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Fate of Pending Motions on Appeal from Judgment: The Consequences of Minnesota's Rule of Civil Appellate Procedure 104.01, T he

J.Jeff Oxley

Note

The Fate of Pending Motions on Appeal from Judgment: The Consequences of Minnesota's Rule of Civil Appellate Procedure 104.01

J. Jeff Oxley

Minnesota's rule controlling the timing of an appeal of a civil judgment differs substantially from the rules governing federal appeal proceedings and state criminal proceedings.[1] Under the Federal Rules of Appellate Procedure (which served

1. The rule governing the timing of appeals in Minnesota civil cases is Minnesota Rule of Appellate Procedure 104.01. The comparable federal rule is Rule 4 of the Federal Rules of Appellate Procedure. The rule controlling the timing of criminal appeals in Minnesota is Rule 26 of the Minnesota Rules of Criminal Procedure.

As stated by the Rules Enabling Act, the purpose of the federal rules is to regulate practice and procedure and not to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1988). The Supreme Court adopted the Federal Rules of Civil Appellate Procedure in 1968. *See* CHARLES A. WRIGHT ET AL., HANDBOOK OF THE LAW OF FEDERAL COURTS § 104, at 520 (3d ed. 1976). Prior to that year, Civil Rules 73-76 and Criminal Rules 37-39 prescribed civil and criminal appellate procedures. *Id.* Wright considers the simplified procedures for taking an appeal under the federal rules to be "one of the most striking achievements" of the federal rules. *Id.*

Under the federal rules, certain post-trial motions delay the starting of the time for taking an appeal from judgment. Rule 4 of the Federal Rules of Appellate Procedure provides, in pertinent part:

> (a) Appeals in Civil Cases
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> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed . . . .
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> . . . .
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> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed

as a model for Minnesota's Rules of Civil Appellate Procedure[2]) and Minnesota's Rules of Criminal Procedure, a timely

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time measured from the entry of the order disposing of the motion as provided above.

FED. R. APP. P. 4.

The Advisory Committee for Minnesota's Rules of Criminal Procedure based the provisions for the commencement of the time period for taking an appeal in criminal proceedings on Rule 4 of the Federal Rules of Appellate Procedure. MINN. R. CRIM. P. 28 cmt. Minnesota's criminal procedures allow criminal defendants to move for a new trial and permit courts to vacate judgments. *Id.* A motion to vacate the judgment must be made within 15 days following a verdict or finding of guilty, or within such time as the court may set during the 15-day period. MINN. R. CRIM. P. 26.04(2). Rule 26.04(1)(3) requires a party to serve notice of a motion for a new trial within 15 days following a verdict or finding of guilty. MINN. R. CRIM. P. 26.04(1)(3). The court must hear the motion within 30 days unless it decides to extend the period for good cause shown. *Id.*

Many states have a rule governing appeals in civil cases similar to Rule 4(a)(4) of the Federal Rules of Appellate Procedure. *See* ALA. R. APP. P. 4(a)(3); ARIZ. R. CIV. APP. P. 9(b); ARK. R. APP. P. 4(b)-(c); CONN. R. SUP. CT. § 4009; HAW. R. APP. P. 4(a)(4); ILL. SUP. CT. R. 303(a)(2); KY. R. CIV. P. 73.02(e); ME. R. CIV. P. 73(a); MD. R. APP. REV. 8-202(c); MICH. APP. R. 7.204(A); MISS. R. SUP. CT. 4(d); MO. R. CIV. P. 81.05; MONT. R. APP. P. 5(a)(4); NEB. REV. STAT. § 25-1912(2) (Supp. 1991); NEV. R. APP. P. 4(a); N.C. R. APP. P. 3(c); N.D. R. APP. P. 4(a); OHIO R. APP. P. 4(A); WASH. R. APP. P. 5.2(e).

2. The goal of the Advisory Committee on the Rules of Civil Appellate Procedure in the mid-1960s was to make Minnesota's civil appellate procedure as much like the newly proposed rules of federal appellate procedure as possible. MINN. R. CIV. APP. P. preliminary cmt. The Minnesota Legislature enacted the Rules of Civil Appellate Procedure in 1967. *Id.*

In 1982, the voters approved a constitutional amendment to create an intermediate appellate court, Court of Appeals Act, ch. 501, 1982 Minn. Laws 569, and the Minnesota Supreme Court directed the Advisory Committee on the Rules of Civil Appellate Procedure to revise the rules. *See* David W. Larson, *Jurisdiction of the Minnesota Court of Appeals*, 10 WM. MITCHELL L. REV. 627, 631-32 (1984).

The Committee explained the variances between federal and state rules as follows:

> Departures from the proposed federal rules consist in the main of preserving practices which are established by statute or which are deemed worthy of retention, and of certain deletions and additions required by the differences in the structure of the judicial systems of the two governments.

MINN. R. CIV. APP. P. preliminary cmt. Notably, however, the Committee did not conform to the federal rules when setting the time period within which a party must appeal. The Committee set different standards because it did not rely on Rule 4(a) of the Federal Rules of Appellate Procedure, the parallel federal provision for civil proceedings, when drafting this portion of the Minnesota rules.

The predecessor to Rule 104.01 read as follows: "An appeal from a judgment may be taken within 90 days after the entry thereof, and from an order within 30 days after service of written notice of the filing thereof by the adverse party." MINN. STAT. § 605.08(1) (1965) (repealed 1974).

With the adoption of Minnesota's Rules of Civil Appellate Procedure in

post-trial motion postpones the commencement of the period for taking an appeal until the trial court enters an order.[3] Both federal appellate and state criminal rules also allow district courts to grant extensions for filing an appeal.[4]

1967, Rule 104 superseded the former § 605.08(1). The state legislature formally repealed the statute in 1974. Act of April 9, 1974, ch. 395, § 11, 1974 Minn. Laws 707. Rule 104.01, however, carried forward the earlier statute essentially unchanged.

3. In federal appellate practice, motions to make additional findings of fact, to alter or amend the judgment, or for a new trial are timely only if made within ten days of entry of judgment, and only a timely motion postpones the running of the time for appeal until entry of the order disposing of the motion. FED. R. APP. P. 4(a)(4) (incorporating 10-day limit of FED. R. CIV. P. 50(b), 52(b), 59); *see* 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 204.12[2], at 4-83 (2d ed. 1991); 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2812, at 81 (1973). Rule 6(b) proscribes enlargements of the time period for filing post-trial motions. FED. R. CIV. P. 6(b).

Note that not all post-trial motions extend the time period for filing an appeal. In Buchanan v. Stanships, Inc., 485 U.S. 265 (1988) (per curiam), the Supreme Court held that an application for costs, which respondents described as a motion to amend the judgment, did not extend the time period for appeal. *Id.* at 269; *see* Charles W. Adams, *The Timing of Appeals Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure*, 123 F.R.D. 371, 371 n.2, 384-93 (1988).

This issue was important in *Buchanan*, where the respondents filed their application for costs two days after the petitioners had filed a notice of appeal, 485 U.S. at 266, because Rule 4(a)(4) of the Federal Rules of Appellate Procedure requires dismissal of prematurely filed appeals. *See supra* note 1. Although the petitioners were allowed to proceed with their appeal, some commentators regard the federal rule as overly harsh. *See* Adams, *supra*, at 375-76.

The Minnesota criminal rules also set strict time limits for filing a notice of appeal. Indeed, the court of appeals may, in the interests of justice, suspend the provisions or requirements of any rules affecting criminal appeals *except* the rule setting the time for filing notice of an appeal. MINN. R. CRIM. P. 28.01(3). Defendants must appeal within 90 days after final judgment or entry of order in felony and gross misdemeanor cases and within 10 days in misdemeanor cases. MINN. R. CRIM. P. 28.02(4)(3). Parties may appeal from an order denying post-conviction relief within 60 days of entry of the order. *Id.* In first degree murder cases, Rule 29 governs the defendant's right to appeal. Rule 29.03(3) gives the defendant who is convicted of first degree murder 90 days from final judgment to appeal. MINN. R. CRIM. P. 29.03(3). An order denying a post-trial motion for a new trial or vacating the judgment in criminal proceedings is reviewable on appeal from the judgment. MINN. R. CRIM. P. 28.02(4)(3).

4. In criminal proceedings, the trial court can extend the time for appeal. MINN. R. CRIM. P. 28.02(4)(3). As in civil proceedings, an appeal does not stay the execution of judgment or sentence unless the trial court judge or the appellate judge so orders. MINN. R. CRIM. P. 28.02(6).

A federal district court may extend the time period for taking an appeal on a showing of excusable neglect or good cause. FED. R. APP. P. 4(a)(5). A post-trial motion in federal courts does not automatically stay entry of judgment, although Rule 62(b) of the Federal Rules of Civil Procedure gives the

In contrast, post-trial motions do not toll the time period within which an appeal from a judgment is permissible under Minnesota's Rules of Civil Appellate Procedure. Minnesota Rule of Civil Appellate Procedure 104.01 requires parties to appeal from a judgment within ninety days of its entry by the clerk of the district court.[5] District courts also lack the power to grant extensions for filing appeals.

No rule in Minnesota civil trial or appellate procedure, however, orders a district court to decide a post-trial motion within any fixed time limit. Once a party perfects an appeal, the district court surrenders jurisdiction on the issues appealed to the appellate court[6] regardless of whether any post-trial motions are pending.[7] The state's rules do not detail what the

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trial court discretion to stay execution or enforcement of the judgment until it decides the motion. *See* 11 WRIGHT & MILLER, *supra* note 3, § 2903, at 312.

5. Rule 104.01 reads in pertinent part:

> An appeal may be taken from a judgment within 90 days after its entry, and from an order within 30 days after service by the adverse party of written notice of filing unless a different time is provided by law.

MINN. R. CIV. APP. P. 104.01.

6. Minnesota courts have held that procedural requirements related to the timing of appeals are jurisdictional. *See* Schaust v. Town Bd., 204 N.W.2d 646, 648 (Minn. 1973) (noting that "the limitation of time within which an appeal may be taken from an appealable order is jurisdictional" (citing Arndt v. Minnesota Educ. Ass'n, 134 N.W.2d 136, 137-38 (Minn. 1965))); Nichols v Meilahn, 444 N.W.2d 872, 875 (Minn. Ct. App. 1989).

