

Striking Nonrecord Evidence

Fast Facts:

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By John Bursch

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Establishing a complete evidentiary record in the trial court is critical to success in the court of appeals. Each deposition excerpt and every document cited on appeal must have actually been presented in the court below it. When a party attempts to expand the record on appeal in a brief by referring to new documents or testimony, the appropriate response is a motion to strike. And in cases of extreme and repeated abuse, the court may even entertain a motion to dismiss the appeal. This article reviews the court rules and applicable caselaw, then walks through the mechanics of filing a motion to strike a party's brief that attempts to enlarge the record on appeal.

What Constitutes the "Record on Appeal"

MCR 7.210(A)(1) expressly states that in an appeal from a lower court decision, "the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." This rule is echoed in MCR 2.302(H)(3), which reiterates that "[o]n appeal, only discovery materials that were filed or made exhibits are part of the record on appeal." Because the rules also require an appellate brief's statement of facts and argument to contain "specific page references to the transcript, the pleadings, or other document or paper filed with the trial court,"¹ it is virtually

impossible to write an appellate brief without a complete trial court record.

Numerous Michigan Court of Appeals decisions stress that appellate review is limited to the record in the trial court.² Moreover, appeals courts will not entertain evidence that a party did not present below.³ Thus, the court of appeals will not consider excerpts from deposition testimony introduced for the first time on appeal,⁴ nor will it consider exhibits or other documentary evidence that were not filed in the trial court.⁵ When a party attempts in an appellate brief to present facts supported by evidence not included in the record below, a timely motion to strike provides the remedy.⁶

An Extreme Case of Record Abuse

A recent Michigan Court of Appeals decision, *Coburn v Coburn*,⁷ should give pause to any attorney who repeatedly abuses the prohibition on use of nonrecord evidence in appellate briefs. *Coburn* involved an appeal from a decision in a child custody case. After the appellant filed her first brief, the appellee filed a motion to strike because the brief did not conform to the requirements of the court rules. The brief violated MCR 7.212(C)(6) and (7) since it had no page references to the record whatsoever, and it violated MCR 7.212(C)(4) because it had no jurisdictional statement. The court granted the motion to strike.

The court rules regarding use of nonrecord evidence on appeal are clear and will be enforced. Because attorneys so frequently abuse these rules, the court of appeals is familiar with the problem and will grant an appropriately filed motion to strike.

The appellant filed her substitute brief, and the appellee again moved to strike. This time, the brief “appended . . . as exhibits, affidavits that were not part of the lower court record, and orders and transcripts that related to matters that occurred in the trial court after the order from which appeal of right had been claimed.” The court also granted this motion to strike.

The appellee met the appellant’s third brief with a third motion to strike, plus a motion to dismiss and a motion to affirm. This brief still contained numerous factual assertions without record references, again referred to matters the court had stricken as improper in brief number two, and contained record references that did not support the factual assertions to which they pertained. The court granted the motion to dismiss, and when the appellee later filed a motion for actual and punitive damages, it granted that too. The court assessed the damages jointly and severally against the appellant and the attorney who had prepared and filed the three defective briefs.

The court noted that before the appellant had submitted the defective briefs, the entire court of appeals had advised the bar generally that it would begin to strictly enforce the court rules. Moreover, according to the court, “where the only basis asserted for appellate relief is outside the record, an appellant cannot entertain a reasonable belief that any issue depending on such nonrecord matters is even arguably meritorious.”

How to File a Motion to Strike

Check the other party’s appellate brief as soon as you receive it to ensure that it does not contain extra-record material. If you discover that the appellate brief cites to nonrecord evidence, follow the example of appellee’s counsel in *Coburn* and file a motion to strike. Start with MCR 7.211, which governs the filing of motions in the court of appeals. The rule requires a party to file an original and four copies of the motion and supporting brief, a motion filing fee (currently \$75), and proof of service.

The motion should be filed under MCR 7.211(E)(2)(c) and MCR 7.212(I), which give the court discretion to strike nonconforming briefs. Unlike substantive motions, this administrative matter will be referred to the chief judge or another designated judge, acting alone, for a decision.⁸

The supporting brief is optional⁹ but highly recommended. It should generally conform with the requirements for appellate briefs.¹⁰ The brief should begin with the court rules and cases that lay the foundation for what is properly part of the record and what is not.¹¹

The brief should then catalogue the citations and exhibits that are not part of the record on appeal. It is helpful to attach an exhibit containing marked-up pages from the offending brief, showing with

edit marks the text and citations that must be struck. In egregious situations, it may be persuasive to actually count the number of improper factual citations and present them as a percentage of the total citations in the brief. (For example, “Appellant’s ‘Statement of Facts’ contains 40 factual citations, 60 percent of which were not part of the record in the trial court.”)

Conclude with a specific request for relief. Ask the court to strike the brief and order that the party submit “a revised brief with deletions of those facts and citations not part of the record on appeal as required by MCR 7.212 (marked in the exhibit) and no other changes and no additions.” Also ask the court to order the party to submit a reformed set of exhibits if the original set included nonrecord documents. Finally, ask the court to extend the deadline for service of your own brief, with the time to run from the date the revised brief and exhibits are filed. This request may not always be granted, but you should nevertheless ask the court for the extension.

Conclusion

The court rules regarding use of nonrecord evidence on appeal are clear and will be enforced. Because attorneys so frequently abuse these rules, the court of appeals is familiar with the problem and will grant an appropriately filed motion to strike. Do not hesitate to file that motion when it is warranted, and think twice before filing a brief that includes references to nonrecord evidence. ♦



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Footnotes

1. MCR 7.212(C)(6), (7).
2. See, e.g., *Burrill v State*, 90 Mich App 408, 412 (1979).
3. See, e.g., *Band v Livonia Assocs*, 176 Mich App 95, 103–104 (1989).
4. *Tope v Howe*, 179 Mich App 91, 105–106 (1989); *Truby v Farm Bureau Gen Ins*, 175 Mich App 569, 571 n 1 (1988) (per curiam).
5. *Amorello v Monsanto Corp*, 186 Mich App 324, 330 (1990).
6. MCR 7.212(I) (giving court of appeals discretion to strike nonconforming briefs); *Good v Modern Globe, Inc*, 346 Mich 602 (1956).
7. 230 Mich App 118 (1998), rev’d in part 459 Mich 875 (1998) (“insofar as it purportedly assessed sanctions against Bookholder & Bassett, P.C.”).
8. MCR 7.211(E)(2)(c); *Coburn*, 230 Mich App at 120.
9. MCR 7.211(A)(3).
10. MCR 7.211(A)(3); MCR 7.212(C).
11. See supra notes 2–6.