STATE OF MICHIGAN

COURT OF APPEALS

SENIOR SMITH, Plaintiff-Appellee,	UNPUBLISHED November 15, 2012
v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellant.	No. 304144 Wayne Circuit Court LC No. 11-002535-AV

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order dismissing an appeal from district court.[1] We reverse and remand.

I. PROCEDURAL HISTORY

This case originated in district court. Judgment entered on a jury verdict in favor of plaintiff on May 8, 2009. Also on May 8, 2009, the district court entered an order "extending time for filing post-judgment motions until 21 days after receipt of the complete trial transcript." On September 29, 2009, within 21 days of receipt of the transcripts, defendant moved for judgment notwithstanding the verdict (JNOV) or new trial. An order denying defendant's motion entered February 10, 2011. Defendant filed a claim of appeal in circuit court on March 2, 2011. The circuit court dismissed the appeal as not having been perfected pursuant to MCR 7.101(C)(3). Specifically, the circuit court found that the file appeared not to reflect the filing of certain required documents. Defendant moved to reinstate the appeal, and that motion was denied in an April 8, 2011 order. Defendant also moved for reconsideration, and that motion was denied in an April 28, 2011 order. Defendant appealed. On appeal, plaintiff argues that the circuit court never had jurisdiction to hear the appeal because the appeal was not timely filed.

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[1] *Smith v State Farm Mut Auto Ins Co*, unpublished order of the Court of Appeals, entered February 22, 2012 (Docket No. 304144).

II. SUBJECT-MATTER JURISDICTION

"A claim of lack of subject-matter jurisdiction may be raised at any time, even if for the first time on appeal." *Davis v Dep't of Corrections*, 251 Mich App 372, 374; 651 NW2d 486 (2002) (citations omitted). This Court reviews jurisdictional issues de novo. *Pontiac Food Ctr v Dep't of Community Health*, 282 Mich App 331, 335; 766 NW2d 42 (2008). Similarly, this Court reviews de novo the interpretation and application of court rules. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 456; 733 NW2d 766 (2006).

"The time limit for an appeal of right is jurisdictional." MCR 7.204(A). A circuit court does not have jurisdiction to hear an appeal if it is not timely filed. *Schlega v Detroit Bd of Zoning Appeals*, 147 Mich App 79, 80; 382 NW2d 737 (1985). See also *Davis*, 251 Mich App at 374-375.

Determining this issue requires interpretation of the court rules. When interpreting a court rule, "[t]he intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Haliw v Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005). "Court rules are subject to the same rules of construction as statutes." *Valeo Switches & Detection Sys, Inc v Emcom, Inc*, 272 Mich App 309, 311; 725 NW2d 364 (2006) (citation omitted). In interpreting statutes, our Supreme Court has made clear that "it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002) (citation omitted).

At the time the instant appeal was filed in the circuit court, the time to take an appeal by right to circuit court was governed by MCR 7.101(B)(1)(b),[2] which alone on its face required that "an appeal of right must be taken within . . . 21 days after the entry of an order denying a motion for new trial or [JNOV] . . . if the motion was filed within the original 21-day period." There is no question that defendant filed the claim of appeal within 21 days after the entry of the order denying its motion for new trial or JNOV. However, the trial court having granted defendant additional time to file the motion for new trial or JNOV, that motion was not filed "within the original 21-day period."

Defendant argues, and we agree, that the above cannot constitute the end of our analysis. We must examine MCR 7.101's place in the Michigan Court Rules as a whole. *Haliw*, 471 Mich at 706. In the instant case, the district court had authority to extend the filing of post-judgment motions. MCR 2.108 provides in relevant part:

[2] The applicable court rules were amended, effective May 1, 2012, and the amendment, if applicable, would render plaintiff's jurisdictional challenge without merit. Effective May 1, 2012, filing an appeal of right to the circuit court is governed by MCR 7.104(A) and provides that an appeal of right to circuit court must be taken within 21 days of an order denying a motion for new trial if that motion was filed within "the initial 21-day period" *or* "further time the trial court . . . may have allowed during that 21-day period."

> **(E) Extension of Time.** A court may, with notice to the other parties who have appeared, extend the time for serving and filing a pleading or motion or the doing of another act, if the request is made before the expiration of the period originally prescribed. After the expiration of the original period, the court may, on motion, permit a party to act if the failure to act was the result of excusable neglect. However, if a rule governing a particular act limits the authority to extend the time, those limitations must be observed. . . .

