

DO YOU REALLY HAVE TO CROSS APPEAL?

by Morley Witus¹

An article in the May 1999 issue of this Newsletter (“Significant Appellate Issues Raised in 2-1 Unpublished Decision”) noted a possible conflict in Michigan case law on the following question: must an appellee file a cross appeal in order to assert grounds for affirmance different from the grounds relied on by the trial court? It is surprising that there is a controversy over this basic question of appellate procedure; the question warrants a clear, unequivocal answer.

As shown below, the great weight of authority, in Michigan and elsewhere, holds that there is no need for a cross appeal in this situation. That is clearly the correct rule. But the contrary view unfortunately pops up from time to time in Michigan. That creates uncertainty, so Michigan appellate lawyers cannot be sure about the consequences of not filing a cross appeal. Accordingly, as argued below, the Supreme Court should clarify this issue soon, by a definitive pronouncement or an amendment to the court rules.

¹ Morley Witus is a member of Barris, Sott, Denn & Driker, P.L.L.C., where he practices commercial litigation. He is immediate past Chair of the State Bar Committee on Civil Procedure and is currently Chair of the State Bar Advisory Task Force on Loser Pays Legislation. He is also President of the Jewish Federation of Washtenaw County.

By a significant margin, Michigan precedent holds that no cross appeal is needed in this situation. The Supreme Court has declared: “A cross appeal was not necessary to urge an ‘alternative ground for affirmance.’” *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n41 (1994). *Accord*, *Menendez v Detroit*, 337 Mich 476, 483 (1953) (“an appellee need not take a cross appeal in order to urge, in support of relief afforded him below, reasons other than those adopted by or those rejected by the lower court.”); *Burns v Rodman*, 342 Mich 410, 414 (1955).

Most recent published decisions from the Court of Appeals agree: “[C]ross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court.” *Candelaria v BC General Contractors*, 1999 Mich App Lexis 141 n 6 (June 4, 1999). *Accord*, *In re Herbach*, 230 Mich App 276, 284 (1998) (“Although a cross appeal is necessary to obtain a decision more favorable than that rendered by the lower tribunal, a cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court.”); *ABATE v Public Service Comm*, 192 Mich App 19, 24 (1991) (“It is well established that an appellee who has taken no cross appeal may still urge in support of the judgment in its favor reasons that were rejected in the lower court.”); *Akyan v Auto Club Ins Ass’n (on remand)*, 208 Mich App 271, 273-274 (1994).

In addition, a host of Michigan cases apply the rule that the trial court will not be reversed where it reached the right result for the wrong reason. *E.g.*, *People v Brownridge*, 459 Mich 456, 462 (1999); *People v Mayhew*, 1999 Mich App Lexis 150 (June 8, 1999) n2; *Ellsworth v Hotel Corp of America*, 1999 Mich App Lexis 151 (June 11, 1999). These cases implicitly recognize that no cross appeal is necessary to consider arguments for affirmance that were rejected (or neglected) by the trial court.

Nonetheless, the contrary view appears in some Michigan cases. *See*, *Beaudrie v Anchor Packing Co*, 231 Mich App 242, 254 (1998) (“this issue is not properly before us because an appellee is limited to the issues raised by the appellant unless the appellee files a cross appeal”); *Barnell v Taubman*, 203 Mich App 110, 123 (1993); *Kordich v Butler Aviation Detroit, Inc*, 103 Mich App 566, 569 (1980); *Cox v Board of Hospital Managers*, Unpublished Court of Appeals No. 205025 (April 6, 1999) (“the better rule of law is to require a cross-appeal”).²

² On examination, some of the other cases cited in support of this view are simply inapposite. For example, in the dicta in the unpublished *Cox* decision (No. 205025 April 6, 1999), the majority opinion mistakenly relied on two cases which did not address the issue, *Shipman v Fontaine Truck Equipment*, 184 Mich App 706, 714 (1990) and *VanderWall v Midkiff*, 186 Mich App 191, 201-203 (1990). The court of appeals in those two cases held that an appellee who obtained a jnov from the trial court must cross appeal if he or she wants to argue that a new trial should have been granted or that the trial court made other erroneous rulings. Those cases
(continued...)

Well, what is the rule in other jurisdictions? The Federal courts are absolutely clear:

“[I]t is settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it.”