During the pendency of an appeal, the trial court even loses its authority to correct clerical errors in the judgment without applying for permission from the court of appeals. MINN. R. CIV. P. 60.01. This rule permits the trial court to correct clerical mistakes in judgments on its own initiative or on motion, but during the pendency of an appeal, it may do so only with the permission of the appellate court. *See, e.g.*, Kath v. Kath, 55 N.W.2d 691, 693 (Minn. 1952) (perfection of an appeal suspends the trial court's power to remedy inadvertent errors); Cronin v. Cronin, 372 N.W.2d 778, 782 (Minn. Ct. App. 1985) (trial court did not apply for leave to amend the judgment to correct a typographical error and, therefore, did not have jurisdiction to order the judgment corrected).

When a party files an appeal and wishes to stay execution of the judgment pending the appeal, the party must post bond. MINN. R. CIV. APP. P. 108. The trial court may continue an injunction even while an appeal is pending despite the filing of cost and supersedeas bonds. David N. Volkmann Constr., Inc. v. Isaacs, 428 N.W.2d 875, 876 (Minn. Ct. App. 1988) (citing State v. Robnan, Inc., 107 N.W.2d 51, 53 (Minn. 1960)).

7. Because the rules offer no instruction, this suggests that the possibility of missing or late rulings did not occur to the Rules Advisory Committee. In the normal course of proceedings after a trial court had arrived at judgment, the parties would make all their post-trial motions, district courts would rule on the motions before 90 days from judgment had passed, and then a party would decide whether to appeal from judgment. Even if the trial court

court of appeals or district courts should do when a party makes an "early" appeal,[8] that is, when the party appeals so soon after entry of judgment that the trial court does not have a full opportunity to rule on post-trial motions before it loses jurisdiction. Nor do the rules explain what the courts should do when the running of the ninety-day time period forces a party to appeal before the trial court rules on post-trial motions. In this situation, the court of appeals confronts either a "missing" ruling, in which the district court has not ruled on the motion, or a "late" ruling, in which the trial court ruled after the filing of the appeal.[9] The rules do not state whether dis-

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did not decide the post-trial motions within 90 days, the time period for appeal from judgment could be irrelevant because a party could separately appeal an order denying a motion for a new trial and thereby obtain review of "any order affecting the order from which the appeal is taken." MINN. R. CIV. APP. P. 103.04. The court of appeals has broad powers: an appellate judge "may reverse, affirm or modify the . . . order appealed from or take any other action as the interest of justice may require." *Id.*

Interestingly, a problem similar to that caused by Rule 104.01 existed in the pre-1979 federal rules. The United States Supreme Court noticed an anomaly in the pre-1979 federal rules:

> Under pre-1979 procedures, a district court lacked jurisdiction to entertain a motion to vacate, alter, or amend a judgment after a notice of appeal was filed. However, if the timing was reversed—if the notice of appeal was filed after the motion to vacate, alter, or amend the judgment—two seemingly inconsistent conclusions were generally held to follow: the district court retained jurisdiction to decide the motion, but the notice of appeal was nonetheless considered adequate for purposes of beginning the appeals process. The reason this theoretical inconsistency was tolerable in practice was that the district courts did not automatically inform the courts of appeals when a notice of appeal had been filed, and there was therefore little danger a district court and a court of appeals would be simultaneously analyzing the same judgment.

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 59 (1982) (citations omitted).

8. An "early" appeal occurs when a party appeals from judgment while post-trial motions are pending and does so well before the time limit expires. In this case, the appellant does not give the trial court a full opportunity to rule on the motions. Early appeals are infrequent. Only rarely does a party perceive a benefit in raising an issue in a post-trial motion to the district court and subsequently abandon that motion to appeal from judgment. *See* Amatuzio v. Amatuzio, 431 N.W.2d 588, 589 (Minn. Ct. App. 1988) (appellant filed post-trial motion 12 days after judgment and appeal 19 days after judgment).

9. "Missing" or "late" rulings are more common than early appeals. Rulings are "missing" when the timing rule forces an appeal and the trial court has not decided pending post-trial motions by the time the appellate court considers the appeal. Since the creation of the Minnesota Court of Appeals in 1983, at least 16 cases involved missing or late rulings. *See, e.g.*, Schmidt v. Apple Valley Health Care Ctr., Inc., 460 N.W.2d 349, 352 (Minn. Ct. App. 1990); Town of Belle Prairie v. Kliber, 448 N.W.2d 375, 378 (Minn. Ct. App. 1989); Rudnitski v. Seely, 441 N.W.2d 827, 829 (Minn. Ct. App. 1989), *aff'd in part,*

trict courts should decide post-trial motions even if the ruling is late or if they should suspend consideration of such motions immediately once a party appeals. Similarly, the rules give the court of appeals no instructions for whether to return an unfinished case to the trial court or whether to consider a trial court ruling made after the appeal divested the trial court of jurisdiction.

The civil appeals timing rules pose procedural dilemmas which are not merely theoretical possibilities. Since the creation of the Minnesota Court of Appeals in 1983, cases involving these issues have appeared frequently,[10] and increases in the complexity and volume of civil litigation in Minnesota suggest that they will arise more frequently in the future.[11]

This Note describes the court of appeals' response[12] to appeals brought while motions are still pending in the trial court and considers the consequences of these decisions for district courts, litigants, and for the court of appeals itself. Part I describes the mechanics of Rule 104.01 and its relationship to other types of appellate rules and the policies of appellate juris-

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rev'd in part, 452 N.W.2d 664 (Minn. 1990); Iverson v. Iverson, 432 N.W.2d 492, 493 (Minn. Ct. App. 1989); McKee-Johnson v. Johnson, 429 N.W.2d 689, 690 (Minn. Ct. App. 1988), *rev'd on other grounds*, 444 N.W.2d 259 (Minn. 1988); Rigwald v. Rigwald, 423 N.W.2d 701, 705 (Minn. Ct. App. 1988); Edsten v. Edsten, 407 N.W.2d 102, 103 (Minn. Ct. App. 1987); Fette v. Peterson, 406 N.W.2d 594, 596 (Minn. Ct. App. 1987); Fitzgerald v. Fitzgerald, 406 N.W.2d 52, 53 (Minn. Ct. App. 1987); Andersen v. Andersen, 376 N.W.2d 711, 716-17 (Minn. Ct. App. 1985); Cronin v. Cronin, 372 N.W.2d 778, 782 (Minn. Ct. App. 1985); Brzinski v. Frederickson, 365 N.W.2d 291, 292 (Minn. Ct. App. 1985); Abendroth v. National Farmers Union Property & Casualty Co., 363 N.W.2d 785, 788 (Minn. Ct. App. 1985); Lundeen v. Lappi, 361 N.W.2d 913, 917 (Minn. Ct. App. 1985); Gummow v. Gummow, 356 N.W.2d 426, 428 (Minn. Ct. App. 1984); Evans v. Blesi, 345 N.W.2d 775, 780 (Minn. Ct. App. 1984). This list does not purport to be exhaustive.

Events preceding the creation of Rule 104.01 foreshadowed some of the difficulties it would cause. One commentator in the 1950s stated, "The number of appeals dismissed as untimely indicates undue difficulty in complying with this jurisdictional requirement." Note, *Time to Appeal in Minnesota*, 35 MINN. L. REV. 640, 640 (1951).

10. *See supra* note 9.

11. In 1982, one observer noted that Minnesota's civil appellate caseload had been growing approximately 11% per annum. John C. McCarthy, *The Civil Appellate Process in Minnesota*, *in* MINNESOTA PRACTICE METHODS: THE APPELLATE PROCESS IN MINNESOTA 1-2 (Advanced Legal Education, Hamline University School of Law No. 285, July 26, 1982).

12. The Minnesota Supreme Court has not explicitly addressed the issues of early appeals and missing or late rulings. The first decision of the court of appeals on these issues was Evans v. Blesi, 345 N.W.2d 775 (Minn. Ct. App. 1984); *see infra* text accompanying notes 40-50. For a critical analysis of the use of state supreme court authority in *Evans v. Blesi*, see *infra* note 46.

diction. Part II argues that Rule 104.01 impedes the efficient conduct of civil proceedings, is potentially unfair to appellants, and frustrates fundamental policy objectives of appellate jurisdiction by interfering with the division of judicial labor between intermediate and lower courts. Part III considers alternative ways of remedying the defects of the civil appeals timing rule. It recommends that the Minnesota Supreme Court explicitly interpret Rule 104.01 to permit trial courts to retain jurisdiction to decide post-trial motions pending at the time of appeal.

I. THE TIMING REQUIREMENT FOR APPEALS FROM JUDGMENT IN MINNESOTA CIVIL COURTS

Rule 104.01 delimits the jurisdiction of the Minnesota Court of Appeals. A critical evaluation of the rule requires understanding whether it effectively implements the policies of appellate jurisdiction. This in turn requires understanding how the timing rule functions in concert with other rules of civil procedure as well as how courts have interpreted it.

A. APPELLATE JURISDICTION IN MINNESOTA

A division of judicial labor between trial and appellate courts requires rules that define when one tribunal transfers a case to another. One such rule followed in Minnesota and many other jurisdictions is the final judgment rule.[13] In these

13. MINN. R. CIV. APP. P. 103.03(a),(f); *see* Village of Roseville v. Sunset Memorial Park Ass'n, 113 N.W.2d 857, 858 (Minn. 1962) (It is generally settled that "appeals cannot be taken from any order or proceeding in the trial court which is not final. The purpose of this rule is not only to conserve judicial energy but also to eliminate delays caused by interlocutory appeals."); *see also* Weinzierl v. Lien, 209 N.W.2d 424, 424 (Minn. 1973) (noting that only orders having the effect of finally determining the action or some positive legal right of the appellant relating to the action are appealable).

