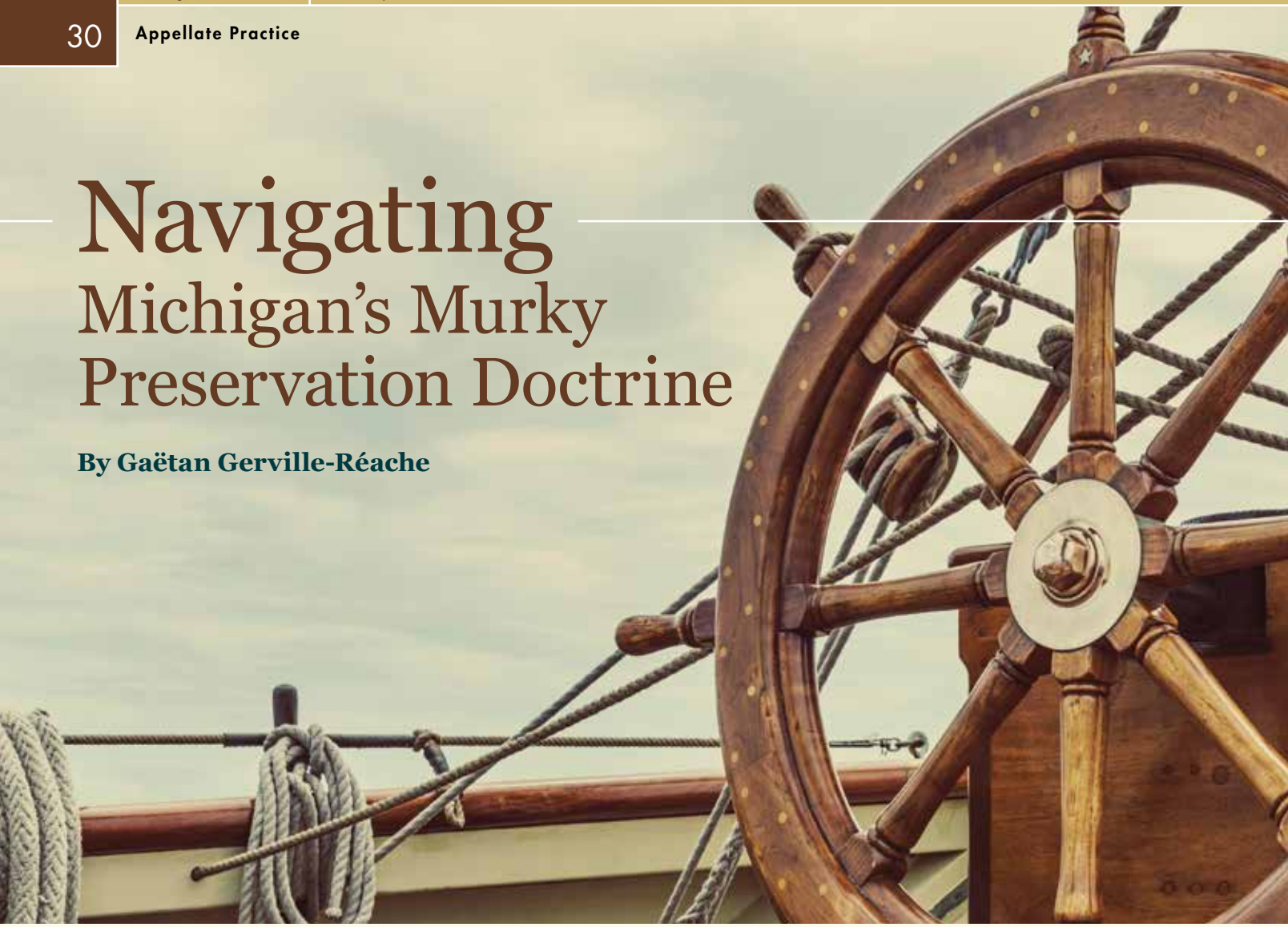

Navigating Michigan's Murky Preservation Doctrine

By Gaëtan Gerville-Réache

Forfeiting a winning issue is a litigator's worst nightmare. If clients expect anything from their litigation counsel, it is that they will take the correct steps to assert the client's rights and preserve prejudicial errors for appeal. The litigator is like a local maritime pilot who boards the captain's ship to navigate it through an unfamiliar and difficult channel. Failure to preserve a winning issue for appeal is the ship running aground before it reaches the pier. To avoid this travesty, a litigator must understand the rules of preservation and forfeiture and know when to raise the issues and how to direct the court toward a decision.

