Set a Precedent

By Nancy Vayda Dembinski

Precedent is defined as "a previously decided case which is recognized as authority for the disposition of future cases."[1] This sounds simple enough, but not all previously decided cases are treated as binding precedent, even by the very court that issued the decision.

Whether a decision has binding precedential effect depends on numerous things, such as which court you are in, which court issued the opinion, when the opinion was issued, whether the opinion is published, and whether there is subsequent history of the opinion.

The precedential effect of Michigan Supreme Court opinions

The Michigan Supreme Court is generally bound by its prior decisions under the doctrine of stare decisis, which means "[t]o abide by, or adhere to, decided cases."[2]

To be binding, the decision must have been signed by a majority of the Supreme Court. "[D]ecisions in which no majority of the justices participating agree with regard to the reasoning are not an authoritative interpretation under the doctrine of stare decisis."[3] For example, in *Hamed v Wayne County*,[4] the Court declined to follow a stare decisis test set forth in a prior decision that was not signed by a majority of the Court because it did not constitute binding precedent.

Along those lines, obiter dictum in a decision is not binding precedent. "'[O]biter dictum' is defined as '1. an incidental remark or opinion. 2. a judicial opinion in a matter related but not essential to a case.'"[5] "A statement that is dictum does not constitute binding precedent under MCR 7.215(J)(1)."[6]

Moreover, application of the doctrine of stare decisis is not wholly inflexible, and "[t]he Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned."[7] Stare decisis attempts to balance a need for stability in legal rules and decisions versus a need of courts to correct past errors.[8] "As a reflection of this balance, there is a presumption in favor of upholding precedent, but this presumption may be rebutted if there is a special or compelling justification to overturn precedent."[9] In making this determination, the Michigan Supreme Court reviews "[w]hether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision."[10]

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FAST FACTS

Supreme Court orders containing a concise statement of facts and reasoning are binding precedent.

Don't cite unpublished Court of Appeals opinions unless you can explain why published opinions do not sufficiently address the issue.

Understand the precedential value of state decisions in federal court, and vice versa.

The precedential effect of Michigan Supreme Court orders

An order of the Michigan Supreme Court can constitute binding precedent if it meets certain criteria. The Michigan Constitution states:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.[11]

Therefore, under art 6, § 6, "[a]n order of [the Supreme Court] is binding precedent on the Court of Appeals if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision."[12]

The requirement of a concise statement of facts and reasons can be satisfied by referring to another opinion. This can be done, for example, by adopting the opinion of the dissenting judge in the Court of Appeals in the same case, where that dissent set forth the facts and legal analysis necessary to support the final disposition of the application.[13]

In *DeFrain v State Farm Mutual Automobile Insurance Company*, the Supreme Court warned that the Court of Appeals erred by reasoning that it "should give more weight to a Supreme Court opinion than to a Supreme Court order."[14] Both may contain binding precedent.

Beware, however, that under MCR 7.301(E) (formerly MCR 7.321): "The reasons for *denying* leave to appeal, as required by Const 1963, art 6, § 6 and filed in the clerk's office, are not to be published and *are not to be regarded as precedent*." (Emphasis added.)

The precedential effect of Michigan Court of Appeals opinions

Under MCR 7.215(C)(2), "A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." While it sounds straightforward enough that published Court of Appeals opinions are precedential, there are a couple of caveats to note.

A published opinion must have been issued on or after November 1, 1990, for another panel of the Court of Appeals to be bound by it.

MCR 7.215(J)(1) addresses the "Precedential Effects of Published Decisions" issued by the Court of Appeals, stating:

> A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

There is an important point to keep in mind. MCR 7.215(C)(2) makes no distinction based on when a published opinion was issued for purposes of precedential effect. A decision published before November 1, 1990, is still binding precedent on lower courts unless it is overruled by the Court of Appeals or Supreme Court. MCR 7.215(J)(1) only provides that a panel of the Court of Appeals is not obligated to follow a rule of law established by a prior opinion issued before November 1, 1990.

Court of Appeals panels have indeed declined to follow pre-November 1, 1990, decisions because they are not binding.[15] Additionally, when there is a conflict between two published Court of Appeals decisions issued post-November 1, 1990, the Court must follow the first opinion that addressed the matter.[16]

A published opinion must not have been reversed or modified for the Court of Appeals to be bound by it.

This one is so obvious it almost goes without saying. Nevertheless, MCR 7.215(J)(1) makes it crystal clear that the Court of Appeals is not bound to follow its prior published opinions that have been reversed or modified by the Supreme Court or by a special panel of the Court of Appeals.