In a somewhat analogous situation, this Court has ruled that a court may extend the time to move for a new trial pursuant to MCR 2.108(E). *Arrington v Detroit Osteopathic Hosp Corp*, 196 Mich App 544, 549; 493 NW2d 492 (1992).

We conclude, consistent with *Arrington*, the district court had the authority to extend the time for defendant to file post-judgment motions. *Id.* at 550. The question then becomes whether the district court's extension of time to file post-judgment motions extended the time for taking an appeal of right to the circuit court. We conclude that it did. To conclude otherwise would be to undermine the meaning of MCR 2.108(E) and render MCR 2.108(E) at least partially nugatory. The only way to give effect to both MCR 2.108(E) and MCR 7.101(B)(1)(b) is to recognize that properly extending the time for filing a post-judgment motion also extends the time for filing a claim of appeal. We therefore conclude that a claim of appeal to the circuit court is timely if it is filed within 21 days after the denial of a timely post-judgment motion in the district court.

Our conclusion is buttressed by the May 1, 2012 amendment to the Michigan Court Rules, which explicitly provides that provides that an appeal of right to circuit court must be taken within 21 days of an order denying a motion for new trial if that motion was filed within "the initial 21-day period" or "further time the trial court . . . may have allowed during that 21-day period." MCR 7.104(A). Although we do not apply the new rule retroactively, we also do not read the amendment as altering the existing interplay between the district court's ability to extend the time for post-judgment motions and the time for filing an appeal in the circuit court. Rather, we conclude that this amendment clarified the interplay between MCR 2.108(E) and the time for filing appeals to the circuit court. Not every change to a statute reflects a change in meaning; "such changes can also demonstrate an attempt to clarify the meaning of a provision rather than change it." *Ottawa Co v Police Officers Ass'n of Michigan*, 281 Mich App 668, 673; 760 NW2d 845 (2008).

We therefore conclude that the circuit court had jurisdiction to decide defendant's appeal. We next turn to our review of the circuit's dismissal of that appeal for supposed procedural defects.

III. THE CIRCUIT COURT'S DISMISSAL OF DEFENDANT'S APPEAL AND DENIAL OF RECONSIDERATION

We review a circuit's decision to dismiss an appeal for an abuse of discretion. See *Smith v Merrill Lynch Pierce Fenner & Smith*, 155 Mich App 230, 234; 399 NW2d 481 (1986). We also review for an abuse of discretion a trial court's decision to deny a motion for reconsideration. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 218; 760 NW2d 674 (2008).

Defendant filed a claim of appeal in the circuit court following the district court's denial of its motion for JNOV. Accompanying the claim of appeal were the following documents: a proof of service, the February 10, 2011 district court order denying defendant's motion for JNOV or new trial, the May 29, 2009 district court order amending judgment and adding costs, the district court judgment on jury verdict, five notices of filing transcripts, and the district court register of actions.

The circuit court entered an order on March 15, 2011, stating:

> This cause having come before the court pursuant to notice and appellant having failed to perfect the appeal pursuant to MCR 7.101(C)(3), the court being fully advised in the premises and after due consideration,
>
> IT IS HEREBY ORDERED that said appeal shall be and hereby is, DENIED for failure to comply with the requirements of the court rules.

Defendant timely filed a motion to reinstate the appeal, providing the circuit court with a copy of a stipulated order staying enforcement proceedings and waiving appeal bond that previously had been filed with the district court.

At the hearing on defendant's motion, the circuit court stated:

> The Court has had an opportunity to review the court file in this matter and the Court has determined that as of this date the requirements of 7.101(C)(3) have not been satisfied. Specifically there's a requirement for Proof of Service that the Appellee was served with a copy of the Claim and Statement. There is a requirement that Proof of Service, a Reporter's Certificate and required Statement must be filed in the Court file and in the Circuit Court file. Those documents are not contained in the file and therefore the, the Rule has not been satisfied, and that is the reason that the claim was rejected. The Motion to Reinstate is denied.

Defendant filed a motion for reconsideration, arguing that there were in fact five notices of filing transcripts and a proof of service in the case file. Defendant further argued that to the extent that the "Statement" referenced by the circuit court referred to the waiver of appeal bond, any such technical defect was cured by defendant's motion to reinstate the appeal.

At the time the circuit court reviewed defendant's appeal, MCR 7.101(N)(2)[3] provided:

> The circuit court may on the appellee's motion or its own initiative issue an order to show cause why the appeal should not be dismissed. An order to show cause is not required for a dismissal under subrules (G) or (J).