Of course, it also helps if the channel to preservation is wide, the doctrine is clear, and its contours are well marked. When it comes to Michigan's issue preservation doctrine, this is not the case. Our appellate courts have muddied the waters considerably in the last few decades with errant terminology and inconsistent standards that make preserving issues and deciding which issues to appeal more difficult and perplexing than it ought to be. This article explores those murky waters to define the doctrine's true contours and put the channel markers in their proper place, all in the hope of making it easier for trial and appellate counsel to safely navigate our justice system.

Landmarks and aids to navigation

Before we get to the problems with Michigan's doctrine, here are some fundamental principles—some aids to navigation—that you should keep in sight.

First, issue preservation is only one special aspect of the broader concept of appellate review. In American jurisprudence, appellate review resembles the traditional proceeding in error at law, where review is limited to consideration of "(1) specific first instance trial court actions or omissions (2) properly suggested as error to the trial court (3) and then properly presented for review to the

appellate court (4) by an aggrieved party."[1] Because drawing the scope of review this narrowly can sometimes lead to harsh or impractical results, many jurisdictions like Michigan have developed several exceptions to this rule. More common ones include those permitting review where "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."[2] Then there are "exceptional circumstances," such as where the "issue resolution was necessary to quell confusion generated by the Court's earlier opinions,"[3] a party has acted with unclean hands,[4] or the court's jurisdiction is called into question.[5]

Second, preservation and forfeiture are two sides of the same coin. To "preserve" something is to "maintain or keep alive," as one might do in preparing food to keep it from going stale or rotting.[6] When an issue was not timely asserted below, it certainly falls outside the traditional scope of review, but in addition, a "rule of forfeiture" applies.[7] Intuitively, an issue that is forfeited has expired, gone stale. The concept of preservation is thus an apt metaphor for the steps counsel must take to prevent forfeiture and keep the issue alive for further judicial review.

Finally, preserving an issue for appeal is not just a matter of *timing* but also of *priming*.[8] The claim, defense, evidence, request, or objection must be presented not only to the right court at the right time, but also with sufficient specificity to prompt a ruling.[9] Generally speaking, appellate courts are loath to say the trial court erred in failing to grant relief or take action the litigant has not specifically requested.

FAST FACTS

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The Court of Appeals should jettison its "raised and decided" formula and adopt the federal court's "raised or decided" standard.

Murky waters and misplaced channel buoys

In Michigan, our appellate courts have so muddled the related but distinct concepts of reviewability and preservation that it is becoming increasingly hard to tell when an issue is forfeited and when it is still in play. Consider the Court of Appeals' repeated statement that "an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court."[10] Because preservation and forfeiture are corollaries, this formula necessarily implies that the Court of Appeals could deem forfeited any issue the lower court declines to decide, even if it was timely and thoroughly presented below. That sounds absurd, because this would obviously deprive a litigant of his day in court through no fault of his or her attorney. And at present, it does not appear that the courts have yet reached such a ridiculous result. But chances are better than one might think; the Court of Appeals has already begun applying this "raised and decided" formula in connection with the penalty of forfeiture.[11] Who is to say the circuit courts, as they draw their appellate doctrine from the appellate courts above, won't take the bait and deem a raised but undecided issue forfeited in the appeals they hear from district court and government agencies. Maybe one or two have already.

Adding to this confusion is the court's use of wildly inconsistent standards for review of unpreserved issues. The Michigan Supreme Court has held that the appellate courts' inherent power to review unpreserved issues—i.e., those not timely raised below—is to be exercised quite sparingly and only in the face of "exceptional circumstances,"[12] such as where there is a "fundamental miscarriage of justice."[13] The Court of Appeals in many instances has applied the difficult-to-satisfy "plain error" standard, reversing only if a plain error occurred that "affected substantial rights."[14] But then, for no rhyme or reason, the courts will disregard these standards and instead apply a far more lenient rule—that review may be had where "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."[15] There is no obligation under these looser exceptions to show the error affected substantial rights or resulted in a miscarriage of justice.

