

Nos. 08-1495/1514

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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STEVEN BRODER,

Plaintiff-Appellee,

v.

JAN EPP and GEORGE PRAMSTALLER,

Defendants-Appellants

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**PLAINTIFF'S OBJECTIONS  
TO DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE**

**Introduction**

This is a civil rights case for the late diagnosis and late treatment of the plaintiff Steven Broder's throat cancer while he was in the custody and care of the defendants. Mr. Broder filed his case in 2003. These defendants filed a motion for summary judgment in 2006, in part raising the defense of qualified immunity.

On March 14, 2008, the district court entered an order denying the defendants' motion for summary judgment on that issue. The defendants had 30 days to file their notice of interlocutory appeal. The defendants waited until the last day to file their appeal, and the notice they filed was deficient on its face. Upon discovering that their claim of appeal was defective, the defendants filed an "amended" notice of appeal the next day, on April 15, 2008. Although the amended notice of appeal was plainly tardy, the defendants did not seek an extension of time in the district court, as they arguably could have done under Fed. R. Civ. P. 6, and as they had an absolute right to do for 30 days under Fed. R. App. P. 4(a)(5).

On April 17, 2008, the Sixth Circuit case manager sent out notices to all counsel directing

them to file their appearances in this Court by May 1, 2008. Defense counsel did not file an appearance by May 1, 2008, and, upon information and belief, still has not filed an appearance.

On April 24, 2008, this Court entered a *sua sponte* order to show cause why the defendants' appeal should not be dismissed, given that the first appeal was deficient and the second was time-barred. The order notified the defendants that they could cure the defect by seeking an extension of time in the district court pursuant to Fed. R. App. P. 4(a)(5). Indeed, at that point the defendants still had almost three weeks to file their motion for extension of time in the district court. The defendants did not file such a motion.

The defendants' response to this Court's show cause order was due 21 days after the order was entered, or May 21, 2008. The defendants did not file their response until May 30, 2008. They combined their response to the show cause order with a motion for extension of time under Fed. R. App. P. 4(a)(5), filing their motion in this Court, not in the district court as the rule requires.

## **ARGUMENT**

### **1. The "Amended" Appeal Was Late**

The defendants concede that their original appeal was deficient, but argue that the second appeal was timely, citing the three-day mailing rule of Fed. R. App. P. 26(c). But of course the mailing rule only applies to papers served on a party, not to orders or judgments. Specifically, Rule 26(a) grants an additional three days when "a party is required ... to do an act *within a prescribed period after service* of a paper upon that party...." Fed. R. App. P. 26(c) (emphasis added). Rule 4(a), however, requires that a party file a notice of appeal "within 30 days *after the date of entry of the judgment or order* appealed from is entered." Fed. R. App. P. 4(a)(1)(A) (emphasis added). Thus, Rule 26(c) is inapplicable. *See Walls v. McClure*, 1990 U.S. App.

LEXIS 14699, 911 F.2d 734 (6th Cir. 1990) (table) (holding that “[a] careful reading of the relevant procedural rules reveals that a would-be appellant is not entitled to an extra three days for filing a notice of appeal”).

**2. The Motion to Extend Time Is Improper in this Court and Is Time-Barred**

The defendants next argue that their motion to extend the deadline should be heard now.

First, as noted, they are in the wrong court, because Fed. R. App. P. 4(a)(5) grants authority to extend the deadline only to the district court.

Second, and more importantly, they are too late. The text of Fed. R. App. P. 4(a)(5) requires that a motion to extend the appellate deadline be filed (i) before the deadline has run, or (ii) within 30 days after the deadline has run. The time to file a motion for extension of time expired on May 14, 2008, more than two weeks before the defendants filed their motion.

Third, even if the motion were filed in the right court and on time, the defendants have not shown “good cause” or “excusable neglect.” *See e.g., Nicholson v. City of Warren*, 467 F.3d 525, 526 (6th Cir. 2006) (holding that excusable neglect is “a strict standard which is met only in extraordinary cases,” and good cause is found only “where forces beyond the control of the appellant prevented her from filing a timely notice of appeal”).

Fourth, the district court cannot extend the time to appeal for more than 30 days (or more than ten days following the granting of a timely motion, whichever is later). Fed. R. App. P. 4(a)(5)(C). Finally, even a motion to re-open – which the defendants have not sought – is timely only if the moving party did not receive notice of the entry of the order sought to be appealed within 21 days after entry. Fed. R. App. P. 4(a)(6). That requirement cannot be met here, as the order was entered by the district court using the court’s electronic filing system, which delivered same-day e-mail notice to all counsel of record.

## Summary

The defendants have shown a clear pattern of failing to protect their rights by the choices they made. They waited until the last day to appeal. They filed a defective appeal. They filed a late amended appeal. Knowing that the appeal *might* be deemed to be late, they failed to file a timely motion to extend the deadline to appeal. They failed to file their appearance in this Court. They responded late to a show cause order that was served upon and received by the plaintiff's counsel. They moved for an extension of time in the wrong court, and beyond the time when the deadline could be extended even in the right court. They made no showing of good cause or excusable neglect.

## Conclusion

For the above reasons, the plaintiff-appellee asks the Court to reject the defendant-appellants' non-conforming notices of appeal, and to dismiss the pending cases so that Mr. Broder's Eighth Amendment and medical malpractice claims can at long last be tried.

Respectfully submitted,

MICHIGAN CLINICAL LAW PROGRAM

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Dated: June 10, 2008

## **Proof of Service**

On June 10, 2008, the plaintiff's objections to the defendants' response to the order to show cause and motion for extension of time were served on the defendants by pre-paid first-class mail addressed to their attorney of record.

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