The United States Supreme Court has defined a final decision of a federal district court as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." 9 MOORE ET AL., *supra* note 3, ¶ 110.07, at 39 (quoting Catlin v. United States, 324 U.S. 229, 233-234 (1945)); *see* 28 U.S.C. § 1291 (1988). A final decision on the merits adjudicates all the claims or the rights and liabilities of the parties, or a whole claim for relief, or the claims and liabilities of one of the parties. 9 MOORE ET AL., *supra* note 3, ¶ 110.08[1], at 45.

It is somewhat misleading to speak of a finality rule as though it represents a single proposition implemented in identical ways in all jurisdictions purporting to reserve appellate jurisdiction to final judgment. *See* Paul D. Carrington, *Toward A Federal Civil Interlocutory Appeals Act*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 165, 165. Although many jurisdictions "can be

jurisdictions, parties may not bring their cases to an appellate court until the trial court has made a full and final disposition of the substantive rights at stake in the litigation.

Commentators state that the major purpose of limiting appellate jurisdiction to final judgments and orders is conservation of judicial, social, and party resources.[14] Resources are economized in several ways. One source of savings results from the removal of an incentive to the prevailing party to appeal unfavorable orders and rulings that the court issued in the course of the trial.[15] Other savings are achieved by consolidat-

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found to have embraced the wisdom that 'causes should not come up here in fragments [or] successive appeals,' none has been discussed which has found that wisdom to be a simple one to be forthrightly applied." *Id.* at 165 (quoting Canter v. American Ins. Co., 28 U.S. 307, 318 (1830)); *see also* Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 171, 172 (describing the existing federal finality rules as "a hodgepodge, a kind of crazy quilt of legislation and judicial decisions").

Many states, including Minnesota, have modeled their civil court rules on the Federal Rules of Civil Procedure and Civil Appellate Procedure. The final judgment rule serves the same goals as both Minnesota and federal civil rules: "to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1; MINN. R. CIV. P. 1.

The Federal Rules of Civil Procedure became effective in 1938. *See* WRIGHT, *supra* note 1, § 62, at 292. Since that time, over half of the states have adopted the Federal Rules of Civil Procedure virtually unchanged. *Id.* at 294. Commentators claim every jurisdiction has revised its procedure to reflect the federal rules in some way. *Id.*; Thomas D. Rowe, Jr., *A Comment on the Federalism of the Federal Rules*, 1979 DUKE L.J. 843, 843.

States that have modeled their rules of civil procedure on the federal rules include: Alabama, Arizona, Colorado, Delaware, Idaho, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Montana, North Carolina, North Dakota, Rhode Island, South Carolina, Tennessee, Utah, Vermont, West Virginia, and Wyoming. *See supra* note 1 (listing state statutes); WRIGHT, *supra* note 1, § 62.

Federal courts apply the final judgment rule, except for interlocutory appeals, under 28 U.S.C. § 1292 (1988). *See* 9 MOORE ET AL., *supra* note 3, § 110.06, at 38. Not all jurisdictions employ the final judgment rule. New York, for example, does not follow it. N.Y. CIV. PRAC. L. & R. §§ 5601-5602, 5701-5703 (McKinney 1978 & Supp. 1992); *see* Jill Paradise Botler et al., Project, *The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court*, 47 FORDHAM L. REVIEW 929, 930, 951-54 (1979). California, although formally employing the final judgment rule, has significantly broadened, by statute and judicial decision, opportunities for interlocutory appeal. *See* Winslow Christian, *Interlocutory Review in California—Practical Justice Unguided by Standards*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 111, 111-13.

14. *See* 9 MOORE ET AL., *supra* note 3, ¶ 110.07, at 39-43; Rosenberg, *supra* note 13, at 171; Gerald T. Wetherington, *Appellate Review of Final and Non-Final Orders in Flordia* [sic] *Civil Cases—An Overview*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 61, 63-64.

15. On the other hand, judicial time also is lost when early review that

ing separate appeals as well as by allowing trial courts to proceed without interruption. Some commentators also contend the policy contributes to the full and fair resolution of disputes,[16] arguing that appellate review on a complete record of lower court proceedings allows an appellate judge to gauge more accurately the harm that the error in question actually caused.

Jurisdictions that apply the final judgment rule to define appellate court jurisdiction commonly set time limits for appealing trial court judgments and orders. Limiting access to appellate jurisdiction on the basis of time ensures finality by forcing litigants to proceed to appeal or to accept the trial court's decision. This policy fosters repose for the prevailing party.[17] In addition, society benefits from the resolution of conflicts.

Minnesota Rule of Civil Appellate Procedure 104.01 establishes when parties can appeal.[18] Rule 103.03 lists the parties who can appeal.[19] Although Rule 103.03 permits interlocutory appeals on questions that the trial court certifies as important as well as appeals from injunctions and attachments, it largely embodies the final judgment rule.[20] Together, the two rules define the jurisdiction of the court of appeals.

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would have brought the litigation to a prompt conclusion is delayed. *See* Rosenberg, *supra* note 13, at 171. Whenever appellate review could have corrected a trial court error that later requires a new trial, delaying appellate review wastes the trial court's time, not to mention that of the parties and the jury. *Id.*

16. 9 MOORE ET AL., *supra* note 3, ¶ 110.07, at 39; Wetherington, *supra* note 14, at 63-64; *cf.* Rosenberg, *supra* note 13, at 171 (discussing the paradox of "trying to promote promptness in disposing of cases by delaying appeals until the end of the process instead of encouraging early appellate review").

17. The Supreme Court stated this policy as follows:

> The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

Browder v. Director, Department of Corrections, 434 U.S. 257, 264 (1978) (quoting Matton Steamboat Co. v. Murphy, 319 U.S. 412, 415 (1943)) (citations omitted).

18. *See supra* note 5 (setting forth the text of Rule 104).

19. *See* MINN. R. CIV. APP. P. 103.03 (listing the types of orders from which "an appeal may be taken to the Court of Appeals").

20. *Id.*

B. THE OPERATION OF MINNESOTA'S CIVIL APPEALS TIMING RULE

1. The Jurisdictional Character of Rule 104.01

As is the case with federal courts, Minnesota courts consider the civil appeal timing rule to be jurisdictional.[21] In Minnesota, the perfection[22] of an appeal divests the trial court of

21. The Minnesota Supreme Court held that § 605.08 was jurisdictional in Arndt v. Minnesota Educ. Ass'n, 134 N.W.2d 136, 137 (Minn. 1965). The court decided that it had no authority except to dismiss an appeal taken after the statutory time period had elapsed. The court did not elaborate further on the meaning of appellate jurisdiction. *See* 2 MARK B. DUNNELL, MASON'S DUNNELL ON MINNESOTA PRACTICE § 3049, at 30-71 (H.F. Bartelt ed., 2d ed. 1952). *But see infra* notes 46, 74.

Federal courts of appeal have jurisdiction over appeals from final decisions of federal district courts. 28 U.S.C. § 1291 (1988). For critical analyses of the jurisdictional character of Rule 4(a) of the Federal Rules of Appellate Procedure, see Adams, *supra* note 3; Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 399 & n.2 (1986).

22. To perfect an appeal in Minnesota, a party files notice of the appeal with the clerk of the appellate court and serves the adverse party. MINN. R. CIV. APP. P. 103.01. When the adverse party does not receive written notice of an order, however, the time limit for appealing the order does not begin to run. Nordeen v. Commissioner of Pub. Safety, 382 N.W.2d 256, 258 (Minn. Ct. App. 1986). Failure to serve an adverse party with notice of appeal results in dismissal of the appeal with respect to parties not notified. Hansing v. McGroarty, 433 N.W.2d 441, 442 (Minn. Ct. App. 1988). The appellate court does not have jurisdiction to extend the time for appeal, even to cure defects in notification. MINN. R. CIV. APP. P. 126.02.

One of the revisions to the Rules of Civil Appellate Procedure resulted in prohibiting appeals from an order for judgment and allowing only appeals from an entered judgment. Larson, *supra* note 2, at 634-35. The revision thus had the effect of disallowing appeals from a stayed order for entry of judgment.

Because a judgment is not effective until entered under Rule 58.01 of Minnesota Rules of Civil Procedure, the appellate court may dismiss an appeal taken prior to entry of judgment. Schaust v. Town Bd., 204 N.W.2d 646, 648 (Minn. 1973); State v. Howell, 359 N.W.2d 629, 631 (Minn. Ct. App. 1984). The court may grant a discretionary review of a prematurely filed appeal in certain circumstances, however. In *Howell*, the court granted discretionary review when the trial court had issued a post-trial order which, in and of itself, was not appealable but had not also ordered the entry of an amended judgment which would have been appealable. 359 N.W.2d at 631.

Rule 77.04 of the Minnesota Rules of Civil Procedure orders the court administrator to serve notice on all affected parties of the filing of an order, decision, or entry of judgment immediately upon doing so. The time limits on taking an appeal are not affected, however, if the administrator fails to notify the parties. MINN. R. CIV. P. 77.04. In Eisenberg v. State Farm Mut. Auto. Ins. Co., 134 N.W.2d 144, 145 (Minn. 1965), the clerk failed to notify the plaintiff of entry of judgment. The plaintiff did not learn of the entry of judgment until after the time for appealing the judgment had run. *Id.* The plaintiff then moved to vacate the judgment, which the court denied in an order that the

jurisdiction on all matters except those collateral to the issues on appeal[23] and confers jurisdiction over the subject matter of the appeal on the appellate court.[24] District courts lack even the power to correct inadvertent errors without leave from a higher court.[25] In addition, the court of appeals has held that

plaintiff then appealed. *Id.* Relying on Tombs v. Ashworth, 95 N.W.2d 423 (Minn. 1955), the court refused to vacate the nonappealable order, explaining that what cannot be done directly cannot be done indirectly. *Eisenberg*, 134 N.W.2d at 145.

23. Jurisdictional terminology is also used in the 1983 comment to Rule 103, which prescribes procedures for taking an appeal. This comment provides: "The notice of appeal served on both the adverse party and the clerk of the trial court and filed with the clerk of the appellate courts is required in order to vest jurisdiction in the Court of Appeals." MINN. R. CIV. APP. P. 103.01 cmt.

