Determining Whether Arguments Were Preserved Below in Michigan and Federal Appellate Courts, and Tools to Use When They Were Not

By Mark J. Magyar

After conducting research and analyzing the trial court record, the appellate lawyer (whether or not involved at the lower court) might determine that significant, possibly outcome-determinative legal arguments either were not raised below, or arguably were not sufficiently "raised and pressed" or "developed" to be preserved for appeal. This not unusual scenario implicates several legal doctrines and considerations, which the appellate lawyer may want to utilize in a tactful attempt to raise such critical issues on appeal (and, with any luck, have them considered by the reviewing court).

The well-known general rule in federal court is that "a federal appellate court does not consider an issue not passed upon below." *Singleton v Wulff*, 428 US 106, 120 (1976). Likewise, in Michigan, an appellant waives an issue "by failing to develop an argument with respect to it and by failing to raise it in the questions presented on appeal." *Estate of Shinholster v Annapolis Hosp*, 255 Mich App 339, 350 n7 (2003), citing *Caldwell v Chapman*, 240 Mich App 124, 132 (2000), and *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152 (1998); *see also Herald Co v City of Kalamazoo*, 229 Mich App 376, 390 1998) (declining to consider issue not raised below and noting that the Michigan Court of Appeals "need not review issues raised for the first time on appeal although [it] may do so to prevent manifest injustice."), citing *Pittsburgh Tube Co v Tri-Bend Inc*, 185 Mich App 581, 590 (1990).

There are caveats and exceptions to this general rule, however, and an appellate party should not necessarily forgo such arguments on appeal. This is especially true if the arguments are potentially dispositive, and if there is a good faith, legally supportable basis for asking the reviewing court to exercise its discretion to consider such new (or inadequately developed) arguments.

Indeed, in federal court, the general rule that arguments must have been preserved below "is prudential and may be disregarded as justice requires." 19 *Moore's Federal Practice* § 205.05[2] (Matthew Bender 3d Ed 2015), citing 28 USC § 2106. Likewise, the Michigan appellate courts "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]" *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427 (2006) (cite omitted). But a practitioner should not construe this language or concept liberally. This discretionary power to review unpreserved arguments is typically reserved for "compelling circumstances, such as a claim of illegal incarceration, a jurisdictional challenge, a claim of sovereign immunity, a serious issues of public policy, or for error that works manifest injustice." 19 *Moore's Federal Practice* § 205.05[2] (Matthew Bender 3d Ed 2015). A reviewing court is probably more likely to reach such unpreserved arguments where they are "presented with sufficient clarity and completeness to resolve the issue," which discretion is "most commonly exercised" when "the issue is one of law, and further development of the record is unnecessary." *Jones v Caruso*, 569 F3d 258, 266 (6th Cir 2009); *see also Cause of Action v Chi Transit Auth*, 815 F3d 267, 281 n19 (7th Cir 2016); *Valdez v United States*, 518 F3d 173, 181-82 (2d Cir 2008); *Cobell v Jewell*, 802 F3d 12, 26 (DC Cir 2015); 19 *Moore's Federal Practice* § 205.05[2] (Matthew Bender 3d Ed 2015). In *Smith*, for example, the Michigan Court of Appeals "elect[ed] to overlook the lack of preservation and consider the issue" because "consideration of th[e] issue [wa]s necessary for a proper determination of the case and the issue involve[d] a significant question of law, the resolution of which may be determined on the facts presented." 269 Mich App at 427, citing *Steward v Panek*, 251 Mich App 546, 554 (2002); *see also Poch v Anderson*, 229 Mich App 40, 52 (1998), citing *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99 (1992); *see also Wolverine Power Supply Coop, Inc v Dep't of Envtl Quality*, 285 Mich App 548, 555 (2009) ("This Court has previously allowed an appellant who challenged the validity of a regulation to pursue an argument on appeal that had not been preserved in the trial court" because the issue "was a question of law and [ ] the record contained the facts necessary to address the question"), citing *McNeil v Charlevoix Co*, 275 Mich App 686, 693-94 (2007), *aff'd* 484 Mich 69 (2009).

