

STATE OF MICHIGAN
COURT OF APPEALS

NABRO HOLDINGS, INC.,

Plaintiff-Appellee,

v

SUBWAY REAL ESTATE, LLC,

Defendant-Appellant.

UNPUBLISHED

April 23, 2020

No. 350571

Wayne Circuit Court

LC No. 19-009316-AV

Before: SAWYER, P.J., and LETICA and REDFORD, JJ.

PER CURIAM.

In this eviction action, which the Michigan Supreme Court remanded to this Court for consideration as on leave granted,¹ defendant appeals the circuit court’s order dismissing its claim of appeal from a ruling of the district court. The circuit court also denied defendant’s motion for reconsideration. We reverse and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

The underlying action arises out of an eviction proceeding initiated by plaintiff against defendant after defendant leased space in a commercial retail building owned by plaintiff. Eventually, a dispute arose over a lease provision and its impact on the rent due. Plaintiff concluded that defendant owed approximately \$80,339 in back payments and initiated eviction proceedings against defendant. Plaintiff later filed a motion for partial summary disposition that the district court granted on June 27, 2019.

Defendant had just 10 days, or until July 8, 2019, to file a claim of appeal. MCR 4.201(N)(2) (“An appeal of right must be filed within 10 days after the entry of judgment.”). Late in the afternoon on the day that defendant’s claim of appeal had to be filed, defendant’s attorney used the Third Circuit Court’s mandatory electronic (e-filing) system to submit it. In a minute, the court’s e-filing system responded via email, informing the attorney that his document was in

¹ *Nabro Holdings, Inc v Subway Real Estate, LLC*, ___ Mich ___, 935 NW2d 45 (2019).

progress his “filing . . . has been received by the court.” A second e-mail followed regarding the document in progress, reporting that the filing (a claim of appeal) had been updated and repeating that his “filing . . . has been received by the court.”

Early the next morning, however, the e-filing system sent defense counsel another e-mail, advising that the Wayne County Circuit Court Clerk had rejected defendant’s claim of appeal. The Clerk requested that defendant “[p]lease add a case type to Claim of appeal form. Please provide fee waiver or pay \$150.00 for new case initiation claim of appeal[.]”

Defense counsel called the Clerk’s Office to obtain an explanation as to why his claim of appeal had been rejected. Defense counsel discovered that he had selected an incorrect case type code, resulting in his claim of appeal being docketed as a miscellaneous motion,² and that, if he had selected the correct code for a claim of appeal, he would have been prompted to pay the filing fee required to file a claim of appeal.

That very afternoon, defense counsel e-filed a claim of appeal, selecting the correct code and paying the required statutory fee. In thirty-two minutes, the circuit court accepted defendant’s claim of appeal and the court’s e-filing system sent a confirmatory email, reflecting that the claim of appeal had been filed.

Ten days later, the circuit court entered an order dismissing defendant’s claim of appeal, stating:

The appeal was not timely filed pursuant to MCR 4.201(N)(2), which requires filing within 10 days of the signing and entry of the Summary Proceeding Judgment. The judgment was entered on June 27, 2019 and this appeal was filed on July 9, 2019. The appeal must have been filed by the end of July 8, 2019.

Defendant filed a motion for reconsideration and requested that the circuit court set aside the order dismissing its claim of appeal. Defendant explained that its claim of appeal was rejected because of his attorney’s “clerical” error—choosing an incorrect case filing code in the e-filing system, and, therefore, failing to pay the requisite filing fee. Defendant contended that “[m]anifest injustice will result should this clerical error preclude Appellant from pursuing its right of appeal.” In particular, defendant relied upon the language of Administrative Order 2011-4, that authorized electronic filing in the Third Circuit Court. In pertinent part, AO 2011-4 read:

The 3rd Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing or service of documents during the transition period, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

² The second e-mail sent to defense counsel reflected that his claim of appeal had been filed as a “Miscellaneous Motion.”

