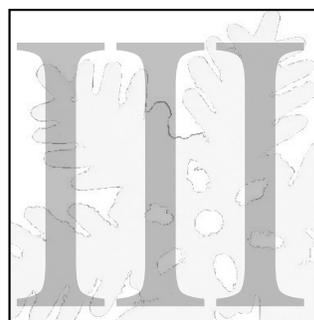

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Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright, PLLC* and Trent B. Collier, *Collins Einhorn Farrell PC*

Effect of Post-Judgment Motions on the Time to Appeal

There are a number of reasons why parties in a civil case might consider filing a post-judgment motion before appealing an adverse decision. In fact, sometimes, a post-judgment motion is required to preserve an issue for appeal. For example, in both Michigan and federal courts, a party must file a motion for judgment notwithstanding the verdict (renewed motion for judgment as a matter of law in federal parlance) if it wishes to challenge the sufficiency of the evidence supporting a jury verdict. It is essential to know how such motions impact the applicable appeal deadline.

State Court

As a general matter, an appeal of right in a civil case must be filed within 21 days of the entry of judgment in a Michigan court. MCR 7.204(A)(1)(a). That deadline, however, is tolled by the timely filing of a “motion for new trial, rehearing, reconsideration, or other relief from the order or judgment appealed.” MCR 7.204(A)(1)(d). If one of these motions is filed, the 21-day appeal period begins to run “from the entry of” an order “deciding” it. *Id.*

A couple of notes: First, the post-judgment motion must be **timely**, meaning that it must be filed “within the initial 21-day appeal period or within any further time that the trial court has allowed for good cause during that 21-day period.” *Id.* Second, not every post-judgment motion will toll the time to appeal. It must be a motion seeking “relief from the order or judgment appealed.”

Federal Court

The Federal Rules of Appellate Procedure similarly provide for tolling of the usual 30-day appeal period in civil cases upon the filing of certain post-judgment motions. FR App P 4(a)(1)(A). Rule 4(A)(4) identifies six such motions:

- Motions “for judgment under Rule 50(b)” (i.e., renewed motion for judgment as a matter of law following a jury trial);
- Motions “to amend or make additional factual findings under Rule 52(b)” (for cases tried by the court; can be combined with a Rule 59 motion for new trial);
- Motions “for attorney’s fees under Rule 54 if the district court extends the time to appeal under Rule 58”;
- Motions “to alter or amend the judgment under Rule 59” (often used to seek reconsideration of a decision made on summary judgment or after a bench trial);
- Motions “for a new trial under Rule 59”; and
- Motions “for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.”

Premature appeal filings

Although filing a timely post-judgment motion will serve to toll the deadline for appealing, it does not preclude a party from filing an appeal anyway—whether in state or federal court.



Phillip J. DeRosier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the area of appellate litigation. Prior to joining Dickinson Wright, he served as a law clerk for Michigan

Supreme Court Justice Robert P. Young, Jr. He is a past chair of the State Bar of Michigan’s Appellate Practice Section. He can be reached at pderosier@dickinsonwright.com or (313) 223-3866.



Trent Collier is a member of the appellate department at Collins Einhorn Farrell P.C., in Southfield. His practice focuses on the defense of legal malpractice, insurance, and general liability claims at the appellate level. His e-mail

address is Trent.Collier@CEFLawyers.com.

The Michigan Court of Appeals had previously concluded that it lacked jurisdiction to hear an appeal in a case where a post-judgment motion remained pending. See *Krywy v State Farm Mutual Automobile Insurance Co*, unpublished per curiam opinion of the Court of Appeals, issued April 24, 2008 (Docket Nos. 274663, 277313); 2008 WL 1836385, *1 (“The record reflects that defendant filed its claim of appeal on the same day that plaintiff moved for reconsideration. If defendant filed first, then plaintiff’s motion for reconsideration was not properly before the trial court, **but if plaintiff filed first, then defendant’s claim of appeal was premature.**”) (emphasis added). But in *Nordstrom v Auto-Owners Insurance Co*, 486 Mich 962; 782 NW2d 779 (2010), the Supreme Court clarified that a pending post-judgment does **not** “operate to divest the Court of Appeals of jurisdiction.” That said, the filing of an appeal would appear to deprive the trial court of jurisdiction to

actually decide the post-judgment motion, in accordance with MCR 7.208(A): “After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order”

The federal rules specifically address premature notices of appeal. Federal Rule of Appellate Procedure 4(a)(4)(B) (i) provides that “[i]f a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.” In other words, the appeal is suspended until such time as the post-judgment motion is resolved.

Conclusion

Aside from being essential for issue-preservation purposes, post-judgment

motions can serve strategic goals, such as providing leverage in settlement discussions or offering a trial court the opportunity to take a “second look” at a decision entered under a summary judgment or a summary disposition. Practitioners just need to keep in mind how these motions will affect the time to appeal.

Endnotes

- 1 See *Napier v Jacobs*, 429 Mich 222, 230; 414 NW2d 862 (1987) (holding that a party cannot challenge a jury verdict on sufficiency-of-the-evidence grounds for the first time on appeal); *Yazdianpour v Safeblood Techs, Inc*, 779 F3d 530, 538 (CA 8, 2015) (refusing to review sufficiency-of-the-evidence argument because the defendants did not renew their motions for judgment as a matter of law after trial).
- 2 This article focuses on appeals in state court from the circuit court to the Michigan Court of Appeals and in federal court from the district court to the United States Courts of Appeals. Appeals to a Michigan circuit court from an administrative agency, for example, are governed by different rules.



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