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In *Thompson v. Immigration & Naturalization Serv.*,[1] twelve days after the federal district court had entered an order denying

* 375 U.S. 384 (1964).
** 376 U.S. 203 (1964).
1. 375 U.S. 384 (1964).

a petition for naturalization, petitioner announced his intention of making motions for a new trial and amended findings of fact. Although the motions must be filed within ten days of the entry of judgment,[2] the judge assured petitioner they were made in ample time, and no objection was raised by the Government. Six months later the motions were denied. Within sixty days of this denial, but not within sixty days of the original judgment, petitioner filed a notice of appeal. The court of appeals dismissed for lack of jurisdiction since the period for taking an appeal, as measured from the order denying naturalization, had elapsed and had not been tolled by a *timely* post-trial motion under rule 73(a).[3]

In another case, *Wolfsohn v. Hankin*,[4] the federal district court, four days after the entry of summary judgment, signed an order purporting to extend the period within which to move for a rehearing under rule 59(b).[5] The motion was actually filed one month later. Four months thereafter the motion was denied, and a notice of appeal was filed within thirty days of this denial. The court of appeals dismissed the appeal as untimely because it was filed more than thirty days after the original judgment had been entered, the trial court having no authority to enlarge the period within which a timely motion must be made.[6]

On certiorari to the United States Supreme Court in both cases,

2. FED. R. CIV. P. 59(b) provides: "A motion for a new trial shall be served not later than 10 days after the entry of the judgment." FED. R. CIV. P. 52(b) provides: "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

3. FED. R. CIV. P. 73(a) provides: "When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a *timely motion* made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run . . . from the entry of any of the following orders made upon a *timely motion* under such rules: . . . Rule 50(b); . . . Rule 52(b); or . . . Rule 59." (Emphasis added.)

4. 376 U.S. 203 (1964).

5. FED. R. CIV. P. 59(b), *supra* note 2. For purposes of this rule, a motion for rehearing is the same as a motion for a new trial.

6. "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; *but it may not extend* the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them." FED. R. CIV. P. 6(b). (Emphasis added.)

held, reversed and remanded (per curiam), four Justices dissenting.[7] When a party's reliance on the trial court's ruling prejudices his perfecting a timely appeal, the "obvious great hardships" present "unique circumstances" allowing the appeal to be heard on its merits.

To assure the prevailing party that his judgment will not be subject to attack indefinitely, the Federal Rules of Civil Procedure provide specific time limits within which motions for post-judgment relief must be initiated. Additional protection is furnished by rule 6(b)'s restrictions on the authority of the trial court to extend these periods.[8] This rule prohibits the enlargement of the time within which to move for judgment notwithstanding the verdict;[9] for new trial;[10] for amended or altered findings of fact;[11] and for relief from a final judgment where mistake, fraud, or newly discovered evidence is involved.[12] Similarly prohibited are enlargements of time for filing an appeal, unless there has been a showing of excusable neglect based on a failure to learn of the entry of the judgment,[13] and for filing the record on appeal.[14] Since rule 73(a) provides that the period for appeal will be tolled only upon the filing of *timely* motions, appellate courts have uniformly considered themselves without jurisdiction to hear appeals not made in strict conformity with these unambiguous and mandatory provisions.[15]

Nonetheless, the Court ordered relief in *Thompson* and *Wolfsohn,* relying on *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*[16] In that case, the district court had extended the period for taking an appeal on the ground that the appellant had excusably neglected to learn of the entry of the judgment. The court of appeals dismissed since the original period had elapsed and, in its opinion, no extension was warranted on the ground of excusable neglect. The Supreme Court reversed and ordered the appeal heard on the