Defendant asked the circuit court to exercise its discretion in setting aside the order of dismissal, and requested that its appeal be reinstated. The circuit court denied defendant's motion for reconsideration, adding a hand-written notation of "no palpable error."

Defendant filed an application for leave to appeal with this Court along with a motion for stay. This Court denied his application "for lack of merit in the grounds presented" and denied his stay request as moot. *Nabro Holdings Inc v Subway Real Estate, LLC*, unpublished order of the Court of Appeals, entered October 9, 2019 (Docket No. 350571).

Defendant subsequently filed an application with our Supreme Court, which stayed the proceedings³ and remanded this matter to this Court to consider as on leave granted. *Nabro Holdings, Inc v Subway Real Estate, LLC*, ___ Mich ___; 933 NW2d 698 (2019); *Nabro Holdings, Inc v Subway Real Estate, LLC*, ___ Mich ___; 935 NW2d 45 (2019).

II. ANALYSIS⁴

Examining the statutes and court rules governing appellate practice reveals jurisdictional time and filing requirements. However, the use of the e-filing system is also mandated. Considering both, we must now answer this question: When an attorney makes a mistake in e-filing his client's claim of appeal on the last day permitted by law, and that error is compounded because the required filing fee goes unpaid, does his client lose its appeal as of right if the court rejects his claim of appeal a day later?

A. STANDARDS OF REVIEW

In general, "[a] trial court's decision to dismiss an action is reviewed for an abuse of discretion." *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007). A trial court's decision regarding a motion for reconsideration is also reviewed for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). A court abuses its discretion when its decision falls "outside the range of reasonable and principled outcomes." *Sanders v McLaren-Macomb*, 323 Mich App 254, 264; 916 NW2d 305 (2018) (quotation marks and citation omitted). MCR 2.119(F)(3) requires the party seeking reconsideration to "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."⁵ Regardless, the

³ Importantly, filing a timely claim of appeal with a bond "stays all proceedings, including an order of eviction issued but not executed." MCR 4.201(N)(3)(b).

⁴ Before proceeding with defendant's claim of error, we first note plaintiff contends that defendant's appeal to this Court is moot because defendant surrendered the property to plaintiff by abandoning its operation of the Subway restaurant on the premises. We decline to address this argument because the facts underlying plaintiff's contention are not part of the record below, and, in any event, disputed by defendant.

⁵ As it is not raised, we express no opinion on the propriety of seeking relief under this rule. Compare MCR 2.119(F) with MCR 7.113(A)(2) ("Within 14 days after the date of [an involuntary]

court retains “considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties.” *Sanders*, 323 Mich App at 264-265 (quotation marks and citation omitted). Additionally, this Court reviews de novo questions of statutory interpretation. *Brickey v McCarver*, 323 Mich App 639, 642; 919 NW2d 412 (2018). And appellate courts “interpret court rules using the same principles that govern the interpretation of statutes.” *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). “Our goal in interpreting and applying statutes or court rules is to give effect to the plain meaning of the text.” *Id.* “If the text is unambiguous, we apply the language as written without construction or interpretation.” *Id.*

B. THE CIRCUIT COURT’S APPELLATE JURISDICTION

As previously mentioned, defendant had 10 days after the entry of judgment to file an appeal as of right. MCR 4.201(N)(2). “The time limit for an appeal of right is jurisdictional.” MCR 7.104(A). Moreover, under MCR 7.104(B), in order

[t]o vest the circuit court with jurisdiction in an appeal of right, an appellant must file with the clerk of the circuit court within the time for taking an appeal:

- (1) the claim of appeal, and
- (2) the circuit court’s appeal fees, unless the appellant is indigent.

The appellant must pay \$150 to the clerk of the court “[b]efore filing a claim of appeal.” MCL 600.2529(1)(b). And the appellant must file other documents with the claim of appeal. MCR 7.104(D). For example, if, as here, the appellant has filed bond, a true copy of that bond must be filed with the claim of appeal. MCR 7.104(D)(4).

It is undisputed that defense counsel timely submitted a claim of appeal via e-filing on July 8th, the day it was due. However, as a result of his submission error, clicking on the wrong box in selecting a case type, he was not prompted to pay the fee and, the following day, the circuit court’s Clerk rejected his claim of appeal for filing because it failed to include a case code and was not accompanied by the requisite filing fee.⁶ See MCR 8.119(C) (“The clerk of the court may only

dismissal order, the appellant may move for reinstatement by showing mistake, inadvertence, or excusable neglect.”).

⁶ For the most part, the rules governing appeals from the district court, MCR 7.100 *et seq.*, parallel the rules governing appeals from the circuit court to this Court, MCR 7.200 *et seq.* But, under MCR 7.201(B)(3), “[i]f a case is accepted for filing [by this Court’s Clerk’s Office] without all of the required documents, transcripts, or fees, the appellant . . . must supply the missing items within 21 days after the date of the clerk’s notice of deficiency.” And, under this Court’s Internal Operating Procedures (IOPs), “a computer-generated ‘defect’ letter may be issued to advise the appellant that the additional documents must be filed, or fee paid, within 21 days.” IOP 7.204-5. No comparable rule exists in MCR 7.100 *et seq.*

reject documents that do not comply with MCR 1.109(D)(1)⁷ . . . , or are not accompanied by a required filing fee or a request for fee waiver, unless already waived or suspended by court order.”).

It is further undisputed that defendant actually filed a claim of appeal on July 9th, one day later. That claim of appeal, aside from being untimely, otherwise satisfied the statutes and court rules.

Defendant contends that it should have been granted a 14-day window to rectify defense counsel’s mistake under MCR 7.113(A)(1) and (2).⁸ MCR 7.113(A) governs involuntary dismissals and states:

(1) **Dismissal.** If the appellant fails to pursue the appeal in conformity with the court rules, the circuit court will notify the parties that the appeal shall be dismissed unless the deficiency is remedied within 14 days after service of the notice.

⁷ MCR 1.109(D)(1)(b)(iii) requires a caption, stating “the case number, including a prefix of the year filed and a two-letter suffix for the case-type code from a list provided by the State Court Administrator pursuant to MCR 8.117, according to the principal subject matter of the proceeding[.]” There are five circuit court case-type codes for appeals, AA (agencies), AE (Employment Security Commission), AP (Parole Board), AR (criminal appeals), and AV (civil appeals). Michigan Trial Court Records Management Standards – Case Type Codes (MCR 8.117) available at

<https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cf_casetyp ecodes.pdf> (accessed on April 9, 2020).

⁸ Defendant did not raise a specific argument regarding the operation of MCR 7.113(A)(1) and (2) until filing its application for leave to appeal in this Court. Instead, defendant generally argued that the circuit court erred by denying its claim of appeal in the court below. “[A]n issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court[.]” *General Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

Additionally, defendant only raised general issues regarding the denial of its claim of appeal in its motion for reconsideration. Although defendant was ostensibly unable to make such an argument until after the claim of appeal was denied, this Court has previously determined that, as a general rule, an issue first presented in a motion for reconsideration of an order or judgment is not properly preserved for review. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 521; 773 NW2d 758 (2009). For the foregoing reasons, this issue is not properly preserved.

Because defendant failed to preserve this issue in the circuit court, this Court’s review of the issue is for plain error affecting defendant’s substantial rights. *Total Armored Car Serv, Inc v Dep’t of Treasury*, 325 Mich App 403, 412; 926 NW2d 276 (2018). “ ‘Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings.’ ” *Elahham v Al-Jabban*, 319 Mich App 112, 121; 899 NW2d 768 (2017) (citation omitted).

(2) **Reinstatement.** Within 14 days after the date of the dismissal order, the appellant may move for reinstatement by showing mistake, inadvertence, or excusable neglect.

Defendant also argues that the circuit court was required to allow it to perfect its claim of appeal under MCL 600.2331, which states that an appeal shall not be dismissed “on account of any informality or imperfection in the bond, affidavit, or other proceedings . . . if plaintiff shall either by amendment, or by furnishing a new bond, affidavit, or other paper, supply the deficiency or defect.”

Conversely, plaintiff argues that defendant’s failure to properly e-file the claim of appeal and pay the filing fee on July 8th means that defendant did not timely file a claim of appeal over which the circuit court had subject-matter jurisdiction. If so, MCR 7.113(A)(1) and (2) cannot serve to prevent dismissal and defendant’s late-filed claim of appeal the next day was properly dismissed.

C. MANDATORY E-FILING AND THE NEW E-FILING RULES

Our Supreme Court and the State Court Administrative Office (SCAO) have been working to implement “a statewide e-filing and integrated electronic document management system” named MiFILE. Nevin, *Statewide E-filing Implementation*, 96 Mich B J 28 (June 2017). “E-filing will improve service to the public, increase access to courts, and reduce the cost of filing for litigants.” *Id.* Concomitantly, “this technological step forward provides an unprecedented opportunity to help courts become more efficient by reducing the need to receive, process, store, and retrieve paper files.” *Id.* MiFILE is en route to establishing a well-functioning system that takes into consideration the features and functions that would benefit attorneys, the “trial courts’ repeat customers[.]” *Id.* at 28-29.

The Third Judicial Circuit Court is an e-filing pilot court. *Id.* Effective May 1, 2019, e-filing is mandatory for attorneys. MCR 1.109(G)(3)(f). Although training is provided to aid filers in successfully navigating the system, as with any system, there exists the opportunity for human error.

The court rules governing the e-filing process explain that “[t]he authorized user has the responsibility of ensuring that a filing has been received by the electronic system.” MCR 1.109(G)(5)(a)(ii). If the user “discovers that the version of the document available for viewing through the e-filing system does not depict the document as submitted, the authorized user shall notify the clerk of the court immediately and resubmit the filing if necessary.” *Id.* “In the event of a controversy between the clerk . . . and the . . . user, the . . . user may file a motion with the court under” MCR 1.109(G)(7), to address it. MCR 1.109(G)(5)(a)(ii).

“A document submitted electronically is deemed filed with the court when the transmission to the electronic-filing system is completed *and the required filing fees have been paid or waived.*” MCR 1.109(G)(5)(b) (emphasis added). “A transmission is completed when the transaction is recorded as prescribed in” MCR 1.109(G)(5)(c). MCR 1.109(G)(5)(b). In turn, “[o]n receipt of a submission or on rejection of a submission for nonpayment, the electronic-filing system shall record the filing transaction and send a notice of receipt of the submission and payment or rejection

to the authorized user.” MCR 1.109(G)(5)(c). “If the filing is rejected, the electronic-filing system shall record the rejection and send a notice of the rejection to the authorized user.” *Id.* This is how the e-filing system processed defendant’s July 8th claim of appeal.

This Court also uses electronic filing and its definition of “filing” to mean “the delivery of a document to a court clerk and the receipt and acceptance of the document by the clerk with the intent to enter it in the record of the court.” MCR 7.202(4). This same definition does not appear in MCR 7.102.

Even so, the e-filing system is a work in progress and continues to develop. One of its anticipated future improvements is providing the participating courts with the capability to edit a filing. MiFILE Brief No. 7, available at <<https://courts.michigan.gov/Administration/admin/Documents/MiFILE/MiFILEBrief7.pdf>> (accessed April 9, 2020).⁹ In other words, “[i]f a filer needs to correct a filing, *pay an additional amount*, or add a document to a filing, *this feature will enable the court to notify the filer to edit the filing rather than rejecting the filing.*” *Id.*

