Bar Association for the United States Court of Appeals for the Eighth Circuit

NEWSLETTER

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The United States Supreme Court decided two cases from the Eighth Circuit last term. Caitlinrose Fisher and Ryan Marth analyze the decisions in *Morgan v. Sundance* and *Boechler, P.C. v. Commissioner of Internal Revenue*. See Page 2.

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Jurisdiction Junction

Eighth Circuit clarifies appealability in decisions on recusal, nominal damages

By Geoffrey D. Kearney

Though the U.S. Court of Appeals for the Eighth Circuit hands down hundreds of merits decisions each term, many cases are either decided on procedural grounds or, at the least, require a meaningful procedural analysis before the court may reach the merits. Below are a few decisions that the court has handed down in the last few months that touch on appellate jurisdiction.

Recusal Motion Order Need Not be Appealed until Related Attorney Fee Motion Decided

Skender v. Eden Isle, 33 F.4th 515 (8th Cir. 2022)

Stetson Skender brought claims under the Fair Labor Standards Act and Arkansas Minimum Wage Act against Eden Isle Corporation ("Eden"), his former employer, seeking damages for unpaid overtime wages. Minutes after the district court entered an order granting the defendant's motion for summary judgment, Skender filed a notice of acceptance of an offer of judgment that had been made six days previous. Despite this notice, the clerk nonetheless entered judgment in favor of the defendant. However, the district court, relying on *Perkins v. U.S. W. Commc'ns*, 138 F.3d 336, 339 (8th Cir. 1998), which holds that an offer of judgment remains open despite an intervening grant of summary judgment, amended the judgment to reflect that it had been accepted.

Skender then filed a motion for attorney fees and costs and a motion seeking the district judge's recusal and reassignment of the matter of fees and costs. While the court denied the recusal motion the day it was filed, the fees and costs order was not entered for 36 more days. Despite a request for substantially more, the latter order granted Skender $1 in attorney fees. He filed a notice of appeal the day of its entry.

Eden filed a motion to dismiss the appeal as to the recusal order on the basis that the notice was untimely. The dispositive question for the court was whether the appellant's deadline was triggered by the recusal order or the order deciding the related fees and costs motion.

The court began its analysis with a brief discussion of the requirements for commencing an appeal—that the notice be filed within 30 days of the order being appealed, and that the predicate order be final to be appealable. Though the panel recognized that recusal orders typically are *not* considered final and appealable, it also observed that, as an order entered post-judgment, this particular recusal order was "more amenable to immediate appeal," as appeals of such orders do not raise the same concerns about efficiency, confusion, *etc.*, that they would if appealed during the litigation. *Skender*, 33 F.4th at 520. Indeed, the court noted that at least one sister circuit had held such an order final and appealable. *See id.* (citing *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2nd Cir. 1991)). Looking to the particulars of the case, however, the court ultimately determined that holding the recusal order final and appealable only upon entry of the latter order was the proper course:

> First, unlike an appeal from most post-judgment orders, an immediate appeal here might have interfered with proceedings before the district court. At the time of the court's order denying recusal, the court had pending before it a motion for an award of costs and attorneys' fees—a motion to

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> which Skender's recusal motion was expressly tethered. So a notice of appeal filed while the court was considering that related motion could arguably have divested the district court of jurisdiction to decide it and thus prevented the court from resolving it until our court resolved the appeal of the recusal order. Second, further proceedings would likely produce an order that was more final than the order denying recusal. The resolution of the motion for attorneys' fees provided a natural terminus after which we could review the fee order and the related, prefatory recusal order.

Id. (citation omitted). However, emphasizing that whether such an order is final and appealable is a product of the posture and circumstances of the case, the court also made clear that this holding should not be construed as a broad statement about post-judgment recusal orders. The court arguably signaled that the disposition in the instant case should be treated as more the exception than the rule:

> We do not intend to intimate that no post-judgment recusal orders are final and appealable. Some post-judgment recusal orders, like the one at issue in *Yonkers*, may respond to recusal motions that do not identify some other motion or proceedings for which recusal is sought and that would soon be resolved. In that circumstance there may be no other court order that would provide a worthwhile or sensible opportunity to review the court's recusal decision. A party should not be able to revive a lost opportunity to appeal after each and every subsequent post-trial order. *See* 15B Edward H. Cooper, Federal Practice & Procedure § 3916 (2d ed. April 2022 update). But here the recusal motion was expressly connected to a specific motion filed the same day whose resolution could be expected in short order. In these circumstances, we think it more practical to review the orders resolving these motions in one fell swoop after the court has decided both of them.