Keep in mind, however, that under MCR 7.215(C)(2), "The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." Therefore,

even if the Supreme Court has granted leave to appeal on a published Court of Appeals opinion, that published opinion still constitutes binding precedent unless and until the Supreme Court reverses or modifies it.

Under MCR 7.215(C)(1), when it comes to unpublished Court of Appeals opinions, they are not binding precedent. Period. Full stop. Nevertheless, attorneys, their clients, and even federal courts look to unpublished decisions as indicative of Michigan law. The Court of Appeals itself has relied on its own unpublished decision as instructive and persuasive authority.[17] Unpublished opinions can be useful when, for example, they address the same question in a dispute and contain facts that are very close to those in dispute.[18] The Supreme Court is considering an amendment to MCR 7.215(C) which, if adopted, would require counsel to explain why published authority is insufficient to address the issue on appeal.[19] Regardless of the proposed rule, a good advocate should point out the reasons why citation to an unpublished opinion is needed.

Are federal court decisions binding precedent in state court?

How a Michigan court treats a federal court decision depends on whether the federal court was deciding an issue of Michigan law or federal law.

Federal court decisions interpreting Michigan law are *not* precedentially binding on Michigan courts.[20] "No federal court has the final say on what [state] law means. Even the decision of the highest federal court, the United States Supreme Court, about the meaning of [a state] law has no more binding authority on the [state] Supreme Court than the decision of [another state's] Supreme Court or for that matter any other court."[21]

The rule is different when a Michigan court is analyzing an issue that involves interpretation of federal law. A Michigan court *is bound* to follow a decision of the United States Supreme Court construing a federal law.[22] But a Michigan court is not obligated to follow a lower federal court decision construing a federal law, although lower federal court decisions may be persuasive.[23] Also, if there is no United States Supreme Court authority on point and there are conflicting decisions of lower federal courts, a Michigan court is "free to choose the view which seems most appropriate to [it]."[24]

It is not uncommon for a Michigan court to look to federal decisions for guidance when interpreting a federal law that is similar to a Michigan law. While federal decisions interpreting federal law are not binding on a Michigan court's interpretation of an analogous Michigan law, "federal precedent is generally considered highly persuasive when it addresses analogous issues."[25] For example, in *Meyer v City of Centerline*,[26] the Court of Appeals

looked to federal decisions interpreting Title VII of the Civil Rights Act when considering a sex discrimination and retaliation claim brought under Michigan's Elliott-Larsen Civil Rights Act. The Court of Appeals acknowledged that it was not bound by federal caselaw interpreting the analogous Title VII statute, but noted that it is "highly persuasive."[27]

Are state court decisions binding precedent in federal court?

When a federal court applies state law, it is only bound by controlling decisions of the state's highest court, and the federal court must anticipate how the state's highest court would rule in the case before it.[28] Therefore, when a federal court is applying Michigan law, the only precedent it is bound to follow is that of the Michigan Supreme Court. "However, where the highest court of the State has not spoken, [a federal] Court is obligated to follow published intermediate state appellate court decisions unless [it is] convinced that the highest state court would decide differently."[29]

If the state's highest court has not conclusively decided the issue, the federal court must try to predict how the state's highest court would rule by looking to all available data.[30] "Relevant data include decisions of the state appellate courts, and those decisions should not be disregarded unless we are presented with persuasive data that the Michigan Supreme Court would decide otherwise."[31] A federal court can even consider state trial court decisions in determining the controlling law of the state.[32] A federal court, however, gives the same precedential value to a state court's decision as that decision would be accorded by the state's courts.[33] Thus, an unpublished

Michigan Court of Appeals decision, which would not be binding precedent on a Michigan court,[34] is also not given precedential value in the federal court deciding an issue of Michigan law. The federal court may still consider and follow unpublished Michigan Court of Appeals decisions however, "so long as they do not contradict published decisions of the Michigan Supreme Court or Michigan Court of Appeals."[35]

A footnote can constitute binding precedent

For anyone who tends to merely skim the footnotes when reading a case, watch out. Footnotes can contain rules of law that constitute binding precedent. In *Allison v AEW Capital Management, LLP*,[36] the Michigan Supreme Court held that a statement contained only in a footnote of a published Michigan Court of Appeals decision could constitute a rule of law for purposes of MCR 7.215(J)(1). "Language set forth in a footnote can constitute binding precedent if the language creates a 'rule of law' and is not merely dictum."[37]

The takeaway: do not skip over the footnotes when reading a case. If a footnote constitutes a rule of law, it is regarded as binding precedent.

Conclusion

Binding precedent can be found where you might not expect it. Alternatively, what you may have thought was binding precedent may not be. Be cautious of how state courts treat their own decisions as well as decisions by federal courts, and vice versa. Be diligent in checking that the law you are citing has not been reversed, modified, abrogated, vacated, or superseded. Do not cite dictum or decisions supported by less than a majority of the court. Lastly, do not overlook footnotes—they may contain binding precedent. ■

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ENDNOTES

1. *Barron's Law Dictionary* (3rd ed), p 364.
2. *Robinson v Detroit*, 462 Mich 439, 463 n 20; 613 NW2d 307 (2000), quoting *Black's Law Dictionary* (rev 4th ed), p 1577.
3. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 206 n 7; 731 NW2d 41 (2007).
4. *Hamed v Wayne County*, 490 Mich 1, 34; 803 NW2d 237 (2011).
5. *Allison v AEW Capital Management, LLP*, 481 Mich 419, 437; 751 NW2d 8 (2008), quoting *Random House Webster's College Dictionary* (1997).
6. *Id.* at 436–437.
7. *Robinson*, 462 Mich at 464, citing *Holder v Hall*, 512 US 874, 937; 114 S Ct 2581; 129 L Ed 2d 687 (1994).
8. *McCormick v Carrier*, 487 Mich 180, 211; 795 NW2d 517 (2010).
9. *Id.*
10. *Robinson*, 462 Mich at 464, citing *Planned Parenthood v Casey*, 505 US 833, 853–856; 112 S Ct 2791; 120 L Ed 2d 674 (1992); see also *Hamed*, 490 Mich at 26, 34 (applying the *Robinson* test for stare decisis).
11. Const 1963, art 6, § 6.
12. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 371; 817 NW2d 504 (2012).
13. *Id.* at 369–370.
14. *Id.* at 370.
15. See, e.g., *Titan Ins v North Pointe Ins*, 270 Mich App 339, 346–347; 715 NW2d 324 (2006) (declining to follow prior published Court of Appeals case issued in 1988); *Garcia v Butterworth Hosp*, 226 Mich App 254, 257; 573 NW2d 627 (1997) (declining to follow prior published Court of Appeals case issued in 1982).
16. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999). Notably, before Administrative Order No. 1990-6 (1990), which was a predecessor of Administrative Order No. 1994-4 (1994) and what would become MCR 7.215, panels of the Court of Appeals were not obligated to follow decisions by previous panels. *People v Young*, 212 Mich App 630, 638–639; 538 NW2d 456 (1995), remanded on other grounds 453 Mich 976; 557 NW2d 315 (1996).
17. See, e.g., *Adam v State Farm Mut Auto Ins Co*, ___ Mich App ___ , ___ NW2d ___ (2015) (Docket No. 319778), citing *Miles v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued May 6, 2014 (Docket No. 311699).
18. *Id.*
19. Administrative Order No. 2014-09 (2015)
20. *Ryder Truck Rental, Inc v Auto-Owners Ins Co, Inc*, 235 Mich App 411, 416; 597 NW2d 560 (1999); *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 604; 673 NW2d 111 (2003).
21. *In re Apportionment of State Legislature—1982*, 413 Mich 96, 116 n 11; 321 NW2d 565 (1982).
22. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), citing *Chesapeake & O RY Co v Martin*, 283 US 209, 220–221; 51 S Ct 453; 75 L Ed 983 (1931).
23. *Abela*, 469 Mich at 606–607.
24. *Id.* at 606, quoting *Schueler v Weintrob*, 360 Mich 621, 634; 105 NW2d 42 (1960).
25. *CPAN v MCCA*, 305 Mich App 301, 320 n 7; 852 NW2d 229 (2014), quoting *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999).
26. *Meyer v City of Centerline*, 242 Mich App 560; 619 NW2d 182 (2000).
27. *Id.* at 569.
28. *National Union Fire Ins Co v Altricor, Inc*, 472 F3d 436, 438 (CA 6, 2007).
29. *Ruth v Bituminous Cas Corp*, 427 F2d 290, 292 (CA 6, 1970).
30. *Allstate Ins Co v Thrifty Rent-A-Car Systems, Inc*, 249 F3d 450, 454 (CA 6, 2001).
31. *Id.*, quoting *Kingsley Assoc v Moll PlastiCrafters, Inc*, 65 F3d 498, 507 (CA 6, 1995).
32. *Bradley v General Motors Corp*, 512 F2d 602, 605 (CA 6, 1975), citing *Royal Indemnity Co v Clingan*, 364 F2d 154 (CA 6, 1966).
33. *Amerisure Mut Ins Co v Carey Transp, Inc*, 578 F Supp 2d 888, 898 (WD Mich, 2008).
34. MCR 7.215(C)(1).
35. *Amerisure Mut Ins Co*, 578 F Supp 2d at 899.
36. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008).
37. *Id.* at 438.