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Summary of Winston Products Co. v. DeBoer, 122 Nev. Adv. Op. 4

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Winston Products Co. v. DeBoer, 122 Nev. Adv. Op. 48 (May 25, 2006)¹

RULES OF CIVIL AND APPELLATE PROCEDURE – COMPUTING TIME

Summary

This case examines “the method used to compute the time for filing motions for judgment as a matter of law and for a new trial and the tolling period to file a notice of appeal when these motions are served by mail or electronic means.”² This case also addresses the issue of whether tolling motions also toll the time to appeal from a post-judgment order awarding attorney fees and costs.

Disposition/Outcome

The Court held that when computing the appropriate time for filing motions for judgment as a matter of law and a new trial and the tolling period to file a notice of appeal, the time should be calculated first under NEV. R. CIV. P. 6(a) and then, under NEV. R. CIV. P. 6(e), three days are added if service is made by mail or electronic means. Further, the Court held that tolling motions also toll the time to appeal from post-judgment orders awarding attorney fees and costs.

Factual & Procedural History

After a jury verdict in favor of respondent, a final judgment was filed on April 18, 2005. Respondent served appellant with notice of entry of the district court’s final judgment via facsimile and mail on April 21, 2005. On May 6, 2005, fifteen days later, appellant moved the district court for judgment as a matter of law under NEV. R. CIV. P. 50(b) or for a new trial pursuant to NEV. R. CIV. P. 59. Respondent opposed appellant’s motions in the district court, arguing, in part, that they were not timely filed.

Before resolving the motions, on June 9, 2005, the district court entered a post-judgment order awarding attorney fees and costs in favor of respondent. Notice of entry of the order was served on appellant on June 10, 2005. On June 27, 2005, the district court entered its order denying appellant’s motion for judgment as a matter of law or for a new trial. The district court determined that appellant’s motions had been timely filed but concluded that appellant was not entitled to any relief. On July 29, 2005, within thirty days after service of notice of entry of the June 27 order resolving the motions, appellant filed a notice of appeal from that order, the final judgment, and the post-judgment order awarding attorney fees and costs.

Respondent filed a motion to dismiss the appeal, alleging that appellant’s motions for judgment as a matter of law and for a new trial were not timely and therefore did not toll the time to appeal. Appellant opposed the motion.

¹ By Dustin Howell.

² Winston Products Co. v. DeBoer, 122 Nev. Adv. Op. 48 (2006).

Discussion

In order for the Court to have jurisdiction to consider an appeal, the appeal must be filed within the time allowed under NEV. R. APP. P. 4(a).³ A timely filed motion for judgment as a matter of law under NEV. R. CIV. P. 50(b) or for a new trial under NEV. R. CIV. P. 59 tolls the time for filing an appeal until no later than thirty days after a party serves written notice that the order resolving such motions has been entered.⁴ A tolling motion under NEV. R. CIV. P. 50(b) or NEV. R. CIV. P. 59 is timely if it is filed within 10 days after a party serves written notice that a judgment has been entered. Three additional days are added to this filing deadline when service was made by mail or electronic means.⁵

In its motion to dismiss, respondent argued that the Court's prior case law required the three day allowance for mailing to be added directly to the ten day period to file tolling motions before computing the filing deadline under NEV. R. CIV. P. 6(a). This approach would provide a thirteen-day time period for filing tolling motions. Under NEV. R. CIV. P. 6(a), Saturdays, Sundays and nonjudicial days would be included in this thirteen-day period. Applying this method of computation to the facts of this case would have put the filing deadline for tolling motions on May 4, 2005. Because appellant's motions were not filed until May 6, 2005, respondent contended that they were untimely.

Appellant argued that the filing deadline for tolling motions should be calculated first under NEV. R. CIV. P. 6(a), excluding intermediate nonjudicial days, and then the three-day allowance for service by mail should be added pursuant to NEV. R. CIV. P. 6(e). Appellant contended that this method of computation aligned with federal court interpretations of the analogous federal rule, FED. R. CIV. P. 6, and furthers the intent of NEV. R. CIV. P. 6(e) by allowing for more time when service is made by mail. Applying this method of computation, appellant contended that its motions for judgment as a matter of law and for a new trial were timely filed and effectively tolled the time to appeal.