Subrules (G) and (J) were not at issue; rather the circuit court held that the appeal did not comply with (C)(3). Although the order dismissing the appeal states "[t]his cause having come before the court pursuant to notice," there is no indication in the circuit court file that a show cause, or any notice, was ever issued to defendant before the appeal was dismissed. Further, defendant's attorney's employee submitted an affidavit that there was no notice provided. Although the word "may" designates discretion, *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008), in light of the technical nature of the purported defects in defendant's appeal, we conclude that the circuit court abused that discretion by failing to order a show cause hearing.

More importantly, we conclude that the appeal was improperly dismissed on the grounds of noncompliance with MCR 7.101(C)(3), because defendant's claim of appeal was not defective.[4]

MCR 7.101(C) provided:

> (3) *Notice and Proof of Service.* Within 7 days after the claim of appeal is filed, the appellant must serve on the appellee and on any other person entitled by rule or statute to notice of the appeal:
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> (a) a copy of the claim of appeal;
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> (b) a statement specifying
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> (i) when an appeal bond, if any, was filed, the amount of the bond, and the sureties,
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> (ii) when the required fees were paid,
>
> (iii) when an act was performed under subrule (C)(2)(c) and the nature of the act;

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[3] This rule was renumbered by the May 1, 2012 amendment. Substantially similar language is found in the current MCR 7.113(A), although that rule states that the court "*will* notify the parties that the appeal shall be dismissed unless the deficiency is remedied within 14 days after service of the notice." MCR 7.113(A)(1) (emphasis added).

[4] This Court Rule has also been rewritten by the May 1, 2012 amendment. The requirements for service and notice are now found in MCR 7.104(E). The current version of the rule does not require the service of a statement specifying when an appeal bond, if any, was filed, but only requires a filing of "any bond required by law as a condition for taking the appeal." MCR 7.104(E)(3).

> (c) a copy of the reporter's or recorder's certificate showing that
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> (i) the transcript has been ordered and payment secured, with the estimated date of completion,
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> (ii) the transcript has been furnished, or
>
> (iii) there is no record to be transcribed.
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> Proof of service, the reporter's or recorder's certificate, and the required statement must be filed in the trial court and the circuit court.

In this case, a copy of the claim of appeal, five notices of filing transcripts, and a proof of service are in the circuit court file. Regarding (3)(b), concerning an appeal bond, defendant did not file a statement with the original claim of appeal. However, the rule requires that a statement specifying "when an appeal bond, if any, was filed, the amount of the bond, and the sureties." Defendant represents that no statement was filed because no appeal bond was required. There is a stipulation waiving appeal bond, which was signed by the district court judge on March 3, 2011. Although defendant did not file this stipulation with the appeal, it was submitted with defendant's motion to reinstate.

We conclude that the language of the court rule did not require the filing of a statement when, as here, there was no appeal bond. The language of MCR 7.101(C)(3)(b) does not require such a statement. Nothing should be read into the court rule that "is not within the manifest intent of the" drafter as gathered from the court rule itself. See *In the Matter of Marin*, 198 Mich App 560, 564; 499 NW2d 400 (1993). We therefore conclude that the rule does not require the filing of a statement of appeal bond when the appellant is exempt from the bonding requirement, whether by stipulated waiver or otherwise.[5]

Therefore, contrary to the circuit court's conclusion, the requirements of MCR 7.101(C)(3) were satisfied. The circuit court abused its discretion when it dismissed defendant's appeal.

The circuit court further abused its discretion when it denied defendant's motion for reconsideration. MCR 2.119(F)(3) concerns motions for reconsideration and provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

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[5] Our conclusion is supported by the new version of the rule, which as noted clarifies that only the filing of "any bond" is required. MCR 7.104(E)(3).

In this case, the motion for reconsideration raised the same issues as the motion to reinstate appeal. However, defendant also represented in its motion that since the previous motion, defense counsel had examined the circuit court file and determined the claim of appeal was complete. Thus, defendant reasoned, the circuit court's "understanding that those documents were not in the court file was palpable error by which" the circuit court was misled. Because the documents referenced by the circuit court were in fact (with the exception of the statement of appeal bond, which was not required) contained in the circuit court file, the circuit court abused its discretion by denying defendant's motion for reconsideration.

IV. CONCLUSION

We reverse the circuit court's denial of defendant's claim of appeal and remand for reinstatement of that appeal. However, we decline defendant's request to assign the appeal to a different judge. Defendant has provided no evidence that the circuit court judge will be unable to rule fairly on remand. *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004). "Repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying." *Bayati*, 264 Mich App at 603.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra