Appellate Rules Followers Beware: Another Party's Post-Trial Motion May Not Toll Your Deadline For Filing A Notice Of Appeal

By Beth Brooks Scherer

Appellate Rule 3 provides that when "any party" timely files a motion under Rule 50(b), 52(b), or Rule 59 of the North Carolina Rules of Civil Procedure, the deadline for filing a notice of appeal is tolled "as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order." N.C. R. App. P. 3.

Until a recent published Court of Appeals' opinion shook my confidence, I had always understood Appellate Rule 3 to stop the notice of appeal clock for all parties when any one of them filed a post-trial motion under Civil Rule 50(b), 52(b), or 59.

In **Estate of Hurst ex rel. Cherry v. Moorehead I, LLC**, 748 S.E.2d 568, 572 (N.C. Ct. App. 2013), a jury returned a verdict in the plaintiff's favor, and the trial court entered a written judgment on 23 May 2011. Thereafter, one of the defendants, Blackmon, filed a timely Rule 50 motion. The remaining defendants did not join in Blackmon's motion or otherwise file their own post-judgment motions under Rules 50, 52, or 59. Instead, they waited to appeal until after the trial court disposed of Blackmon's Rule 50 motion.

Four-and-a-half months later, the trial court denied Blackmon's Rule 50 motion. Within thirty days of the order denying the post-trial motion, the defendants jointly filed a notice of appeal challenging the underlying 23 May judgment. Under my reading of Appellate Rule 3, Blackmon's Rule 50 motion should have tolled the deadline for filing the notice of appeal as to the underlying judgment "as to all parties."

The **Hurst** court, however, reached the opposite conclusion, stating:

> Under Rule 3 of the North Carolina Rules of Appellate Procedure, timely filing of a motion for judgment notwithstanding the verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b) tolls the period for filing and serving written notice of appeal in civil actions. N.C. R. App. P. 3(c)(3)(2013).
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> Here, Blackmon filed a timely motion for judgment notwithstanding the verdict pursuant to Rule 50. However, this motion was filed by Blackmon alone, and not by the remaining defendants. *Therefore, although the notice of appeal given on 9 November 2011 was on behalf of all defendants, the time for filing notice of appeal in this case was tolled during the pendency of the motion as to Blackmon only.* The remaining defendants failed to file notice of appeal within 30 days from entry of the trial court's judgment. Because timely notice of appeal is jurisdictional, we dismiss the present appeal as to [the remaining defendants].

Hurst, 748 S.E.2d at 572 n.2 (emphasis added; citations omitted). No petition for rehearing or petition for discretionary review was filed in the case—and therefore, the issue was not brought to either appellate court's attention in sufficient time for either appellate court to address the apparent discrepancy before the **Hurst** opinion became final.

Unfortunately, this opinion has the potential to create an appellate procedure quagmire—especially for unsuspecting parties who are happy with most parts of the judgment, but who may want to challenge an issue such as the award of costs, or an earlier procedural ruling, by way of cross-appeal. The burning question is as follows: "In a post-**Hurst** world, what should I do when faced with this situation?"

Set forth below are a few of the different options that I have considered. As you will see, none of the options are perfect.

1. Rely on the Plain Language of Appellate Rule 3, Ignore *Hurst*, And File Your Notice Of Appeal After The Trial Court Enters An Order On The Post-Trial Motion(s).

While I strongly suspect that the Court in **Hurst** inadvertently overlooked the language in the Appellate Rules that provides that Rule 3's tolling provision applies to all parties regardless of who filed the motion, **Hurst** is a published opinion. You are all likely aware of case law that provides that a prior Court of Appeals' opinion is binding on all future panels of the Court of Appeals and, therefore, an argument can be made that future Court of Appeals panels have no other choice than to follow **Hurst.** *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

However, I think the better arguments as to why **Hurst** should not control is that 1) the Court of Appeals did not address the phrase in Appellate Rule 3 that an appeal deadline is tolled "as to all parties," and therefore this issue was not specifically addressed by the **Hurst** Court, and/or 2) that the tolling provision of Appellate Rule 3 is crystal clear, and that the Appellate Rules (which are promulgated by the North Carolina Supreme Court) cannot be overridden or "overruled" by a Court of Appeals' opinion.

However, if your client is facing a multi-million dollar judgment, you are unlikely to find comfort in my non-authoritative opinion that the Court of Appeals should limit **Hurst** and apply the tolling provision of Appellate Rule 3 as written.

2. Wait For The Other Party To Appeal After A Ruling Is Entered On Its Post-Trial Motions, File A Notice Of Appeal Within 10 Days Of This First Notice of Appeal, And Argue That *Hurst* Does Not Address The Application Of Appellate Rule 3's 10-Day "Cross-Appeal" Provision.