Minnesota courts also have interpreted the time limits for filing post-trial motions as jurisdictional. Weberg v. Chicago, M., St. P. & P.R.R., 59 N.W.2d 317, 320 (Minn. 1953) (trial court's jurisdiction to grant a motion for a new trial expired at the end of the 60-day period specified in Rule 59.03). *But see* State v. Independent Sch. Dist. No. 31, 116 N.W.2d 711, 716 (Minn. 1962) (failure to timely settle case after expiration of stay should not deprive party of right to appeal); Crawford v. Woodrich Constr. Co., 51 N.W.2d 822, 824 (Minn. 1952) (mutual mistake of parties excuses failure to make timely motion after expiration of stay).

24. Minnesota's Rules of Civil Procedure do not allow parties to waive subject matter jurisdiction or to consent to a court acting without subject matter jurisdiction. *See* MINN. R. CIV. P. 12.08(c). The court of appeals consistently has equated its appellate jurisdiction with subject matter jurisdiction. *See* Gummow v. Gummow, 356 N.W.2d 426, 428 (Minn. Ct. App. 1984); Evans v. Blesi, 345 N.W.2d 775, 780 (Minn. Ct. App. 1984); *see also infra* part II.C. Although the perfection of an appeal divests the trial court of jurisdiction as a general rule, this rule is subject to exceptions. *See, e.g.*, State v. Barnes, 81 N.W.2d 864, 866 (Minn. 1957) (trial court retains jurisdiction to decide if defendant is entitled to a free transcript); Smith v. Condux Int'l, Inc., 466 N.W.2d 22, 25 (Minn. Ct. App. 1991) (trial court has jurisdiction to enforce permanent injunction that was part of the final judgment during appeal); David N. Volkmann Constr., Inc. v. Isaacs, 428 N.W.2d 875, 876-77 (Minn. Ct. App. 1988) (trial court has jurisdiction over enforcement of the judgment while appeal is pending, but not to modify or set aside its order on the merits); Fette v. Peterson, 406 N.W.2d 594, 597 (Minn. Ct. App. 1987) (on appeal, trial court retains power to order prejudgment interest); Hasan v. McDonald's Corp., 377 N.W.2d 472, 473-74 (Minn. Ct. App. 1985) (trial court cannot order filing of depositions on post-appeal stipulation of parties); Bio-Line, Inc. v. Wilfley, 365 N.W.2d 338, 341 (Minn. Ct. App. 1985) (trial court retains jurisdiction over discovery during appeal but could not dismiss counter claim which would have rendered appeal moot). *But see* Hoyt Inv. Co. v. Bloomington Commerce & Trade Center Assocs., 421 N.W.2d 735, 739 (Minn. Ct. App. 1988) (during pendency of appeal from an extraordinary writ of the court of appeals, trial court does not have jurisdiction to carry out the order).

25. The earliest reference to a post-appeal order of a trial court which was declared null on appeal occurred in Kath v. Kath, 55 N.W.2d 691, 693 (Minn. 1952) (trial court memorandum to correct error in judgment which was made nunc pro tunc a part of the order from which appeal was taken, issued after

Minnesota's Rules of Civil Procedure prohibit parties from obtaining appellate court jurisdiction by waiver or consent.[26] The appellate court should sua sponte raise problems of jurisdiction, including problems of timeliness.

Minnesota courts have applied Rule 104.01 strictly.[27] The court of appeals normally dismisses appeals filed prior to entry of judgment or after expiration of the ninety-day period for taking an appeal from judgment.[28] Trial courts cannot extend

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perfection of appeal, "is a nullity and cannot be considered on review since the trial court had no jurisdiction of the cause when the memorandum was made"); *see* Cronin v. Cronin, 372 N.W.2d 778, 782 (Minn. Ct. App. 1985) (noting that a trial court may correct clerical errors with leave from the appellate court under Rule 60.01 of the Minnesota Rules of Civil Procedure).

26. *See* Gummow v. Gummow, 356 N.W.2d 426, 428 (Minn. Ct. App. 1984) (interpreting Rule 12.08(c) of the Minnesota Rules of Civil Procedure). Appellate jurisdiction cannot be enlarged or conferred by the consent or stipulations of parties. *See* Burns v. Stewart, 188 N.W.2d 760, 767 (Minn. 1971); State v. Bentley, 28 N.W.2d 179, 181 (Minn.), *later proceeding*, 28 N.W.2d 770 (Minn. 1947).

27. The strict interpretation that courts give to Rule 104.01 with respect to removing jurisdiction from the trial court parallels the interpretation of the Rule with respect to obtaining appellate jurisdiction. Rule 103.03 is Minnesota's version of a finality rule. MINN. R. CIV. APP. P. 103.03. An order for judgment that has not been entered is not final, on the theory that it may be amended prior to entry. *See* Schaust v. Town Bd., 204 N.W.2d 646, 648 (Minn. 1973). Prematurely filed appeals must be dismissed. MINN. R. CIV. APP. P. 104.01; *see also* State v. Howell, 359 N.W.2d 629, 631 (Minn. Ct. App. 1984) (noting that, in general, an appeal before entry of judgment is premature).

28. This is a harsh result in light of the fact that an appellant has no right to notice of entry of judgment. In Minnesota, a party cannot rely on the clerk of the court for notification of the entry of judgment, even though Rule 77.04 of the Minnesota Rules of Civil Procedure obliges the clerk to provide it. *See* MINN. R. CIV. P. 77.04; Servin v. Servin, 345 N.W.2d 754, 757 (Minn. 1984); *Schaust*, 204 N.W.2d at 648; Swenson v. City of Fifty Lakes, 439 N.W.2d 758, 759 (Minn. Ct. App. 1989); Bongard v. Bongard, 342 N.W.2d 156, 158 (Minn. Ct. App. 1983), *later proceeding*, 380 N.W.2d 592 (Minn. Ct. App. 1986); Recent Cases, *Lack of Knowledge of Entry of Judgement Not Ground for Reviving Lost Right of Appeal*, 44 MINN. L. REV. 186, 187 & nn.5-9 (1959). Because dismissal obliges appellants to refile the appeal once judgment is entered, the rule creates a trap for unwary litigants. It is difficult to see any substantive merit to this strict implementation of Rule 104.01, especially because appellants generally refile identical papers.

The parallel federal rule is Rule 77(d) of the Federal Rules of Civil Procedure. In Hill v. Hawes, 320 U.S. 520, 523-24 (1944), the Supreme Court held that a district court could vacate and re-enter a judgment to permit a party to appeal when the court clerk failed to notify the parties of entry of judgment. The Minnesota Supreme Court interpreted the state rule differently, holding that a trial court could not extend the time period for appeal. *See* Eisenberg v. State Farm Mut. Auto. Ins. Co., 134 N.W.2d 144, 145 (Minn. 1965). Later, the Advisory Committee on amendments to the federal rules stated that Rule 77(d) was amended in order to avoid the *Hill* result. *See* FED. R. CIV. P. 77(d)

the time within which a party may file an appeal.[29]

2. Differences Between Appealable and Unappealable Orders

After entry of judgment, a party may make motions seeking trial court review or may appeal from judgment. The Minnesota Rules of Civil Procedure allow several motions for securing trial court review.[30] The rules prescribe strict time limits for filing post-trial motions.[31] Although the rules estab-

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advisory committee's note, *in* 10 Fed. R. Serv. (Callaghan) cxxxiii (1948) (discussing the 1946 amendments to the Federal Rules of Civil Procedure).

29. Trial courts cannot vacate a judgment and re-enter it in order to extend the time to appeal. *See, e.g., Eisenberg*, 134 N.W.2d at 145 (appellant is not entitled to have a valid judgment vacated in order to appeal the same judgment when the trial court re-enters judgment). Trial courts also cannot modify a judgment in order to extend the time to appeal issues that a party could have raised in an appeal from the original judgment. *See* Beeson v. Beeson, 432 N.W.2d 501, 502 (Minn. Ct. App. 1988) (unless a court modifies or amends its decision on an issue involved in a judgment, an issue decided in a judgment may not be raised on appeal from a modified or amended judgment).

A stay preventing entry of judgment would delay the start of the period within which a party may file an appeal until the expiration of the stay. *See* Weberg v. Chicago, M., St. P. & P.R.R., 59 N.W.2d 317, 320 (Minn. 1953); McKee-Johnson v. Johnson, 429 N.W.2d 689, 691 n.2 (Minn. Ct. App. 1988), *rev'd on other grounds*, 444 N.W.2d 259 (Minn. 1989).

30. *See* MINN. R. CIV. P. 50 (motion for judgment notwithstanding the verdict); MINN. R. CIV. P. 52 (motion to amend findings or judgment); MINN. R. CIV. P. 59 (motion for new trial); MINN. R. CIV. P. 60 (motion for relief from judgment).

31. Rule 59.03 requires a party to serve notice of its motion within 15 days after a general verdict and further obliges the trial court to hear the motion within 30 days of the general verdict or within 30 days of service of notice by a party. MINN. R. CIV. P. 59.03. When Minnesota first adopted the Rules of Civil Procedure, Rule 59.03 required that motions for a new trial had to be made within 60 days of the date of verdict or notice of the filing of the decision. *Weberg*, 59 N.W.2d at 319. The trial court may, however, extend this period for good cause. MINN. R. CIV. P. 59.03. A stay of entry of judgment under Rule 58 will not, however, extend the time within which a party may make these motions. MINN. R. CIV. P. 59.06; *see* State v. Independent Sch. Dist. No. 31, 116 N.W.2d 711, 715 (Minn. 1962).