The Court then reviewed its two prior cases that governed computation of time under NEV. R. CIV. P. 6 when service was made by mail. In both *Ross v. Giacomo*⁶ and *Custom Cabinet Factory of New York v. District Court*,⁷ the Court held that the three-day allowance for service by mail should be added directly to the time allotted by statute or rule. Only then would NEV. R. CIV. P. 6(a) be applied to determine the filing deadline. In the case of filing motions for judgment as a matter of law and for a new trial, the three days would be added to the ten-day period, resulting in a thirteen-day period, which was then calculated under NEV. R. CIV. P. 6(a).

The Court noted however, that after both *Ross* and *Custom Cabinet*, NEV. R. CIV. P. 6 was amended to be consistent with the 1985 amendments to FED. R. CIV. P. 6. That amendment made the exclusion of intermediate Saturdays, Sundays, and nonjudicial days applicable in computing time periods of less than eleven days, when they were previously only applicable to

³ See Nev. R. Appellate Proc. 3(a); *Alvis v. State, Gaming Control Bd.*, 99 Nev. 184, 660 P.2d 980 (1983).

⁴ NEV. R. APP. P. 4(a)(4).

⁵ NEV. R. CIV. P. 6(e).

⁶ 97 Nev. 550, 553 nn.1-2, 645 P.2d 298, 300 nn.1-2 (1981).

⁷ 119 Nev. 51, 54-55, 62 P.3d 741, 743 (2003).

time periods of less than seven days. The Court then cited several federal court cases⁸ in which the relevant amendments were analyzed in view of the three-day allowance for service by mail as well as the intent of the amendments. Each of the cases recognized the purpose of the amendment was to increase the amount of time a party has to respond. Further, the three cases also acknowledged the fact that if the three-day allowance was added to the allotted time period before applying Rule 6(a), responding parties would have the same or less time to respond than before the amendment. Therefore, each of the cases held that the filing deadline for tolling motions should be calculated by applying Rule 6(a) first, then adding three more days pursuant to Rule 6(b).

Although acknowledging that federal court interpretations of the Federal Rules of Civil Procedure are only persuasive when interpreting the Nevada Rules of Civil Procedure, the Court followed the federal courts in their reasoning and interpretation of Rule 6. Specifically, the Court recognized that if the three-day allowance of NEV. R. CIV. P. 6(e) were first added directly to the time period allotted by the applicable rule or statute and then the filing deadline was calculated under NEV. R. CIV. P. 6(a), the responding party would have less time to respond than if the three days were added after calculating the deadline under NEV. R. CIV. P. 6(a). To further the intent of the amendments to NEV. R. CIV. P. 6, the Court overruled its early cases, and held that when computing filing deadlines under NEV. R. CIV. P. 6, the filing deadline is calculated under NEV. R. CIV. P. 6(a) first, and then three days are added for service by mail under NEV. R. CIV. P. 6(e).

In this case, notice of the judgment's entry was served by mail on Thursday, April 21, 2005. Computing the ten-day time period from this date and excluding intermediate nonjudicial days under NEV. R. CIV. P. 6(a), extended the deadline for tolling motions to Thursday, May 5, 2005. Adding three days at that point for service by mail made Monday, May 9, 2005, the final deadline to file motions for judgment as a matter of law or for a new trial. Appellant's motions were timely filed because they were filed before May 9, 2005, thus effectively tolling the time to appeal.

Although not addressed by the parties, the Court ruled on whether appellant's tolling motions tolled the time to appeal from the post-judgment order awarding attorney fees and costs. Typically a party has thirty days from the date that notice of the order's entry is served to file an appeal from an order awarding attorney fees and costs.⁹ Because of the close connection between the final order and a post-judgment order, the need to avoid piecemeal litigation, and to avoid confusion over the time for filing appeals from special orders after final judgment, the Court held that a tolling motion to toll the time to appeal from a final judgment also tolls the time to appeal special orders entered after final judgment.

Conclusion

The Court ruled that when computing filing deadlines under NEV. R. CIV. P. 6, the deadline should be calculated under NEV. R. CIV. P. 6(a) first, then, if service is made by mail or

⁸ See *Nalty v. Nalty Tree Farm*, 654 F. Supp. 1315, 1317 (S.D. Ala 1987); *Lerro v. Quaker Oats Co.*, 84 F.3d 239, 242 (7th Cir. 1996); *Tushner v. U.S. Dist. Court for Cent. Dist. Of Cal.*, 829 F.2d 853, 855-56, 9th 1987).

⁹ NEV. R. APP. P. 4(a)(1).

electronically, three days should be added to the filing deadline. In addition, tolling motions for time to appeal final judgments also toll the time to appeal special orders entered after final judgments are entered.