7. Wolfsohn v. Hankin, 376 U.S. 203 (1964); Thompson v. Immigration & Naturalization Serv., 375 U.S. 384 (1964).

8. See note 6 *supra.*

9. FED. R. CIV. P. 50.

10. FED. R. CIV. P. 59.

11. FED. R. CIV. P. 52.

12. FED. R. CIV. P. 60(b).

13. FED. R. CIV. P. 73(a).

14. FED. R. CIV. P. 73(g).

15. See, *e.g.,* Nugent v. Yellow Cab Co., 295 F.2d 794, 796 (7th Cir. 1961), *cert. denied,* 369 U.S. 828 (1962); Hulson v. Atchison, T. & S.F. Ry., 289 F.2d 726, 729 (7th Cir.), *cert. denied,* 368 U.S. 835 (1961); Nichols-Morris Corp. v. Morris, 279 F.2d 81 (2d Cir. 1960); Safeway Stores Inc. v. Coe, 136 F.2d 771 (D.C. Cir. 1943); Greenwood v. Greenwood, 16 F.R.D. 366, 369-70 (E.D. Pa. 1954), *appeal dismissed,* 224 F.2d 318 (3d Cir. 1955). See BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1306, n. 63.19 (Wright ed. 1958); 6 MOORE, FEDERAL PRACTICE ¶ 59.09(1) (2d ed. 1953); WRIGHT, FEDERAL COURTS § 95, at 366-67 (1963). Several state courts have also held that the time requirements are jurisdictional. See, *e.g.,* Wells v. American Maize Prods. Co., 201 N.E.2d 292 (Ind. App. 1964); Cogdell v. Johnston, 381 S.W.2d 678 (Tex. Civ. App. 1964).

16. 371 U.S. 215 (1962) [hereinafter referred to as *Harris*].

merits. Noting the clear prejudice to the party who relies on a lower court's factual determination and then suffers a reversal thereof after the period of appeal has expired, the Court said the original finding was entitled to "great deference by the reviewing court."[17] Thus *Harris*, in effect, narrowly limited appellate review of the excusable neglect question.

The dissenting Justices in *Thompson* and *Wolfsohn* considered that *Harris* should not be controlling, since the trial court in that case had authority, under rule 73(a), to enlarge the period of taking an appeal upon the finding of excusable neglect. In *Thompson* and *Wolfsohn*, however, rule 6(b) expressly prohibited extending the time in which the post-trial motions could be initiated. Nonetheless, the cases can be reconciled by focusing attention on the factor common to all three: an expression by the trial court on which the moving party prejudicially relied in delaying the filing of his notice of appeal—in *Harris*, the finding of excusable neglect; in *Thompson*, the treating of the motions as timely; in *Wolfsohn*, the extension of the ten-day period in which to file the motion.[18]

Limiting the scope of *Thompson* and *Wolfsohn* to situations where there is prejudicial reliance on actions of the trial court will ensure that lower courts will not acquire *carte blanche* to circumvent the rules. First of all, there is no indication that the principal cases can be invoked to rescue a party who waits until after the original period for taking an appeal has run before making his post-trial motions or seeking extensions of the time within which to make them.[19] Thus, the maximum period of uncertainty created by the decisions would be the thirty- or sixty-day period for filing the appeal, whichever is applicable, as that is the only period in which reliance on the trial court could be prejudicial. Moreover, the party prevailing below can effectively prevent extensions of the appeal period by objecting to the proposed extension.[20] Since the principle of finality of judgments is designed for the benefit of the prevailing party, he cannot complain if he fails to invoke the principle by raising an objection.[21] In

17. *Id.* at 217.

18. It would seem that the same result should be reached where the trial court is silent as to timeliness, apparently taking the motion under submission. See Pierre v. Jordan, 333 F.2d 951, 955 (9th Cir. 1964).

19. See, *e.g.*, United States v. Robinson, 361 U.S. 220 (1960) (denied appeal from a criminal conviction); Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (3d Cir. 1962); Shotkin v. Weksler, 255 F.2d 100 (5th Cir.), *cert. denied*, 358 U.S. 855 (1958); Edwards v. Doctors Hosp., Inc., 242 F.2d 888 (2d Cir. 1957), *cert. denied*, 356 U.S. 930 (1958).

20. If the objection should be overruled, a writ of prohibition could be obtained to cure the error.

21. The prevailing party will always have an opportunity to object since the motion cannot be made *ex parte*. See Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (3d Cir. 1962); North Umberland Mining Co. v. Standard Acc. Ins. Co., 193 F.2d 951 (9th Cir. 1952).

effect, *Thompson* and *Wolfsohn* put a burden on the prevailing party to raise his timeliness objections when the motions are offered, thereby leaving the movant sufficient time in which to seek appellate review.