For this reason, the circuit court abused its discretion given the unique facts of this case in dismissing defendant’s appeal. This is consistent with our reading of AO 2011-4. More bluntly, if defendant’s attorney had had the option of filing his appellate paperwork by actually handing it over to the Clerk, she would have asked him about the appropriate case-code type or affixed it herself, she would have requested the \$150 fee, and, then, she would have time-stamped and filed the claim of appeal. “[T]here is no reason to throw this [appeal] out of court just because the e-filing system did not know how to take an equivalent step.” *Farzana K v Indiana Dep’t of Ed*, 473 F3d 586, 707 (CA 7, 2007). See also *Vince v Rock Cty, Wisconsin*, 604 F3d 391 (CA 7, 2010) (accepting as timely a notice of appeal that was originally filed on the last day of the appeal period, using the wrong case code, and refiled six days later, after the time for filing the notice would have expired, and three days after the Clerk’s Office had notified appellant of the initial error.).

We caution counsel that it is his responsibility to ensure that the document was received. He should have been alerted to the possibility of misfiling by the email indicating that he had filed a miscellaneous motion and further recognized that he had neither been prompted to pay, nor paid, the requisite filing fee. MCR 1.109(G)(5)(a)(ii). Indeed, counsel could then have notified the Clerk and addressed any issue, or, if the dispute persisted, pursued a motion under MCR 1.109(G)(7). MCR 1.109(G)(5)(a)(ii).

And we note that, even if the court Clerk had the ability to exercise her discretion and had properly rejected defendant’s July 8th claim of appeal, the Michigan Court Rules provide a specific mechanism for rectifying mistakes regarding the untimely filing of an appeal to the circuit court. Under MCR 7.105(G)(1), “[w]hen an appeal of right . . . was not timely filed, the appellant may file an application as prescribed under subrule (B) accompanied by a statement of facts explaining the delay.” This is similar to the provision in MCR 7.205(G)(1), under which this Court has

⁹ We note that MiFILE Brief No. 7 was released after the circuit court’s ruling.

“discretion to grant leave with regard to untimely appeals.” *Chen v Wayne State Univ*, 284 Mich App 173, 193; 771 NW2d 820 (2009).

In light of the circumstances—a failed, but timely e-filing of a claim of appeal, notice of the deficiency after time to correct it had expired, and, then, a quick, but untimely, e-filing of a claim of appeal—the circuit court should have granted defendant’s motion for reconsideration, exercised its power to treat defendant’s untimely July 9th claim as a delayed application,¹⁰ and granted it. MCR 7.105(B), (E)(3)-(4), and (G).

Finally, given the parallels in the appellate processes under the MCR 7.100 *et seq* and MCR 7.200 *et seq*, appellant may have proceeded on the assumption, albeit erroneous, that the circuit court, in its function as an appellate court, proceeds as our Court does when a claim of appeal is not accompanied by the requisite fee or is missing a required document. MCR 7.201(B)(3). But, in this case, the circuit court’s Clerk’s Office e-mail via the e-filing system was notifying defense counsel of its *rejection* of his filing, not affording him the opportunity to remedy any defect, as our Court would have. MCR 7.201(B)(3); IOP 7.204-5. In light of the potential confusion here, relief is warranted. Cf. *Allied Elec Supply Co, Inc v Tenaglia*, 461 Mich 285; 602 NW2d 572 (1999) (providing a litigant who had filed an untimely claim of appeal where “the structure of the rules was not ideal” and prior published authority of this Court “created the possibility of confusion” the opportunity to file an application for leave to appeal in this Court within 21 days). See also MCR 7.216(A)(7) (“The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just: . . . enter any judgment or order or grant further or different relief as the case may require[.]”).

Reversed and remanded to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction and direct that no costs be taxed.

/s/ David H. Sawyer
/s/ Anica Letica
/s/ James Robert Redford

¹⁰ At that point, defendant would have been well within the 6-month timeframe for filing a delayed application for leave to appeal. MCR 7.105(G)(2).