Although this discretionary power is available, if the legal argument was truly unraised below, an appellant probably will do well to provide a thorough explanation or justification as

to the reason for not raising the argument below, or provide convincing arguments as to why equity and fairness militate in favor of review that will not prejudice the appellee. *See* 19 *Moore's Federal Practice* § 205.05[2] (Matthew Bender 3d Ed 2015). Even so, the reviewing court might require a showing of a "plain miscarriage of justice" that will result if the new argument is not considered. *Overstreet v Lexington-Fayette Urban County Gov*, 305 F3d 566, 578 (6th Cir 2002) (citations omitted); *see also Valdez*, 518 F3d at 181; *Herald Co*, 229 Mich App at 390 (the Michigan appellate courts may consider an unpreserved issue "to prevent manifest injustice."). Some appellate courts might also require "an over-arching purpose beyond that of arriving at the correct result in an individual case," which "may exist where the state of the law is uncertain." *Foster v Barilow*, 6 F3d 405, 408 (6th Cir 1993) (citing cases from the Ninth and DC Circuits).

It is not always clear whether an argument was preserved or waived. There may have been some references and varying degrees of attention or detail paid to the arguments in the court below which the litigant wants to further emphasize or highlight or even elevate to the cornerstone argument for the appeal. In such instance, whether the argument was preserved will be fact intensive, depending on the degree to which the argument was advanced below. Thus, the appellate lawyer should not assume merely because he or she can point to a single reference or footnote in a brief below that the argument is indeed preserved for appeal, and should certainly provide more than short shrift in the opening brief to establishing preservation. *See, eg, United States v White*, 879 F2d 1509, 1513 (7th Cir 1989) ("by failing to raise this issue other than by a passing reference in a footnote, [appellant] has waived it."). As the Sixth Circuit has stated, "[i]t is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones." *McPherson v Kelsey*, 125 F3d 989, 995-96 (6th Cir 1997); *De Araujo v Gonzales*, 457 F3d 146, 153 (1st Cir 2006). "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Id.*

In the Supreme Court and some of the federal circuit courts of appeals, this concept requires that the argument was "raised and pressed" or "pressed or passed upon" below. *See, eg, Rogers v Guaranty Trust Co of NY*, 288 US 123, 129 (1933); *see also Powell v Brunswick County*, 150 US 433, 441 (1893); *United States v Williams*, 504 US 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'") (citation omitted); *Sheridan v Michels*, 362 F3d 96, 117 (1st Cir 2004); *Harzewski v Guidant Corp*, 489 F3d 799, 803 (7th Cir 2007); 19 *Moore's Federal Practice* § 205.05[1] (Matthew Bender 3d Ed 2015). Although this standard may seem somewhat vague or amorphous, an argument is generally "pressed or passed upon below" when it "fairly appears in the record as having been raised or decided." 19 *Moore's Federal Practice* § 205.05[1] (Matthew Bender 3d Ed 2015), citing *Wheatley v Wicomico County, Md*, 390 F3d 328, 334-35 (4th Cir 2004). This may also require the party to "call the district court's attention to its failure to decide the issue." 19 *Moore's Federal Practice* § 205.05[1] (Matthew Bender 3d Ed 2015), citing *Hopkins v Saunders*, 199 F3d 968, 974-75 (8th Cir 1999). Some courts also describe this requirement as sufficiently "developing" the argument below. *See, eg, McPherson*, 125 F3d at 995; *JPMorgan Chase Bank, NA v First Am Title Ins Co*, 750 F3d 573, 583 (6th Cir 2014); *Cornwell Entm't, Inc v Anchin, Block & Anchin, LLP*, 830 F3d 18, 30 (1st Cir 2016); *Crespo v Colvin*, 824 F3d 667, 674 (7th Cir 2016).