Appellate Rule 3 provides that if "timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party." Thus, even if Appellate Rule 3's tolling provision does not apply, there is a good argument that filing of a notice of appeal within 10 days of the first notice of appeal from the underlying judgment triggers this supplemental 10-day notice of appeal period for all remaining parties. The **Hurst** opinion did not consider whether this 10-day cross-appeal provision could have applied. The bad news is that the cross-appeal provision should have saved the other defendants in **Hurst**. Again, who wants to rely on my predictions of how the Court of Appeals might rule when your clients are relying on you to preserve their right to appeal?

3. Any Party Who Does Not File A Post-Trial Motion Should File A Notice Of Appeal Within 30 Days Of The Judgment.

Filing your notice of appeal within 30 days of the underling judgment while the post-trial motions of another party are still pending is the position that the **Hurst** court appears to endorse.

However, several practical problems arise with this approach. First, Appellate Rule 11(d) provides that when there are multiple appellants, there shall only be one record on appeal. That would likely be impossible in a situation like the one in **Hurst**. The **Hurst** court determined that all the defendants—except for Blackmon—should have filed their notices of appeal in June 2011. Under Appellate Rule 11, these other defendants' proposed record would have been due to be served sometime in July 2011 and due to be filed in the Court of Appeals sometime around September 2011. Under this scenario, Blackmon—whose notice of appeal was not due until November 2011—would have still have been waiting for a ruling on his Rule 59 motion while the other parties were filing their record on appeal and briefing their appeal. Therefore, it would have been extremely difficult to comply with Rule 11's requirement that there only be one record in the case. Would the Appellate Rules really require Blackmon to pursue a completely separate appeal from the remaining defendants? The Court of Appeals generally does not like piecemeal litigation, and it is entirely conceivable that they would have kicked the other defendants' appeal back as premature if they have filed a notice of appeal in June. I suppose you could ask the Court of Appeals to indefinitely stay the other defendants' due date for serving their proposed record on appeal until the trial court entered its order on Blackmon's post-trial motion. However, your guess is as good as mine as to whether the Court of Appeals would be open to granting that motion so that the parties could file a single record.

Second, under this scenario, the parties who did not join in the post-trial motions have filed their notices of appeal before an order is entered on the post-trial motions. In many circumstances, the filing of a notice of appeal divests the trial court of jurisdiction to issue a ruling on the pending post-trial motions under N.C. Gen. Stat. § 1-294. *See* **Lovallo v. Sabato**, 216 N.C. App. 281, 285, 715 S.E.2d 909, 912 (2011). If you cannot get a ruling on the post-trial motions, there would be no opportunity to ask the Court of Appeals to consolidate the two appeals.

4. If You Cannot Beat 'Em, Join 'Em (In Filing A Post-Trial Motion).

Another option I have considered is to file your own post-trial motion to ensure that the Rule 3's notice of appeal deadline is tolled as to your client.

Alas, this solution is not perfect either. Rules 50, 52, and 59 all provide that a party has 10 days to file post-trial motions. There is no provision for filing one of these motions on day 11 because one of the other parties has done the same.

Second, there are a couple of Court of Appeals' opinions that state that to toll the notice of appeal deadline under Appellate Rule 3, post-trial motions must be proper and specific motions. *See* **N.C. Alliance for Transportation Reform, Inc. v. N.C. Department of Transportation**, 183 N.C. App. 466, 470, 645 S.E.2d 105, 108 (2007); **Smith v. Johnson**, 125 N.C. App. 603, 607,481 S.E.2d 415, 417 (1997). If you file a post-trial motion for the purpose of tolling your client's appellate deadline and your Rule 50, 52, or 59 does not find any proper basis under those rules, you are no better off. For example, do not file a Rule 59 motion as to cost in an attempt to trigger Rule 3's tolling provision if the trial court has already given you everything you wanted.

5. Try To Get The Trial Court To Quickly Enter Its Written Ruling on the Post-Trial Motions, And Appeal As Soon As That Written Order is Entered (*i.e.*, Within 30 Days Of The Underlying Judgment).

In most cases, this option will be impractical. Post-trial motions are due within 10 days of the entry of the judgment—meaning you usually only have 20 days to get any post-judgment motions calendared for hearing, decided by the trial judge, and a written order entered before the original 30-day deadline for filing a notice of appeal runs. However, if you are successful in getting the post-trial motions resolved at super-sonic speed and the notice of appeal filed within 30 days of the original judgment, you should be able to avoid most of the troubles identified above.

Conclusion

The **Hurst** dilemma will likely create a lot of headaches for both practitioners and the appellate courts until the Court of Appeals or Supreme Court clarifies or corrects this opinion. Until then, the best practice is to identify the issue early, alert your clients to the problems before any mistakes can be made, and let them make the final decision as to how to proceed.

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