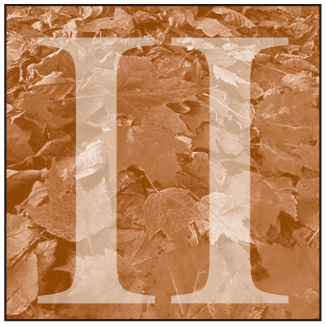
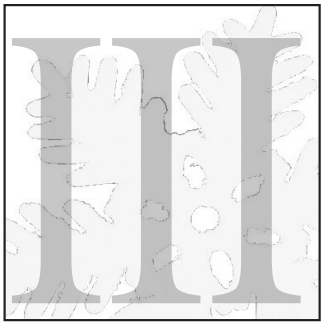
MICHIGAN DEFENSE
QUARTERLY

Volume 39, No. 2 - 2023





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Appellate Practice Report

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Issues Becoming Moot on Appeal

Although appellate courts are generally obligated to address the issues that are properly brought before them, that is not the case when it comes to issues that have been rendered moot by subsequent developments—either in the case or in the law.

General Rule

As the Michigan Court of Appeals explained in *B P 7 v Bureau of State Lottery*, 231 Mich App 356; 586 NW2d 117 (1998), an appellate court ordinarily "will not decide moot issues." *Id.* at 359. "A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights." *Id.* "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *Id.* The Sixth Circuit has similarly recognized that "[i]f events occur during the case, including during the appeal, that make it 'impossible for the court to grant any effectual relief whatever to a prevailing party,' the appeal must be dismissed as moot." *Fialka-Feldman v Oakland Univ Bd of Trustees*, 639 F3d 711, 713 (CA 6, 2011).[1]

The mootness doctrine applies to both factual and legal developments. In *B P 7*, for example, it was a statutory amendment. *B P 7*, 231 Mich App at 359. In *Fialka-Feldman*, it was the fact that a learning-disabled student challenging a university's denial of his request for on-campus housing had "completed the program and left the University with no plans of returning." *Id.* at 713. See also *Can IV Packard Square, LLC v Packard Square, LLC*, 328 Mich App 656, 666; 939 NW2d 454 (2019) (dismissing the defendant's appeal from a judgment of foreclosure because the statutory redemption period expired while the appeal was pending).

Exception for Issues That are "Capable of Repetition, Yet Evading Review"

Courts may, however, overlook mootness if the case raises an issue that is "capable of repetition, yet evading review." *Chirco v Gateway Oaks, LLC*, 384 F3d 307, 309 (CA 6, 2004). For example, in *Turunen v Dir of Dep't of Natural Resources*, 336 Mich App 468; 971 NW2d 20 (2021), the Michigan Court of Appeals found that the plaintiff's challenge to a Department of Natural Resources ("DNR") invasive species order was not moot even though the plaintiff's eight pigs that were the subject of the order had died, because the plaintiff "continue[d] to raise and sell pigs for the main purpose that plaintiff raised and sold the eight dead ones," and thus would be subject to the potential for future DNR action. See also *Franciosi v Michigan Parole Bd*, 461 Mich 347, 348 n 1; 604 NW2d 675 (2000) ("Although plaintiff has apparently been paroled, we issue this opinion because the issue is capable of repetition while evading our review, the issue has been briefed, defendant has not argued the case is moot, and the Court of Appeals opinion is published.").

This exception is most commonly applied in cases involving the government. *Chirco*, 384 F3d at 309. "When the suit involves two private parties . . . the complaining party must show a reasonable expectation that he would again be subjected to the same action by the same defendant." *Id.* Moreover, speculating that an issue "could" recur is not sufficient. In *Mich Dept of Educ v Grosse Pointe Farms Public Schools*, 474 Mich 1117; 712 NW2d 445 (2006), the Michigan Supreme Court emphasized that the test is whether the issue is "likely to recur." See also *In re Sterba*, 383 BR 47, 51 (CA 6 BAP,

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2008) (holding that in order to avoid mootness, the appellant "must establish a demonstrated probability that the same controversy will recur").

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Public Interest Exception

There is one important area in which Michigan and federal courts appear to diverge. The Sixth Circuit has said that under the "case-or-controversy" requirement of Article III of the United States Constitution, mere "public interest" in an issue does not warrant review "when there is no reasonable expectation that the wrong will be repeated." *Fialka-Feldman*, 639 F3d at 715 (citation and internal quotation marks omitted). Michigan courts, however, appear to recognize a stand-alone "public interest" exception. See *Mead v Batchlor*, 435 Mich 480, 487; 460 NW2d 493 (1990) ("[T]he refusal of a court to decide a moot case or to determine a moot question is not based on lack of jurisdiction to do so. . . . [A] court will decide a moot case or determine a moot question where this appears to be in the public interest, as for guidance in future cases.") (citation and internal quotation marks omitted), abrogated on other grounds *Turner v Rogers*, 564 US 431(2011).

Conclusion

In summary, although there are exceptions, appellate courts generally will not consider issues that have become moot during the pendency of an appeal—the question then becomes whether to simply dismiss the appeal or dismiss and vacate the lower court decision.

Endnotes

1 Depending on the circumstances, an appellate court might also vacate the lower court decision. See, e.g., *League of Women Voters of Michigan v Secy of State*, 506 Mich 561, 588; 957 NW2d 731 (2020) (noting that "'the decision whether to vacate turns on 'the conditions and circumstances of the particular case'"), quoting *Azar v Garza*, 584 US ___; 138 S Ct 1790, 1792; 201 L Ed 2d 118 (2018). "One clear example where '[v]acatur is in order' is 'when mootness occurs through . . . the unilateral action of the party who prevailed in the lower court.'" *Azar*, 138 S Ct at 1792 (citation and some internal quotations omitted).