Prior to the Supreme Court's ruling in the principal cases, however, there was little reason for the prevailing party to object to untimely motions. If the trial court entertained the motion, taking several months to dispose of it, a subsequent appeal would be dismissed. Since there was no advantage to be gained by notifying the movant in time for him to correct his mistake by filing an immediate appeal, and much to be gained by silence, no objection would be made. The principal case puts an end to such practice. A similar device to prevent this kind of "mousetrapping" is found in the Michigan court rules:[22] if a defendant fails to object to plaintiff's non-joinder of causes of action arising out of the same transaction, the case will be res judicata only as to those causes of action specifically tried. This prevents the defendant from sitting back at the trial and later attempting to claim the benefits of the doctrine against splitting causes of action.[23]

The problem caused by untimely appeals requires a balancing of two competing principles—the finality of judgments and disposition on the merits. If the Rules are treated as jurisdictional, a position espoused by the dissenters in the principal cases, finality is sanctified to the exclusion of meritorious disposition.[24] On the other hand, if complete *ad hoc* relaxation of the Rules is permitted, the principle of finality would become clouded with uncertainty, a result the Rules were designed to avoid.[25] *Thompson* and *Wolfsohn* suggest a middle ground: if the moving party prejudicially relies upon an erroneous determination by the trial court and the prevailing party fails to protect the finality of his judgment by objecting to an untimely motion, the appellate court may be authorized to hear the merits of what would normally be an untimely appeal.

It must be noted, however, that *Thompson* and *Wolfsohn* dis-

22. MICH. GEN. CT. RULE 203.1 (1963).

23. See 1 HONIGMAN & HAWKINS, MICHIGAN COURT RULES ANNOTATED 476-78 (2d ed. 1962); Blume, *The Scope of a Cause of Action—Elimination of the Splitting Trap*, Mich. S.B.J., Dec. 1959, p. 10. Although the situations are analogous, it must be noted that determining what constitutes splitting causes of action is normally more difficult than determining whether a ten-day period for filing motions has passed.

24. Since Congress has not indicated that these Rules should be jurisdictional it may be questioned whether the courts should be adamant in this regard.

25. See Notes of Advisory Committee on Amendments to Rules, 28 U.S.C.A. Rule 6, at 309; 2 MOORE, FEDERAL PRACTICE ¶ 1.13 (2d ed. 1964). See generally Comment, *Ad Hoc Relief For Untimely Appeals*, 65 COLUM. L. REV. 97 (1965). The Preliminary Draft of Proposed Federal Rules of Appellate Procedure, Rule 4(a), 35 F.R.D. 317, 321 (1964), modifies FED. R. CIV. P. 73(a) to the extent that it allows the trial court to extend the period for appeal up to thirty days for any kind of excusable neglect, not just for failure to learn of the entry of the judgment. See generally Wright, *Proposed Changes in Federal Civil, Criminal, and Appellate Procedure*, 35 F.R.D. 317 (1964).

regard the clear language of the rules. By permitting *ad hoc* exceptions to the rules, the Court seems to have departed from expressions in prior cases that rule changes should be effected only after full consideration by the Judicial Council of the United States.[26] In none of these cases, however, was prejudicial reliance on a trial court ruling a factor. Since the exception announced in *Thompson* and *Wolfsohn* is based on that factor and since they eliminate a possible source of abuse by the prevailing party without impairing the finality of his judgment, the decisions appear to be warranted.

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26. Miner v. Atlass, 363 U.S. 641, 649-50 (1960) (no provision in the General Admiralty Rules for taking oral depositions for discovery purposes only); United States v. Robinson, 361 U.S. 220, 229-30 (1960) (no provision in criminal rules for enlarging period for taking an appeal based on excusable neglect *after* the original period had elapsed); United States v. Isthmian S.S. Co., 359 U.S. 314, 323 (1959) (no provision under the Suits in Admiralty Act for the United States to file a counterclaim in the nature of a set-off).