In this scenario, where an argument was raised below in some fashion but arguably not adequately "pressed" or "passed upon" or "developed," the litigant likely will not want to concede waiver, but should not ignore the issue either. One approach might be to make alternative arguments, leading with a robust argument setting forth all the ways in which the argument was developed below (and therefore preserved), but then arguing, alternatively, that, even if the argument is deemed waived, the reviewing court should nevertheless exercise its discretion to review the issue for any applicable reason discussed above, such as to avoid a miscarriage of justice. Further, where there was at least some reference to the argument below, it might make for a stronger appeal to fairness, and a stronger argument that the appellee will not be prejudiced by consideration of the purely legal issue which does not require expansion of the record. *See, supra*, 19 *Moore's Federal Practice* § 205.05[2] (Matthew Bender 3d Ed 2015).

The Michigan Court of Appeals seems to be more lenient in deeming even only "minimal[ly]" raised issues in the trial court to be preserved for appellate review, as "appellate consideration is not precluded merely because a party makes a more developed or sophisticated argument on appeal." *Mueller v Brannigan Bros Rests & Taverns LLC*, 323 Mich App 566, 585 (2018), citing *Steward*, 251 Mich App at 554. In *Steward*, the record indicated that plaintiffs "asserted their 'absolute equitable title' argument to the circuit court," and "[t]he fact that plaintiffs may not have fully briefed and argued this issue in their lower court pleadings, or that they now cite authority that the circuit court did not consider, does not preclude them from raising the issue on appeal." 251 Mich App at 554. Of course, an appellant will still want to demonstrate preservation in the opening brief, especially if relying on minimal presentation of the issue to the trial court. And if an appellant raises an issue on appeal that was either not raised or only minimally developed in the trial court, the appellant will need to give it sufficiently thorough treatment in the appellate brief: "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to

discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Palo Group Foster Care, Inc*, 228 Mich App at 152, quoting *Mitcham v Detroit*, 355 Mich 182, 203 (1959).

Finally, if it is the appellee seeking to advance a new legal argument in support of affirmance, virtually every appellate court retains the power to affirm the district court's judgment "on any basis disclosed in the record, whether or not the district court agreed with or even addressed that ground." *Warner Bros Entm't, Inc v X One X Prods*, 644 F3d 584, 591 (8th Cir 2011) (citation omitted); *Zadrozny v Bank of NY Mellon*, 720 F3d 1163, 1172 n3 (9th Cir 2013) (it may be "appropriate for an appellate court to pass on issues of law that the trial court did not consider"); *Jordan v US DOJ*, 668 F3d 1188, 1200 (10th Cir 2011) ("we treat arguments for *affirming* the district court differently than arguments for *reversing* it," and "we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal.") (emphasis in original), citing *SEC v Chenery Corp*, 318 US 80, 88 (1943).

The same is true in Michigan, as the Court of Appeals "may uphold a lower tribunal's decision that reached the correct result" even if the lower court reached the correct conclusion for a different or incorrect reason. *Klooster v City of Charlevoix*, 488 Mich 289, 310 (2011); *see also Adell Broad v Apex Media Sales*, 269 Mich App 6, 12 (2005) (stating that "[a]lthough not decided by the trial court, the issue was presented and we may affirm on an alternative ground for summary disposition"). Therefore, "[i]f summary disposition is granted under one subpart of [MCR 2.116(C)] when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart." *Gibson v Neelis*, 227 Mich App 187, 189-190 (1997), citing *Royce v Citizens Ins Co*, 219 Mich App 537, 541 (1996).

In sum, argument preservation is an issue often confronting appellate attorneys and parties. If the point was raised in an arguably passing manner, the practitioner will want to take care to establish that the argument was at least sufficiently pressed, developed, and passed upon below. But if the argument was not raised or sufficiently developed below, the party desiring to advance such a new argument is not forced to simply give up. It might be an uphill battle, but there are theories upon which the party can rely in asking the reviewing to court to consider the argument. The party seeking to introduce a new legal argument should give thorough treatment in its brief as to the propriety of considering the new argument rather than, for example, simply providing a rote string citation to cases establishing the court's discretionary authority to reach the new argument. The appellant should provide persuasive analysis as to *why* the court *should* exercise that discretion. This likely will require emphasizing the equitable and prudential implications as well as the lack of prejudice to the opposing party, the importance of the issue to the case, and the purely legal character of the argument to be reviewed without need for further factual development or expansion or supplementation of the record on appeal.

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