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Appellate Practice Report

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Late Applications for Leave to Appeal: Don't Underestimate the Need to Explain the "Reasons for the Delay"

Under the Michigan Court Rules, a party who has failed to timely file a claim of appeal (or application for leave to appeal if the judgment or order was not appealable as of right) has the option of filing a late appeal. Depending on where the judgment or order being appealed originated, such a late appeal can be filed either in the circuit court or the Court of Appeals. See MCR 7.105(G) (governing "late" appeals to circuit court from a district court or agency); MCR 7.205(A)(4) (governing "delayed" appeals to the Court of Appeals from a circuit court, the Court of Claims, or an agency or tribunal from which an appeal can be taken to the Court of Appeals).

Because late appeals are always discretionary, it is necessary to file a delayed application for leave to appeal. In addition to the usual requirements that apply to any application for leave to appeal (allegations of error and relief sought, concise argument, etc.), the appellant must also provide a "statement of facts explaining the delay." MCR 7.105(G)(1); MCR 7.205(A)(4) (requiring a statement of facts explaining the "reasons for the delay"). The appellee's answer "may challenge the claimed reasons" for the delay, and the court "may consider the length of and the reasons for the delay in deciding whether to grant the [delayed] application." *Id.*

Attention should always be paid to explaining the reasons for the delay, and providing good grounds, but it is especially important for late appeals to circuit court. Why? Because the Court of Appeals has long said that it reviews a circuit court's denial of leave to appeal only for an abuse of discretion. See, e.g., *People v Flowers*, 191 Mich App 169, 172; 477 NW2d 473 (1991) ("The decision of a circuit court to grant or deny leave is reviewed under an abuse of discretion standard."); *Blue Cross & Blue Shield of Mich v Comm'r of Ins*, 155 Mich App 723, 730; 400 NW2d 638 (1986) ("A decision denying a motion for leave to appeal will not be reversed absent an abuse of discretion."). That is consistent with MCR 7.103(B), which states that a circuit court "may" grant leave to appeal from certain orders.

Application of the abuse of discretion standard can be especially problematic if the circuit court rejects the claimed reasons for a delayed appeal and denies leave on that basis, without ever addressing the merits. That is precisely what happened in *Teddy 23, LLC v Michigan Film Office*, 313 Mich App 557; 884 NW2d 799 (2015). Teddy 23, a movie production company, sought a "postproduction certificate of completion" from the Michigan Film Office (MFO) in order to receive a tax credit from the Michigan Department of Treasury. *Id.* at 560-562. The MFO denied Teddy 23's request, finding that its claimed expenditures were significantly overstated. *Id.* at 562. The MFO also advised Teddy 23 that it had "60 days" to



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Appellate Practice Report, cont.

pursue “any rights of appeal.” *Id.* at 562.

Instead of appealing to the circuit court, *Teddy 23* filed an original action against the MFO and the Department of Treasury in the Court of Claims. The Court of Claims, however, dismissed the action for lack of subject-matter jurisdiction because the decision that aggrieved *Teddy 23* was the MFO’s administrative decision to deny it a postproduction certificate of completion, and not a “assessment, decision, or order” by the Department of Treasury that would trigger Court of Claims jurisdiction under the tax revenue act. *Id.* at 563. As a result, review of the MFO’s decision was subject to the circuit court’s exclusive jurisdiction. *Id.*

In the meantime, while the MFO’s and Department of Treasury’s motions to dismiss were still pending in the Court of Claims, *Teddy 23* also filed a delayed application for leave to appeal in the Ingham County Circuit Court, arguing that it “did not file a circuit court action sooner because defendants induced them to believe that the Court of Claims had jurisdiction to review the MFO’s decision.” *Id.* The circuit court denied *Teddy 23*’s delayed application for leave appeal. *Id.*

In addressing the circuit court’s denial of leave to appeal, the Court of Appeals cited the abuse of discretion standard, and

held that the circuit court did not abuse its discretion in denying leave to appeal. The Court rejected *Teddy 23*’s claim of having been misled about its appeal rights, and noted that *Teddy 23* had waited several weeks after the MFO and the Department of Treasury challenged the Court of Claims’ jurisdiction before filing its delayed application for leave to appeal in the circuit court. *Id.* at 569-570. Consequently, neither the circuit court nor the Court of Appeals ever addressed the merits of *Teddy 23*’s appeal.

While it may seem extreme, the *Teddy 23* decision illustrates the importance of not only acting promptly in filing a delayed application for leave to appeal in circuit court, but giving ample attention to the reasons being offered as to why the appeal is late. Otherwise, there is a real risk that the delayed application for leave to appeal could be denied, and that decision upheld by the Court of Appeals, without the merits of the appeal ever being considered.

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