For example, in *Kern v Blethen-Coluni*, the Court of Appeals reviewed for plain error the lower court's decision to let the jury decide whether the plaintiff suffered a threshold injury under the No Fault Act, even though no party had moved for directed verdict on that

issue.[16] Six years later in 2006, the Court of Appeals in *Smith v Foerster-Bolser Construction, Incorporated* considered whether implied warranty of habitability exists outside of transactions with a builder-vendor because it was "necessary to a proper determination of the case," even though the contractor failed to argue this in his directed verdict motion.[17] In *Steward v Panek*, the Court said it would review the appellants' claim of "absolute equitable title" to the condominium under the lenient standards above, even if they had not raised it in response to the appellees' summary disposition motion.[18] But then six years later in 2008, the Court of Appeals decided in *In re Smith Trust* that it should apply the plain error standard to the appellee's new defense that the petitioner had failed to comply strictly with the terms of the lease because this ground for summary disposition was not asserted below.[19] Mind you, these are all published opinions from the Court of Appeals.

No meaningful distinction or justification is apparent for the Court of Appeals choosing the lenient standards over the stricter ones. And the Michigan Supreme Court is just as guilty of this.[20] The appellate courts' choice of standards appears completely arbitrary, leaving practitioners no clue as to how lenient or strict they will be in future cases. Fundamental fairness requires the court to apply the standards consistently. But it seems that Michigan's preservation doctrine has been mucked up to the point that not even the court can readily discern which circumstances will justify review of an unpreserved issue or why.

Clearing the waters and marking the true channel

The solution is to disentwine the narrow concept of preservation from the much broader doctrine of reviewability. An issue may be unreviewable for reasons other than not being timely and fairly presented below. Sometimes an issue is timely and fairly presented but the trial court declines to decide it, choosing to instead dispose of the case on other grounds. The appellate court may decline to decide the issue in favor of remanding for a decision by the trial court in the first instance, particularly where the decision lies in the trial court's sound discretion. But it cannot properly decline the issue on the ground that it is forfeited or unpreserved. As the Michigan Court of Appeals said in *Candelaria v BC General Contractors, Incorporated*, "we do not deem the issue to have been forfeited because the question was not addressed below."[21] And if forfeiture is not at issue, then it is not appropriate to characterize the issue as "unpreserved" or "not preserved for appeal," contrary to what our appellate courts have frequently said.[22] There was a time when the Michigan Supreme Court shared this sentiment,[23] but it seems to have since forgotten.[24]

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Having clarified that point, the proper contours of the preservation doctrine become apparent. Preservation is strictly a question of whether counsel timely and adequately asserted a right or objection in the original proceeding (and then on appeal) or whether he or she forfeited it. Whether the lower court chose to address and decide the properly presented issue or not is irrelevant. As the Michigan Supreme Court said in *Peterman v Department of Natural Resources*, a party "should not be punished for the omission of the trial court."[25]

This calls for jettisoning the Court of Appeals' "raised and decided" formula. Frankly, that standard is not even appropriate for defining the Court's traditional scope of review, much less determining whether an issue is preserved. The better standard for determining which issues are preserved is the one used in federal courts—that the issue must be raised *or* decided to preserve it for appeal.[26] If the issue has been decided, obviously the Court of Appeals can review that decision, regardless of the fact that it arose sua sponte. And if the issue has not been decided but was properly asserted below, preservation and forfeiture are not in question.

Fundamental fairness also requires a consistent rule of forfeiture. Plain error review has long been the standard for reviewing unpreserved errors committed during the course of trial.[27] That high standard is a fitting incentive for trial counsel to timely object and potentially save the parties and court the great expense of a new trial. One could imagine a more lenient standard for unpreserved pre-trial or post-trial errors, especially dispositive legal questions where the relief on appeal would be something other than a new trial. But the Michigan Supreme Court has already set the bar pretty high there as well, requiring "compelling or extraordinary circumstances" for

making any exception to the forfeiture rule.[28] The appellate courts should adhere to this.

