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APPELLATE Advocate

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DID YOU KNOW? OBSCURE APPELLATE QUIRKS

By Helen L. Gemmill

In our firm's appellate work, there are many rules and issues that we see and address repeatedly. Recently, however, we have seen a few unusual appellate quirks that do not show up very often. We thought we would share some of the more interesting quirks.

What do you mean there is no appeal?

Cases filed in the state trial courts are often removed by the defendant to federal district court when the federal courts appear to have subject matter jurisdiction. Did you know, however, that if a federal district court decides that it lacks subject matter jurisdiction and remands the case to state court, the defendant cannot appeal the district court's decision to the federal court of appeals?

The United States Judiciary and Judicial Procedure Code states that:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officers or agencies sued or prosecuted] or 1443 [civil rights cases] of this title shall be reviewable by appeal or otherwise.

28 USC § 1447(d). Thus, if you disagree with the federal district court's ruling that there is no subject matter jurisdiction, and cannot convince the district court to reconsider, your only option is to continue with the litigation in state court.

What do you mean the bond premium can't be recovered?

When an appeal is filed from a trial court decision entering a judgment for money damages to the plaintiff, the defendant can avoid paying the judgment during the pendency of the appeal by posting a bond. Depending on the amount of the award, the premium for a bond can be many thousands of dollars.

If the defendant subsequently wins on appeal and the judgment is overturned, under Rule 39(e) of the Federal Rule of Appellate Procedure the cost of obtaining the bond is a cost that is taxable to the plaintiff. Even though bond premium is recoverable from the plaintiff as a cost on appeal, Rule 39(e) also states that this cost is taxable in the district court. Thus, the Third Circuit Court of Appeals has taken the position that it will not include the cost for the bond in its mandate to the district court that tells the district court what costs defendant incurred on appeal that should be included in the district court judgment in favor of the defendant.

However, that the Clerk for the United States District Court for the Eastern of Pennsylvania has taken the position that if the bond premium cost is not included in the Third Circuit mandate, the District Court will not include it in the judgment for costs against the plaintiff? So, even though the rule is clear that you are entitled to the bond cost if you prevail on appeal, neither the appeals court or the district court will award you that cost because each thinks the other court should do so.

What do you mean you want two different cover pages?

A significant amount of time in any appeal is spent ensuring that court filings are formatted in the way required by the appellate court rules. Sometimes, those rules don't seem to be written anywhere, or at least anywhere where they can be easily found.

Here's a recent example of such a rule. Did you know that when there are multiple docket numbers on an appeal, such as when two or more appeals are consolidated, the Pennsylvania Supreme Court requires that you provide separate cover pages for a petition for allowance of appeal for each docket number? Your petition cannot have just one cover page with all of the docket numbers, or even multiple copies of the cover page with all of the numbers. Unless you provide with your filing a separate cover sheet for each docket number with only that docket number, or provide the separate pages quickly after the omission is noted by the Clerk, your appeal could be dismissed. ■

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RECENT APPELLATE DECISION: WHAT KIND OF "BREAKDOWN" IN COURT OPERATIONS WILL TOLL THE APPEAL DEADLINE? *By Debra P. Fourlas*

In limited circumstances, a trial court has discretion to allow an untimely appeal *nunc pro tunc*. One such circumstance occurs where the appeal is late because of a "breakdown" in the court's operations. Recently, in *Fischer v. UPMC Northwest*, 2011 PA Super 247, 34 A.3d 115 (2011) *reargument denied* (Pa. Super. Jan. 30, 2012), the Superior Court found such a "breakdown" in the trial court's operations.

After an unfavorable verdict, plaintiffs filed a post-trial motion. The trial court denied the motion, but plaintiffs' counsel never received a copy of that order. Twenty-nine days after the order, counsel learned of the order in a telephone discussion with the prothonotary's office. Counsel explained that he had not received the order. The prothonotary's staff investigated and found that the order had been time-stamped the date it was issued, but had not been entered on the docket. It was then entered and back-dated to the date it had been issued. Counsel received mailed notice of the order a week later and filed a notice of appeal five days thereafter. The Superior Court quashed the appeal as untimely.

Plaintiffs then filed a motion in the trial court for permission to appeal *nunc pro tunc*. Evidence revealed that it was the local practice for the court reporter, rather than the prothonotary, to mail notice of orders to the parties. The court reporter testified that she had no specific recollection of mailing the notice at issue, but it was her practice to mail notices. The evidence also indicated that someone on the prothonotary's staff had previously updated the docket notation regarding plaintiffs' post-trial motion by noting the motion's denial. Ultimately, the trial court refused to allow the appeal, because (1) the court reporter believed she had mailed notice of the order, even though she had no specific recall of doing so; and (2) counsel had actual, albeit oral, notice of the order 29 days after the order date, within the appeal period.

Plaintiffs appealed the denial of their motion, arguing that there had been a breakdown in the trial court's operations that entitled them to their requested appeal. The Superior Court agreed.

The court concluded that the prothonotary did not comply with Pa. R.C.P. 236, which requires written notice of every order and a notation of such notice in the docket. The rule does not permit the prothonotary to delegate that responsibility to another office such as the court reporter. Moreover, verbal notice of the order in a telephone discussion with counsel was insufficient to comply with the prothonotary's express duties of written notice and notation on the docket. Similarly, the previous notation on the docket did not comply with Rule 236, because that notation was undated and did not indicate that any notice had been mailed to counsel. Thus, the failure of the *prothonotary* to give written notice of the entry of the order constituted a breakdown in court operations.

Under Pa. R.A.P. 108, an order is not "entered" until the prothonotary notes on the docket the provision of written notice. Under Pa. R.A.P. 903(a), an appeal is timely if filed within 30 days after the "entry" of the order. Therefore, the court concluded that the time for filing an appeal does not begin to run until the *prothonotary* has formally complied with Pa. R.C.P. 236 by (1) entering the order on the docket, (2) mailing written notice of the entry of the order, and (3) noting the mailing on the docket.

Finally, the court rejected the defendant's argument that allowing a late appeal would be prejudicial. Absence of prejudice to the appellee is a prerequisite for leave to file an appeal that is untimely because of "non-negligent circumstances" related to appellant or appellant's counsel. However, there is no requirement to demonstrate absence of prejudice where a party is seeking leave to appeal *nunc pro tunc* because of a breakdown in court operations. ■

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