The Minnesota Rules of Civil Procedure also make other post-trial motions subject to the time limits Rule 59.03 imposes. The rules permit parties to move that "judgment be entered notwithstanding the verdict or notwithstanding the jury has disagreed and been discharged." MINN. R. CIV. P. 50.02(1). Parties must make these motions within the time limits of Rule 59.03. *See* MINN. R. CIV. P. 50.02(3). Rule 52 motions to amend findings, make new findings, or amend the judgment are subject to the same time constraints. Rule 60.02 of the Rules of Civil Procedure provides an exception to the general rule. Rule 60.02 creates a category of post-trial motions that is not subject to the time limits of Rule 59.03 by permitting trial courts to relieve parties from final judgment, order a new trial, or grant other relief because of mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, and other similar

lish a uniform time limit for making post-trial motions, orders deciding certain post-trial motions are appealable while orders denying others are not. Rule 103.03 defines which judgments and orders are appealable as a matter of right.[32] For example, a ruling on a motion for a new trial is appealable.[33] Orders denying motions to vacate, to amend the judgment, or for a verdict notwithstanding the judgment are not appealable.[34] Rule 104.01 requires a party to appeal from an order denying a motion for a new trial within thirty days of receiving notice.[35] This time period runs independently of the period for appealing from judgment. An appeal from an order denying a motion for a new trial is not barred simply because the period for appealing from the judgment has run.[36]

Rule 104.01 thus may force a party to appeal from a judgment because an order denying a motion to amend or vacate the judgment is not independently appealable. To preserve the right to appeal in such situations, several courts have en-

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reasons. MINN. R. CIV. P. 60.02. Through the operation of 60.02, a trial court could vacate an order or judgment, and then, because no judgment existed, order a new trial. *Id.* In this way, a party may obtain a new trial well after the time that Rule 59.03 allows. *See* MINN. R. CIV. P. 60.02 advisory committee's note; Nordeen v. Commissioner of Pub. Safety, 382 N.W.2d 256, 259-60 (Minn. Ct. App. 1986).

32. MINN. R. CIV. APP. P. 103.03. Rule 105.01 empowers the court of appeals to permit a party to appeal from any order, except those made during trial, even if not appealable as a matter of right. MINN R. CIV. APP. P. 105.01. In addition to those orders and rulings which parties have a right to appeal, the court of appeals has discretion under Rule 105.01 to allow parties to appeal otherwise nonappealable orders. Parties seeking appeal under Rule 105.01 must file a petition within 30 days of the filing of the order. MINN. R. CIV. P. 105.01 cmt.

33. MINN. R. CIV. APP. P. 103.03; *see, e.g.*, Iverson v. Iverson, 432 N.W.2d 492, 493 (Minn. Ct. App. 1988) (denial of motion for a new trial is appealable within 30 days after service of the adverse party with written notice of the order's filing).

34. *See, e.g.*, *In re* R.M. & C.M., 436 N.W.2d 807, 808 (Minn. Ct. App. 1989) (motions to reconsider, vacate, or amend do not extend the time to appeal a final order); Beeson v. Beeson, 432 N.W.2d 501, 502 (Minn. Ct. App. 1988) (order denying post-trial motion for amended findings is not appealable). The reasoning behind the rule is that if a judicial error can be corrected by an appeal from judgment, the rules do not permit another method to be used to obtain review. *Nordeen*, 382 N.W.2d at 259 (order denying post-trial motion to vacate the judgment is not appealable).

35. MINN. R. CIV. APP. P. 104.01.

36. *See, e.g.*, *Iverson*, 432 N.W.2d at 493 (denial of a motion for a new trial is separately appealable, and the appeal period is independent of the time to appeal from judgment); Alholm v. Wilt, 348 N.W.2d 106, 108 (Minn. Ct. App. 1984) (citing Honeymead Prods. Co. v. Aetna Casualty & Sur. Co., 132 N.W.2d 741, 743 (Minn. 1965)).

couraged parties always to include a new trial motion in their post-trial motions because an order denying a new trial motion is independently appealable[37] and commences its own distinct time period for appeal.

3. Enforcement of Rule 104.01 in the Court of Appeals

Despite the existence of a procedural technique for avoiding late or missing rulings, the court of appeals still encounters appellants who have not employed it.[38] Soon after the creation of the intermediate court of appeals in Minnesota,[39] the potential problem of Rule 104.01 became an actual issue.

In *Evans v. Blesi*,[40] Evans claimed that his business partner Blesi breached a fiduciary duty, and he sued Blesi for damages and reinstatement in the corporation.[41] After the court entered judgment for Evans, Blesi made several post-trial motions, including motions to amend provisions of the judgment, the dam-

37. When no trial has occurred, and a motion for a new trial is therefore inappropriate, a party may request that the trial court stay the entry of judgment until it resolves all post-trial motions. *See* MINN. R. CIV. P. 58.02; Amatuzio v. Amatuzio, 431 N.W.2d 588, 590 (Minn. Ct. App. 1988).

38. The technique of including a new trial motion is obviously inappropriate if no trial has taken place. After a trial, this tactic preserves the right to appeal, however long the district court takes to decide the motions. Although counsel may use a new trial motion strategically to avoid the potentially damaging consequences of Rule 104.01, this is a less-than-perfect solution for a number of reasons. It creates a trap for appellants who are unaware of the insurance value of a new trial motion. Further, a party who makes a new trial motion for strategic purposes might not have made the same motion in an appeal from the judgment following reception of the trial court's rulings on the accompanying motions. In addition, requiring parties to make an additional motion because the trial court might render a tardy ruling imposes additional and possibly avoidable costs on litigants. Finally, because of the potential uncertainty as to whether a particular motion substantively falls into the category of an appealable motion, attorneys might make unnecessary motions for a new trial.

In one case, the appeals court urged the parties to "exhaust their remedy of review in the trial court before initiating an appeal." Coady v. Jurek, 366 N.W.2d 715, 718 (Minn. Ct. App. 1988). Waiting until the penultimate day of the period for appealing from judgment, however, only cures the problem of "early" appeals, not "late" or "missing" rulings. *See Amatuzio*, 431 N.W.2d at 590 ("If post-trial motions are pending, parties should avoid filing an appeal, where possible, before resolution of the motions.").

39. In 1982, the Minnesota Legislature passed a statute creating the court of appeals. *See* Court of Appeals Act, ch. 501, 1982 Minn. Laws 569; MINN. STAT. §§ 480A.01-.11 (1982). The new court began accepting filings in August 1983. *See* Larson, *supra* note 2, at 639-40.

40. 345 N.W.2d 775 (Minn. Ct. App. 1984).

41. *Id.* at 777.

age awards, and the order to reinstate Evans.[42] The trial court did not decide these motions within ninety days from entry of judgment, forcing Blesi to appeal.[43] By the time the appellate court considered Blesi's appeal, the trial court had issued orders setting aside Evans's reinstatement and reducing damages on the basis that the conduct of Evans's attorney unfairly influenced the jury's award of damages.[44]

In considering the legal status of the trial court's post-appeal orders, the *Evans* court noted an "apparent anomaly" in the Minnesota Rules of Civil Appellate Procedure.[45] The court observed that one consequence of Rule 104.01 was that "an order that is not really late, if entered after an appeal is taken, is of no effect."[46]

Despite holding that the district court's late order had no legal effect, the appellate court nonetheless relied heavily on it.[47] The court noted the trial court's "unique position"[48] for

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42. *Id.* at 778.

43. *Id.*

44. *Id.* at 780.

45. *Id.*

46. *Id.* In holding the trial court's post-appeal order null, the court of appeals cited Kath v. Kath, 55 N.W.2d 691 (Minn. 1952), for the proposition that "[t]he jurisdiction over the subject matter of defendants' motions had shifted from the district court to the Court of Appeals at the time of filing of the notice of appeal." *Evans*, 345 N.W.2d at 780. *Kath*, however, does not contain such broad language, nor is its holding concerning trial court jurisdiction after appeal relevant to the issue presented in *Evans v. Blesi*. In *Kath*, the trial court issued an order denying a post-trial motion for a new trial which the plaintiff appealed. *Kath*, 55 N.W.2d at 693. The trial court then filed a memorandum purporting to amend the original order. The Minnesota Supreme Court held the memorandum to be null. *Id.* In *Evans v. Blesi*, the court of appeals interpreted *Kath* to hold that, once a party appeals, trial courts lack jurisdiction to decide post-trial motions made before appeal. 345 N.W.2d at 780. *Kath*, however, did not involve undecided post-trial motions on appeal.

The court of appeals also has interpreted State v. Barnes, 81 N.W.2d 864 (Minn. 1957), to require divesting the trial court of jurisdiction over "those matters necessarily involved in the appeal" on perfection of an appeal. State v. Patrick, 348 N.W.2d 94, 99 (Minn. Ct. App. 1984). In cases involving early appeals and missing or late rulings, the court of appeals has not relied on *Barnes*; *see supra* note 9. Nevertheless, *Patrick* suggests that the court of appeals alternatively could anchor its holding in *Evans v. Blesi* on *Barnes* instead of *Kath*. Like *Kath*, however, *Barnes* does not concern an early appeal or missing or late rulings. Rather, it concerns whether a trial court retains jurisdiction to decide a motion that a party makes *after* appealing. *Barnes*, 81 N.W.2d at 865-66. Read in light of their specific facts, neither *Kath* nor *Barnes* requires the interpretation the court of appeals gives Rule 104.01 in *Evans v. Blesi*. *See infra* part II.C.

47. *Evans*, 345 N.W.2d at 780.

48. *Id.*; *see also* United States v. Beasley, 809 F.2d 1273, 1278-79 (7th Cir.

evaluating the consequences of alleged misconduct by plaintiff's counsel[49] and specifically followed the trial court's determination of the prejudicial effect of the conduct on the jury's determination of punitive and compensatory damages.[50]

In subsequent opinions, the court of appeals has followed *Evans v. Blesi*, holding post-appeal orders null while nonetheless taking cognizance of the trial court's results.[51] Some opin-

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1987) ("Trial judges have a comparative advantage because they alone see all the evidence in context, and the judicial system as a whole takes advantage of the division of labor.") (Easterbrook, J.).

49. *Evans*, 345 N.W.2d at 780.

50. *Id.* at 779-81. In its post-appeal order, the trial court ordered remittitur of punitive damages from $500,000 to $250,000. The appellate court similarly lowered punitive damages to $250,000.

51. This method of handling a late ruling has much to commend it. Trial courts have experience in conducting trials as well as knowledge of the manner in which witnesses and counsel comport themselves. In addition, trial judges know their own thought processes. This is particularly important when they do not comprehensively explain their findings and conclusions. Clearly, a substantive treatment of post-trial motions requiring additional fact-finding or a reweighing of the evidence is particularly within the competence of the trial court.

It is also preferable for the trial court to decide post-trial motions without the disruptive intervention of an appeal, which, if it succeeds, likely may result only in the appellate court remanding the case for a new trial. In addition to consuming judicial and party resources, a new trial may yield a less accurate result than trial court review because the greater the passage of time from the events being litigated, the greater the likelihood that memories will fade and witnesses will become unavailable.

In Lundeen v. Lappi, 361 N.W.2d 913 (Minn. Ct. App. 1985), a purchaser of shorefront property sued the seller and real estate broker for misrepresentation. *Id.* at 914. Defendants appealed the judgment for Lundeen after having filed a motion for amended findings. *Id.* at 915. The trial court ordered the judgment amended after the filing of the appeal so as to disallow the attorney fees and expenses granted in the original judgment. *Id.* The appellate court held the order null. *Id.* at 917. Although the appellate court did not explicitly endorse the trial court's order in its decision, it came to the same conclusion. *Id.*

The court in Abendroth v. National Farmers Union Property & Casualty Co., 363 N.W.2d 785 (Minn. Ct. App. 1985), held that the trial court lacked the power to amend its findings after the plaintiff appealed from judgment. *Id.* at 788. The court nonetheless adopted the trial court's amended findings, stating the trial court's amendment had "undisputed merit." *Id.* The trial court apparently had overlooked the waiver of a term of the insurance contract in its original ruling.

In Brzinski v. Frederickson, 365 N.W.2d 291 (Minn. Ct. App. 1985), a husband moved to amend provisions of a dissolution decree. *Id.* at 292. After the trial court issued an amended order, his wife moved for a new trial, a more complete hearing or, in the alternative, more specific factual findings. *Id.* Before the trial court ruled, the wife appealed, rendering the trial court's subsequent order null. *Id.* Because the affidavits did not supply enough information and because no testimony was taken during trial, the court of appeals

ions, however, suggest the court is dissatisfied with its approach of tacitly relying on legally null rulings.[52]

An appellate court faced with an early appeal[53] or missing ruling[54] potentially has the option of remanding the case to the trial court for a decision on the post-trial motion. The court of appeals rejected this possibility in *Amatuzio v. Amatuzio*.[55] The *Amatuzio* court held that the rules did not authorize a summary dismissal of an appeal in order to confer jurisdiction on the trial court to decide pending motions.[56]

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remanded the case to the trial court to hold a second hearing on the issue. *Id.* at 293. The trial court in this case simply did not provide any findings for the appellate court to consider.

Andersen v. Andersen, 376 N.W.2d 711 (Minn. Ct. App. 1985), involved an action to partition a family farm. While the trial court considered various post-trial motions by the parties, one party filed an appeal. *Id.* at 714. Some months later, the trial court issued amended findings, conclusions of law, order for judgment, and judgment and decree. *Id.* The court denied a motion for a new trial and all other motions. *Id.* The appellate court confronted the issue of whether the post-appeal order of the trial court had any legal effect. *Id.* at 716-17. Following *Evans v. Blesi*, the court held the order null and void, but because "the trial court was in a position to re-examine the judgment and properly rectified the error," the court ordered the judgment amended as the trial court had attempted to do. *Id.* at 717.

In Fitzgerald v. Fitzgerald, 406 N.W.2d 52 (Minn. Ct. App. 1987), an appellate court held a trial court's post-appeal modification of a restraining order void. The court cited *Evans v. Blesi* as authority for taking cognizance of the trial court's modification order for the insight offered. *Id.* at 54.

The most recent case in which an appellate court has taken judicial cognizance of a post-appeal order of a trial court is Schmidt v. Apple Valley Health Care Ctr., Inc., 460 N.W.2d 349 (Minn. Ct. App. 1990). Although the appellate court did not give effect to the post-appeal order, it reasoned that it clarified the basis for the trial court's damage calculations and relied on it for that specific purpose. *Id.* at 352.

52. *See, e.g.*, Nordeen v. Commissioner of Pub. Safety, 382 N.W.2d 256, 260 (Minn. Ct. App. 1986) (noting "there is indeed good sense in permitting the trial court to correct its own error and, if it refuses, in allowing a timely appeal from the refusal" (quoting Schildhaus v. Moe, 335 F.2d 529, 531 (2d Cir. 1964))); Coady v. Jurek, 366 N.W.2d 715, 718 (Minn. Ct. App. 1985) (holding that it is "unacceptable to demand that a party appeal the judgment and forego review by the trial judge").

53. If a party appeals too early in the 90-day period for the trial court to have an opportunity to rule on post-trial motions, the court may consider it an early appeal. *See supra* note 8.

54. A missing ruling results when the running of the 90-day time period forces a party to appeal before the trial court has ruled on post-trial motions. *See supra* note 9.

55. 431 N.W.2d 588 (Minn. Ct. App. 1988).

56. In *Amatuzio*, the court denied respondent's request to remand the appeal to permit the trial court to rule on the respondent's pending motion for amended findings. *Id.* at 590. Although the appellate court embraced the policy of giving the trial court an opportunity to undertake review of its own ac-

Alternatively, an appellant could attempt to avoid a missing or late ruling by requesting a stay from the court of appeals. In *Gummow v. Gummow*,[57] the appellate court granted a stay on the appeal to give the trial court time to decide a post-trial motion.[58] The trial court still had not ruled on the motion at the expiration of the stay, and the appellate court refused a motion to grant an extension.[59]

Although the appellate court offered no explanation for its refusal, several concerns readily justify the result. Establishing stays as a mechanism for curing late or missing rulings unfairly places the burden on appellants to accommodate dilatory trial court review and tacitly encourages such practices. *Amatuzio* further suggests that, just as remanding a case for a missing ruling violates appellate jurisdiction, so too would the granting of stays for this purpose. In addition, a stay cures missing rulings but does not resolve problems with rulings issued while the court of appeals is considering the case. A stay also consumes judicial and party resources while contributing nothing to the litigation itself.

II. THE DEFECTS OF RULE 104.01

A. INEFFICIENT USE OF JUDICIAL AND PARTY RESOURCES

The court of appeals' use of post-appeal district court rulings clearly indicates that it values district court results despite their legal nullity.[60] Although the court of appeals has not ex-

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tions before any appeal was made, it held that the rules gave it no authority to do so. *Id.* at 589-90.

57. 356 N.W.2d 426 (Minn. Ct. App. 1984). This case involved a dissolution proceeding. Gary Gummow moved for amended findings, which the trial court granted in part by amending the judgment. *Id.* at 428. Before the trial court issued its amended findings, however, Gary filed an appeal. *Id.* Both parties agreed to Gary's request to the appellate court to stay the appeal to permit the trial court to rule on the motion. *Id.* The appellate court granted the stay, but the trial court had not ruled on the motion at the expiration of the stay. *Id.* The appellate court denied a request for another stay. *Id.* Five months after the expiration of the stay, the trial court ordered that the judgment be amended. *Id.* Rosanne Gummow appealed the amended judgment, claiming that the trial court did not have jurisdiction to amend. *Id.*

In ruling on the appeal, the court did not explicitly acknowledge the trial court's post-appeal ruling. The trial court's amended findings increased the share of marital property awarded to Gary Gummow. *Id.* The appellate court reversed and remanded, indicating several considerations which required that Gary receive a larger share. *Id.* at 429.

58. *Id.* at 428.

59. *Id.*

60. *See* Schmidt v. Apple Valley Health Care Ctr., Inc., 460 N.W.2d 349,

plicitly instructed district courts to rule on motions despite the district court's loss of jurisdiction on appeal, its repeated use of legally null findings encourages district courts to make them.

Considered from the perspective of an ongoing judicial system, the approach is not beneficial for several reasons. First, to the extent that the policy of judicial recognition of late results evades the strictures of Rule 104.01, the use of null findings is implicitly critical of the rule.

Second, the practice of considering a late district court ruling is not consistent with the court of appeals' other statements about the relative values of late and missing rulings. By taking cognizance of late results, the appellate court indicates that it values trial court results highly enough to consider them despite their null legal status. Decisions that refuse to grant a stay to obtain rulings on post-trial motions,[61] however, indicate that the rulings are not important enough for the appellate court to wait. Thus, district courts face conflicting signals on how to manage their dockets. They cannot allocate their efforts efficiently when they do not know the relative valuations which appellate courts place on post-appeal trial court rulings.

Third, the prospect that a district court may not decide a post-trial motion when the appellate court considers an appeal injects additional uncertainty into the litigation decisions of parties. If appellants are aware of the risk of missing rulings, their estimates of the expected benefits of making post-trial motions is affected. Some wary but risk averse appellants will insure themselves against late or missing rulings by including a new trial motion in their post-trial motions. Others more concerned with cost will elect to forgo post-trial motions. Uncertainty thus can impose real costs in the form of otherwise unnecessary new trial motions and forfeitures of post-trial motions.

Fourth, party and judicial resources are wasted when district courts conduct hearings but fail to rule before the appel-

352 (Minn. Ct. App. 1990); Andersen v. Andersen, 376 N.W.2d 711, 716-17 (Minn. Ct. App. 1985); Abendroth v. National Farmers Union, 363 N.W.2d 785, 788 (Minn. Ct. App. 1985); Lundeen v. Lappi, 361 N.W.2d 913, 917 (Minn. Ct. App. 1985); Gummow v. Gummow, 356 N.W.2d 426, 428-29 (Minn. Ct. App. 1984); Evans v. Blesi, 345 N.W.2d 775, 780 (Minn. Ct. App. 1984). *But see* Rudnitski v. Seely, 441 N.W.2d 827, 829, 831 (Minn. Ct. App. 1989) (finding that trial court's post-appeal order contained error of law), *aff'd in part, rev'd in part*, 452 N.W.2d 664 (Minn. 1990); Brzinski v. Frederickson, 365 N.W.2d 291, 293 (Minn. Ct. App. 1985) (rejecting trial court's post-appeal order because the record did not contain the order's factual basis).

61. *See Gummow*, 356 N.W.2d at 428.

late court considers the appeal. It is also inefficient to require litigants to prepare for both a trial court and an appellate court proceeding when a trial court ruling might obviate the appeal entirely.