The standards applied in *Foerster-Bolser* and *Steward* do not come even close to meeting that high standard, nor do they make sense as exceptions to forfeiture. Take the exception that allows review where "consideration is necessary for a proper determination of the case."[29] If the issue were not necessary to a proper determination of the case the litigant probably would not care whether the court decides it. If all one had to do is satisfy this standard to avoid forfeiture, the rule of forfeiture would be practically meaningless. The same goes for the exception allowing review "if the issue involves a question of law and the facts necessary for its resolution have been presented."[30] These exceptions serve the noble purpose of conserving the parties' and court's resources when the choice is between deciding the issue and remanding for a decision below. They do not serve that interest, or promote fairness, when the time to raise the issue has already passed below; they merely offer the favored appellant a gratuitous second bite at the apple.

In summary, a coherent preservation doctrine will eventually appear if the court stops using the term "preservation" outside the context of forfeiture and stops conflating those concepts with its scope of review. When that happens, navigating the doctrine will become much easier, particularly for appellate counsel, who must discern when it is worthwhile to raise a meritorious but unpreserved or undecided issue on appeal.

Some trouble spots will still remain, of course, such as the lack of clarity as to when the appellant is merely raising new argument on an adequately preserved issue. (Query whether that distinction could explain *Foerster-Bolser* and *Steward*.) This may just be one of those murky areas that will keep appellate counsel busy for years to come. ■

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ENDNOTES

1. Phillips, *The Appellate Review Function: Scope of Review*, 47 Law & Contemp Probs 2 (1984).
2. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).
3. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993).
4. *Stachnik v Winkel*, 394 Mich 375, 382–383; 230 NW2d 529 (1975).
5. *Smith v Smith*, 218 Mich App 727, 729–730; 555 NW2d 271 (1996); *Lehman v Lehman*, 312 Mich 102, 105; 19 NW2d 502 (1945).
6. *The Oxford American College Dictionary* (2002).
7. See, e.g., *People v Carines*, 460 Mich 750, 773; 597 NW2d 130 (1999); *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012).
8. Cf. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("The appellant himself must first adequately prime the pump. . . .").
9. *People v Moorer*, 262 Mich App 64, 78; 683 NW2d 736 (2004); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).
10. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005).
11. See, e.g., *McDonald v McDonald*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2013 (Docket No. 313253); *People v Fomby*, unpublished opinion per curiam of the Court of Appeals, issued April 2, 2013 (Docket No. 305602).
12. *Booth Newspapers*, 444 Mich at 234 n 23; accord *Carines*, 460 Mich at 773; *Wischmeyer v Schanz*, 449 Mich 469, 483; 536 NW2d 760 (1995).
13. *Napier v Jacobs*, 429 Mich 222, 237–238; 414 NW2d 862 (1987).
14. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), quoting *Carines*, 460 Mich at 763.
15. *Foerster-Bolser Constr*, 269 Mich App at 427.
16. *Kern*, 240 Mich App at 335–336.
17. *Foerster-Bolser Constr*, 269 Mich App at 427.
18. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).
19. *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008).
20. See *People v Rao*, 491 Mich 271, 289 n 4; 815 NW2d 105 (2012) (applying the looser "necessary to a proper determination" standard to the prosecutor's unpreserved argument that he acted with reasonable diligence).
21. *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 83 n 6; 600 NW2d 348 (1999).
22. See, e.g., *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011); *Hines*, 265 Mich App at 443–444.
23. See *Peterman v State Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).
24. See *Klooster*, 488 Mich at 310.
25. *Peterman*, 446 Mich at 183.
26. *United States v Williams*, 504 US 36, 41; 112 S Ct 1735; 118 L Ed 2d 352 (1992).
27. See *Carines*, 460 Mich at 773.
28. *Napier*, 429 Mich at 237–238; accord *Booth Newspapers*, 444 Mich at 234 n 23.
29. *Foerster-Bolser Constr*, 269 Mich App at 427.
30. *Id.*