Id. Denying the motion to dismiss the appeal, the court reached the merits of the case.

Order Stating Nominal Damages will be Awarded but Does Not Set Amount is Not a Final Order

Perficient v. Munley, 43 F.4th 887 (8th Cir. 2022)

Thomas Munley's former employer, Perficient Inc. ("Perficient"), sued him and Spaulding Ridge, LLC ("Spaulding"), his subsequent employer, for relief relating to non-competition and confidentiality agreements Munley executed during his time with Perficient. The district court granted summary judgment in favor of Perficient through two orders entered on April 15, 2021. However, the court held that no actual damages had resulted from the breach and that only nominal damages were appropriate. It further held that the attorney fees incurred in the litigation were consequential damages under a breach of contract theory. The court ordered briefing on damages and attorney fees and advised the parties that a final judgment would be entered thereafter. Before judgment was entered, Munley filed his notice of appeal. Perficient filed a motion to dismiss the appeal for lack of jurisdiction.

Perficient's position was that the April 15 orders were not final, and therefore did not provide a basis for appellate jurisdiction. Munley argued that, to the contrary, the orders were final and appealable. The panel held that the orders were not final and, therefore, were not appealable.

The court began its analysis by explaining the basics of appellate jurisdiction; namely, a civil appeal must be commenced by a timely notice of

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appeal and 28 U.S.C. § 1291 only grants courts of appeal jurisdiction over "final decisions." The court then defined a final order and discussed the consequences of a purportedly final order that does not fix a damages amount:

> "A final decision within the meaning of § 1291 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Dieser v. Cont'l Cas. Co.*, 440 F.3d 920, 923 (8th Cir. 2006) (quoting *Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund*, 425 F.3d 1087, 1091 (8th Cir. 2005)). "A judgment awarding damages but not deciding the amount of the damages or finding liability but not fixing the extent of the liability is not a final decision within the meaning of § 1291." *Id.*; *see also St. Mary's Health Ctr. Of Jefferson City v. Bowen*, 821 F.2d 493, 498 (8th Cir. 1987) (citing *Parks v. Pavkovic*, 753 F.2d 1397, 1404 (7th Cir.), *cert. denied*, 473 U.S. 906, 105 S. Ct. 3529, 87 L.Ed.2d 653 (1985) ("Normally an order that merely decides liability and leaves the determination of damages to future proceedings does not finally dispose of any claim; it is just a preliminary ruling on the plaintiff's damage claim.")); *Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1092 (10th Cir. 1995) ((brackets omitted) (quoting 16 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 4009 (3d ed.)) ("[A]n order that determines liability but leaves damages to be calculated is not final.").

Perficient, 43 F.4th at 889–90. Because the April 15 orders determined that damages would be awarded but left the *amount* of damages open, it did not fit the standard definition of a final order.

The court noted authority providing that such an order may be nonetheless final if calculating the damages is merely a "ministerial task." *Id.* at 890 (collecting cases). However, the instant case did not present such circumstances. While the determination that a task is merely ministerial is appropriate where the court will not need to exercise "independent legal judgment" or will undertake only "mechanical or computational" work, it is not so when the question is open and rests upon the district court's evaluation of competing briefs on the matter. Though the court seemed to leave open the possibility that an order with an unspecified nominal damages award could be held to be final where "nominal damages" has a fixed definition, this is not the case under Missouri law (which governs the relevant contract).

The court concluded with a brief analysis of Fed. R. App. P. (4)(a)(2). This rule allows an appellate court to accept a prematurely filed notice of appeal if it is filed after a decision that is final from a practical standpoint but precedes the filing of a true final order or judgment. However, under even this somewhat more generous approach, the April 15 orders did not qualify as final and appealable. "[T]he rule applies 'only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment' and does not save a premature appeal 'from a clearly interlocutory decision.'" *Perficient*, 42 F.4th at 891-92 (quoting *FirsTier Mortg. Co. v. Invs. Mortg. Ins.*, 498 U.S. 269, 276 (1991)). As discussed above, the relevant orders left at least one crucial issue unresolved. Accordingly, the orders did not qualify under Rule 4(a)(2).

The court therefore granted the motion to dismiss the appeal.

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