B. UNFAIRNESS TO APPELLANTS

1. Trial Compared to Appellate Review

Unwary appellants may find themselves forced to abandon their post-trial motions. In effect, Rule 104.01 creates a trap for the unwary and is at least a nuisance for the wary. The timing rule[62] makes the premature transfer of jurisdiction possible and thus exposes appellants to potential unfairness by depriving them of the trial court's ruling.

Appellate review is not a substitute for trial court review of factual findings.[63] An appellate court will not set aside the factual findings of the trial court unless they are clearly erroneous,[64] while the trial court's review of its own findings is de novo.[65] Trial court review also is preferable to appellate court review because the trial judge reviews from the vantage point of a participant and observer of the entire litigation.[66]

For questions of law, the differences between appellate court and trial court are less pronounced because appellate review of issues of law is de novo.[67] Still, appellants may value

62. *See supra* notes 1, 5 and accompanying text.

63. This is reflected in the fact that appeals courts generally show great deference to a trial court's factual findings. Professional litigators note that the chance an appeal will succeed is low, about 20%, and that an appeal is more likely to succeed when it involves issues of law rather than fact. *See* Thomas W. Tinkham, *Appeals—Procedure and Practice*, *in* CIVIL TRIAL PRACTICE 281-84 (Advanced Legal Education, Hamline University School of Law No. 232, May 31-June 1, 1984); *see also* McCarthy, *supra* note 11, at 7 (explaining that reversals and even modifications of trial court decisions are rare on appeal).

64. Trial court judges, for example, simply can decide that they erred in weighing factors relevant to deciding an issue. An appellate court cannot decide that the trial court abused its discretion by failing to weigh the evidence properly. Rather, it must determine that the trial court findings are palpably against the weight of the evidence. *See, e.g.*, MINN. R. CIV. P. 52.01; Estate of Serbus v. Serbus, 324 N.W.2d 381, 385 (Minn. 1982); Reserve Mining Co. v. State, 310 N.W.2d 487, 490 (Minn. 1981); Coady v. Jurek, 366 N.W.2d 715, 718 (Minn. Ct. App. 1985).

65. *See* MINN. R. CIV. P. 52.02; McCauley v. Michael, 256 N.W.2d 491, 500 (Minn. 1977).

66. See *supra* note 48 and accompanying text.

67. *See, e.g.*, Nichols v. Meilahn, 444 N.W.2d 872, 874 (Minn. Ct. App. 1989) (" '[A]n appellate court need not give deference to a trial court's decision on a legal issue.' Therefore, we review the trial court's ruling de novo." (quoting

the trial court's superior familiarity with factual and evidentiary issues, particularly when questions of law are intertwined with issues of fact on appeal.[68]

Rule 104.01 also may harm appellants by depriving them of post-trial rulings to use in preparing an appeal.[69] A ruling could provide information which would assist in strengthening an appeal. On review, the trial judge might identify precedents, interpretations, or issues that the post-trial motions, briefs, and oral arguments of the parties failed to take into account but which could be argued or challenged in the appeal. In addition, the ruling might expose trial court errors by more clearly revealing the reasoning of the trial judge and the factors the judge considered in deciding the post-trial motion. Finally, appeals obviously cannot address objections to a post-trial ruling not yet made.

The trial court ruling may be significant in another, more subtle sense, in that it could influence the appellate judge's understanding of the issues involved on appeal.[70] If the record more completely reflects the trial judge's reasoning, it will provide the appellate court with a more comprehensive view of the course of lower court proceedings and the significance of facts and issues involved in the appeal. The detrimental effects of Rule 104.01 on appellants may be especially significant in cases involving complex factual and legal issues in which the appellate court lacks the trial court's familiarity with the case.

C. RULE 104.01'S JURISDICTIONAL EFFECTS

If Rule 104.01 were solely a procedural rule, criticisms of inefficiency and unfairness probably would suffice to condemn it.[71] Because the rule has jurisdictional significance,[72] however,

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Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984))).

68. In many cases, because the trial court could correct errors of law on its own review, it is inefficient to have the appellate court preempt trial court review.

69. *See supra* note 9 and accompanying text.

70. The significance of this concern depends on the extent to which appeals from original judgments rely on the grounds identical to those the party would assert on denial of a post-trial judgment.

71. The Minnesota Supreme Court commented on this problem:

> Limitations upon the time for bringing an appeal, and logically likewise upon the power of the court to modify its judgments and orders during such period, are to be liberally interpreted to avoid a forfeiture of either the right of appeal or of the right to the exercise of such power of modification.

Gelin v. Hollister, 24 N.W.2d 496, 500 (Minn. 1946).

it is not so easily dismissed. It is therefore necessary to consider the timing rule in relation to the policies underlying appellate jurisdiction.

In interpreting Rule 104.01's jurisdictional consequences, Minnesota courts were faced with three basic options: they could have likened appellate jurisdiction to personal jurisdiction; they could have modeled it after subject matter jurisdiction; or they could have distinguished appellate jurisdiction from either of the other two types of jurisdiction.[73] The court of appeals consistently has followed the second option and held that Rule 104.01 defines its subject matter jurisdiction.[74] In doing so, the court of appeals has failed to appreciate that the policies of appellate jurisdiction significantly differ from those of subject matter jurisdiction and require different means to effectuate them.

The courts were correct in refusing to interpret appellate jurisdiction on the model of personal jurisdiction. Personal jurisdiction concerns the authority of the court over parties.[75] Rule 12.08(a) of Minnesota's Rules of Civil Procedure allows parties to consent to or to challenge the trial court's authority over them.[76] If a party fails to raise the lack of personal jurisdiction in the course of the pleadings, the defense is waived.[77] The concept of consent is appropriate when the issue is whether a court has authority over a party, but it is irrelevant

72. "The limitation of time is so far jurisdictional that the parties cannot waive the objection or by st[i]pulation clothe the supreme court with authority to determine a belated appeal." 2 DUNNELL, *supra* note 21, § 3050, at 30-74.

73. For a discussion of the distinctive character of appellate jurisdiction, see Hall, *supra* note 21, at 407-08 (arguing that the timing and notice provisions for appeal render it more analogous to personal jurisdiction than to subject matter jurisdiction).

74. In Evans v. Blesi, 345 N.W.2d 775 (Minn. Ct. App. 1984), the court of appeals relied on Kath v. Kath, 55 N.W.2d 691 (Minn. 1952), in interpreting Rule 104.01 as defining its subject matter jurisdiction so as to remove trial court jurisdiction over post-trial motions pending at the time of appeal. *Evans*, 345 N.W.2d at 780. The decision in *Kath* held that a trial judge could not amend, after appeal, a ruling on a post-trial motion. *Kath*, 55 N.W.2d at 693. In *Kath*, the Minnesota Supreme Court did not address the issue of whether, after appeal, trial court jurisdiction continued over pending post-trial motions, nor did the court use the phrase "subject matter jurisdiction." Opinions by the court of appeals subsequent to *Evans v. Blesi* follow its interpretation of Rule 104.01 as encompassing subject matter jurisdiction. *See, e.g.*, Rigwald v. Rigwald, 423 N.W.2d 701, 705 (Minn. Ct. App. 1988); Gummow v. Gummow, 356 N.W.2d 426, 428 (Minn. Ct. App. 1984).

75. *See* 21 C.J.S. *Courts* § 11 (1990).

76. *See* MINN. R. CIV. P. 12.08(a).

77. *Id.*

to an appeal proceeding which appellants have as a matter of right. Rule 12.08(a) also gives the trial court no responsibility for noticing a lack of personal jurisdiction. An appellate court, in a court system based on the policy of finality, must play an active role in ensuring that only timely appeals of final orders and judgments receive appellate review.

The courts have failed to see that appellate jurisdiction also has as little in common with subject matter jurisdiction as does personal jurisdiction.[78] Appellate jurisdiction defines a division of judicial labor between the appellate and trial courts in the adjudication of a case. In contrast, the subject matter jurisdiction of a court system is the power to decide a dispute. Subject matter jurisdiction may involve allocating cases to the appropriate kind of court within that system; for example, a state's juvenile or criminal court. The subject matter jurisdiction of Minnesota's district courts is absolute in the sense that parties cannot waive it, and the court can bring up a defect of subject matter jurisdiction and dismiss the action at any time.[79] When the goal is to limit the power of trial courts to certain kinds of cases, it is reasonable to make jurisdiction noticeable by the court *sua sponte* and not subject to the consent of the parties.

The policies underlying the subject matter jurisdiction of a court system, however, are irrelevant to policies that determine when a higher court takes power from a lower court over a case within a court system. Appellate court jurisdiction concerns judicial function, not judicial authority.[80] The court of appeals has interpreted Rule 104.01 in a way that allows for the prema-

78. Commentators, however, have recognized the distinction. *See, e.g.*, Rosenberg, *supra* note 13, at 172 (explaining the inappropriateness of analogizing the jurisdictional character of the finality requirement to subject matter jurisdiction based on diversity and amount in controversy).

79. *See* MINN. R. CIV. P. 12.08; *see also* FED. R. CIV. P. 12(h) (incorporating provisions having the same effect as the Minnesota rule).

80. Some commentators strongly urge eliminating jurisdictional concepts from finality-appealability rules and appeal timing provisions. *See* Hall, *supra* note 21, at 399-400; Rosenberg, *supra* note 13, at 173.

In federal courts, a motion to amend findings of fact "in more than purely formal or mechanical aspects" tolls the time for taking an appeal. Leishman v. Associated Wholesale Elec. Co., 318 U.S. 203, 206 (1943) (holding that filing of a motion to amend "deprived the judgment of that finality which is essential to appealability" because the motion involved issues of substance as well as alteration of rights that the trial court had determined).

The Minnesota Court of Appeals has articulated the policy behind its position as follows:

> "[N]o good purpose is served by requiring the parties to appeal to a higher court, often requiring remand for further trial proceedings, when the trial court is equally able to correct its decision in the light

ture transfer of jurisdiction from trial to appellate court.[81] It is possible to interpret Rule 104.01 to avoid that result. For example, the Rule could be read to require only the filing of a notice of appeal within ninety days of entry of judgment, leaving the trial court with authority to decide post-trial motions then pending.[82] By failing to distinguish appellate jurisdiction from subject matter jurisdiction, the judiciary has imposed rigid and mechanical concepts derived from subject matter jurisdiction on a problem of a very different kind, thereby causing problems of inefficiency and unfairness.

