished opinions in

in this proposed amendment precludes the citation to unpublished opinions; it just precludes a “free for all” in the citation of unpublished opinions in this Court. Hence, if an unpublished opinion is “on point” with the one being argued, the party can simply explain that reason for citation to the opinion. But that is a far cry from what we currently see.

After all, we are required to follow the law. The law, as you well know, is established by statute, court rule and published authority. Again, nobody has suggested amending MCR 7.215(C)(1) which states that “an unpublished opinion is not precedentially binding under the rules stare decisis.” Thus, since we are required to follow the law, and unpublished opinions are *not* binding law, why should parties be free to cite ad nauseam unpublished opinions? They should not. Instead, they should be required to first consider the controlling law, and then briefly explain why that law is not sufficient to resolve the issue.⁵

It is also worth noting that if the proposed amendments to MCR 7.215(C)(1) are adopted, Michigan would be in line with many other states. For instance, Alaska, Kansas, Kentucky, North Carolina and Oklahoma (with respect to criminal cases) all have a similar rule indicating that unpublished opinions have no precedential value and can only be utilized if there is no published opinion which would serve as well. And, it is important to point out that many other states *preclude* the use of any unpublished opinions. States that have such a rule include California, Colorado, Idaho, Illinois, Mississippi (for cases decided before November 1, 1998), Missouri, Montana, Nebraska, Nevada, Pennsylvania and Wisconsin. Each of those states either completely preclude the use of unpublished opinions or allow it for the limited purpose of establishing res judicata, law of the case or collateral estoppel. Although the quality of unpublished opinions varies by state, looking to these other states establishes at least two points: 1) our proposed rule is neither draconian nor out of step with what other states’ intermediate appellate court rules contain and 2) there is a countrywide recognition of the limited value to unpublished opinions.

The “uproar” regarding these proposed amendments can be seen in social media (appellate list serve, family law list serve, etc) and in some of the correspondence that the Court has received. These concerns miss the point of what the amendment provides for

that exact scenario, i.e., when they are truly “persuasive.” The only difference is that under the proposal attorneys would have to explain why the published authority is not sufficient.

⁵ It is worth noting that several members of the Rules Committee met with representatives of the Appellate Practice Section and Family Law Section of the State Bar and explained that the proposed rule did not envision paragraph long explanations for why published authority was not sufficient to resolve the issue. And, we indicated that this fact could be addressed in writing through an internal operating procedure.

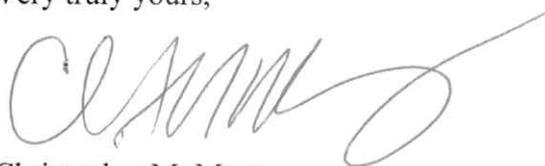
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and arises in part from the fact that it is always difficult to limit what somebody has always been allowed to do. They should not detract from the reasonableness of the proposal, which also includes more clearly defined publication standards that should result in more published decisions from the Court of Appeals.

Finally, the Appellate Practice Section (and others) has stated that this rule “could suggest that such decisions are not worthy of respect because they do not accurately state or apply the law.”⁶ No one on this Court has made any such suggestion. But the reality is that unpublished opinions are deserving of less respect than published opinions, see MCR 7.215(C)(1), and I fear that this distinction is being lost on attorneys more and more every year given the ease with which one can attain unpublished opinions.

I think the rule is reasonable and warranted and I urge the Court to adopt it. Thank you for your time and consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'C. Murray', with a long, sweeping flourish extending to the right.

Christopher M. Murray

Attachments
CMM/vap

⁶ May 21, 2015 Appellate Practice Section correspondence, p. 1.