Massachusetts Mutual Life Co v Ludwig, 426 US 479, 481, 48 L Ed 2d, 784, 96 S Ct 2158 (1976) (quoting *United States v American Ry Exp Co*, 265 US 425, 435, 68 L Ed 1087, 44 S Ct 560 (1924)). *Accord*, *Colautti v Franklin*, 439 US 379, 397 n16, 58 L Ed 2d 596, 99 S Ct 675 (1979) (“Appellees, as the prevailing parties, may of course assert any ground in support of that judgment, ‘whether or not that ground was relied upon or even considered by the trial court.’”); *Stone-Container Corp v Hartford Steam Boiler Inspection & Ins Co*, 165 F3d 1157, 1159 (7th Cir 1999); *Jordan v Duff & Phelps, Inc*, 815 F2d 429, 439 (7th Cir 1987) (“Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than

² (...continued)
did not hold that the failure to cross appeal precluded the appellee from asserting alternative arguments to support the judgment.

Similarly, Martin, Dean & Webster, *Michigan Court Rules Practice Text* (3rd Ed 1992), Rule 7.207 disregards the wealth of authority for the majority view, and cites inapposite cases such as *Therrian v General Lakes*, 372 Mich 487, 490 (1964), which held that the plaintiff-appellee had to file a cross appeal to be entitled to argue for *increasing* the award in the judgment.

unnecessary.”); *New Castle County v Hartford Accident and Indemnity Co*, 933 F2d 1162, 1205 (3rd Cir 1990).

The same rule “appears to be uniformly followed in state appellate courts.” Kravitz, “Cross Appeals,” *National Law Journal*, Vol 21, No 43 (June 21, 1999) p 89. *E.g.*, *Aycock Pontiac v Aycock*, 335 Ark 456, 466-467; 983 SW2d 915, 921 (1998) (“A cross-appeal is required only when the appellee seeks some affirmative relief that he or she failed to obtain in the trial court A cross-appeal is not necessary, however, when the appellee won the case below and merely asks that the judgment be affirmed on a different basis.”); *Nicholson Air Servs v Board of County Comm’rs of Allegany County*, 120 Md App 47, 73; 706 A2d 124, 137 (1998).

This is clearly the right principle. Jurisprudentially, appellate courts should not reverse when the outcome in the trial court is correct, and reversal would just needlessly multiply and extend the proceedings. Michigan should not abide such an aberrational and artificial doctrine, refusing to consider valid arguments, made and preserved below, that would sustain the decision on appeal.

Moreover, there is nothing in the court rules that compels or supports the minority position. In addition, how can an appellee cross appeal from an order he or she wants affirmed? It would seem fundamental that you can only appeal if you want an order reversed or modified; you cannot appeal if you just want it affirmed.

In other words, the minority position violates the axiom that the prevailing party cannot appeal from a judgment or order granting the relief it requested. 5 Am Jur 2d Appellate Review § 276 p 47 (“One who has received in the trial court all the relief that her or she sought therein is not aggrieved by the judgment and has no standing to appeal. In particular, a litigant has no right to appeal a judgment in his favor merely for the purpose of having the judgment based on a different legal ground than that relied upon by the trial court . . .”).

The main reason offered for the minority view is that an appellant may be unfairly surprised by the appellee’s alternative arguments--appellant might not have addressed them in its initial appeal brief, and might not have room in its ten page reply brief. Of course, appellant can seek leave to file a longer reply brief in that case. Or this concern could be satisfied by amending MCR 7.212 (G) to provide that leave to file a longer reply brief will be freely granted if the additional pages are necessary to address alternative theories raised by appellee that were not anticipated and addressed in appellant’s initial brief.

An advocate of the minority view might also contend that requiring a cross appeal is not terribly burdensome. But it does require unnecessary paperwork — it means paying the costs of an appeal, plus it means an extra set of three briefs for

the appellate court to consider in most cases (if the minority view prevails, appellees will have to file cross appeals in virtually every case as a precaution).

Where does this leave us now? Because there is some uncertainty, if you are the appellee, you should consider filing a cross appeal in every case; if you are the appellant, move to strike any alternative arguments made by an appellee who has not filed a cross appeal. And if you are the Supreme Court, amend the court rule and put an end to this nonsense. Amend MCR 7.207(A) to say that an appellee is not required to file a cross appeal to preserve the right to assert alternative grounds or theories supporting the judgment or order on appeal.

h:\docsopen\mw\l-memo\0154477.02