D. RULE 104.01 IS NOT JUSTIFIED AS A TIMING DEVICE

Rule 104.01 cannot be defended from these criticisms on the grounds that, despite these defects, it nonetheless serves an important control function as a timing device. With missing rulings, Rule 104.01 has a major failing: It penalizes parties who cannot effectively control the pace of district court proceedings. Although the rule does force parties to initiate further proceedings on the penalty of automatically terminating the litigation, the court of appeals' interpretation of the Rule[83] unnecessarily divests trial courts of authority to rule on post-trial motions.

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of new authority on application made within the time permitted for appeal."

Nordeen v. Commissioner of Pub. Safety, 382 N.W.2d 256, 260 (Minn. Ct. App. 1986) (quoting Schildhaus v. Moe, 335 F.2d 529, 531 (2d Cir. 1964)).

81. *See supra* note 9 (citing court of appeals decisions which have interpreted Rule 104 in this manner).

82. Federal courts and state courts with timing rules similar to Rule 4(a) of the Federal Rules of Appellate Procedure, are more efficient in this regard:

> [I]f the motion did not hold matters in status quo the machinery of appellate procedures will move forward with respect to the judgment appealed from. . . . [T]he court will docket the appeal and instruct plaintiff on the mechanics he must follow. Plaintiff must notify the court reporter to prepare a transcript and make financial arrangements for it. When the transcript is completed the clerk of the district court will prepare and file the record in the appellate court. The time then begins to run for the filing of briefs. . . . [D]elays in briefing may have to be asked to see what happens to the motion pending in the district court, which leaves the case dead in the water in the court of appeals. Some, or all, of this effort may have to be cancelled, or supplemented, or done over again once the new trial motion has been disposed of.

Martin v. Campbell, 692 F.2d 112, 115 (11th Cir. 1982).

83. *See supra* note 60 (citing cases).

III. REMEDIES FOR THE DEFECTS OF RULE 104.01

Various approaches are possible for reducing or eliminating the inefficiency and unfairness that Rule 104.01[84] causes. The approaches attempt a more adequate recognition of the distinctive nature of appellate jurisdiction. A satisfactory treatment of appellate jurisdiction based on the final judgment rule requires that jurisdiction remain in the trial court until it rules on all challenges to the judgment within its competence to decide.

Methods of remedying Rule 104.01's harmful effects can be roughly divided into two groups: proposals that restructure the appeal process to avoid the harmful results of Rule 104.01, and proposals providing remedies that do not significantly alter current procedures. A proposal that allows an appeal from judgment after the trial court rules on post-trial motions belongs in the first category. Setting time limits for trial court decisions on post-trial motions, permitting extension of the time to appeal from judgment, and interpreting Rule 104.01 to allow trial courts to retain jurisdiction to decide post-trial motions fit into the second category.

If the rules of civil appellate procedure were susceptible to significant restructuring, it would be possible to adopt the approach taken in the Federal Rules of Appellate Procedure and in Minnesota's Rules of Criminal Procedure. These rules allow an appeal from judgment for a limited time after issuance of an order denying a motion to amend or vacate the judgment, for additional findings of fact, or for judgment notwithstanding the verdict. This approach would eliminate the problems of missing and late rulings without adding any additional procedural steps. Unfortunately, it would require a major legislative revision of the Rules. A simpler but slightly less efficient solution would require the state supreme court to take up a case involving a late ruling or early appeal and explicitly interpret Rule 104.01 to allow trial courts to retain jurisdiction to decide post-trial motions. The greater feasibility of this solution makes it more attractive than the former, despite its somewhat less perfect results.

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84. Because the reasons for the Civil Appellate Rules Advisory Committee's failure to follow the federal scheme relate to the statutory definition of appellate jurisdiction, any revision of Rule 104.01 to cure its defects would likely have to be made by the Legislature. *See supra* note 2.

A. ALLOWING APPEAL FROM JUDGMENT AFTER TRIAL COURT RULINGS ON POST-TRIAL MOTIONS

This solution permits, for a limited time, appeal from judgment after the trial court makes a ruling on post-trial motions, such as motions to amend or vacate the judgment, to make new findings of fact, to request a new trial, or to ask for judgment notwithstanding the verdict.[85] Currently, a party must make a new trial motion to secure appellate review in the event the trial court does not decide the post-trial motions before the ninety-day period for appeal from judgment runs.[86] The approach proposed here would eliminate the need for parties to insure themselves of an opportunity for appellate review by making otherwise unnecessary new trial motions. This approach avoids late or missing rulings because parties are not forced to appeal from judgment before the trial court disposes of the motions.[87]

This solution does not prevent early appeals, but early appeals are very infrequent.[88] In addition to implementing the final judgment rule more effectively by avoiding missing and late rulings, extending the time period for appealing from judgment in this way does not require extra procedural steps. By following the approach taken in federal appellate and criminal appeal proceedings, this solution would have the salutary effect of bringing Minnesota's Rules of Civil Appellate Procedure into conformity with other appeal proceedings. However, because it requires a significant restructuring of a process the state legislature and bar long ago became accustomed to, it may not be a feasible solution.

B. EXTENSION OF THE TIME TO APPEAL FROM JUDGMENT

Another possible solution would permit parties to consent to or petition for continued trial court jurisdiction until the trial court has decided all motions attacking the judgment.[89]

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85. This recommendation excludes renewing the appeal from judgment on denial of Rule 60 post-trial motions to correct clerical errors or to make allowances for mistakes, excusable neglect, or newly discovered evidence.

86. *See* Amatuzio v. Amatuzio, 431 N.W.2d 588, 589-90 (Minn. Ct. App. 1988).

87. Another benefit of this approach is that litigants will no longer forgo an appeal from judgment because they mistakenly believe they can appeal from an order denying the post-trial motion they have made. *See, e.g.*, Beeson v. Beeson, 432 N.W.2d 501, 502 (Minn. Ct. App. 1988).

88. *See supra* note 8.

89. Allowing parties to consent to continuing trial court jurisdiction does

Allowing petition by either party alone, or both jointly, however, poses the problem that parties may perceive their advantage to lie in forcing an appeal. Respondents could strategically waive or withhold their consent to waiver in order to cut off trial court review when doing so would be advantageous. Appellants are less likely to see an advantage to withholding their consent, but the possibility exists.

This approach also adds another procedural step, thereby placing a burden on litigants more appropriately placed on the court. The fatal shortfall of extension by petition is that if no request is made, or if it is made and denied, appellate jurisdiction is not postponed, and all the problems of the timing rule remain. Revising the rule of appellate jurisdiction in this way does not establish functional appellate jurisdiction.

C. TIME LIMIT ON TRIAL COURT RULINGS

A different approach from remand or waiver would introduce a requirement that trial courts decide all potentially relevant post-trial motions within ninety days from entry of judgment.[90] In fact, a statute[91] requires the court of appeals to rule on post-judgment motions within ninety days.[92] Trial court judges could be constrained similarly.

District courts, however, could still fail to issue timely rulings despite being bound to do so. Nor is it obvious that putting time pressure on judges serves the interests of justice at either the trial or appellate court levels. In addition to potentially forcing last-minute decisions, this approach also requires a procedure for appellate court approval of district court delays in issuing rulings. Thus, this approach may lead to unfairness and consume scarce judicial resources.

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not implicate the power of the court to decide a case, and, therefore, there is no reason to assume functional appellate jurisdiction should bar extension.

90. While many appellate courts have held that post-appeal rulings by district courts are null, none has criticized the lower courts for their lack of timeliness, suggesting that trial court judges are not to blame for "late" or "missing" rulings. *See supra* note 9 (citing appellate court decisions, none of which criticizes the actions of the trial court).

91. MINN. STAT. § 480A.08(3) (1990).

92. *Id.* The statute reads, in pertinent part:

> A decision shall be rendered in every case within 90 days after oral argument or after the final submission of briefs or memoranda by the parties, whichever is later. The chief justice or the chief judge may waive the 90-day limitation for any proceeding before the court of appeals for good cause shown.

Id. The 90-day time limit begins when oral argument is heard or the filings of briefs is final.

D. JUDICIAL REINTERPRETATION OF RULE 104.01

A more effective solution would be for the Minnesota Supreme Court to overrule the court of appeals' interpretation of Rule 104.01[93] as mandating the trial court's loss of jurisdiction to decide pending post-trial motions on appeal. By interpreting the rule as implementing appellate jurisdiction rather than subsuming it into subject matter jurisdiction, the Supreme Court could permit trial courts to retain the power to decide post-trial motions pending on appeal.

Procedurally, appellants still would file a notice of their intent to appeal within ninety days of judgment. The notice would state whether any post-trial motions still were pending. The court of appeals would stay consideration of the appeal until after the trial court issued rulings. Parties would not be required to file briefs until they received the trial court's decision.[94]

This approach cures the unfairness and inefficiencies Rule 104.01 creates, but it adds an extra procedural step by requiring appellants to file two notices of their appeal. Although the rules could be restructured to cure the defects of the appeals timing rule in order to avoid the possibility of double-filing, a judicial decision to allow trial courts to retain jurisdiction to enter rulings on post-trial motions would eliminate early appeals and missing or late rulings without requiring large-scale revisions of civil appellate procedures.

CONCLUSION

Rule 104.01 of the Minnesota Rules of Civil Appellate Procedure, which governs the time period for appealing from judgment, serves the court system and litigants poorly. Missing or late rulings encourage the inefficient use of judicial and party resources and can have an unfair impact on the parties. Appel-

93. *See supra* note 60 (citing cases).

94. To implement fully this new interpretation of Rule 104.01 in cases in which the appellant files a supersedeas bond under Rule 108.01, the Legislature would have to amend Rule 108.03 of the Minnesota Rules of Civil Appellate Procedure. As it stands, Rule 108.03 states that a supersedeas bond "shall stay all further proceedings in the trial court upon the judgment or order appealed from." To be consistent with the interpretation of Rule 104.01 proposed here, Rule 108.03 would need to allow trial courts to continue proceedings on post-trial motions made prior to appeal. *See* Spaeth v. City of Plymouth, 344 N.W.2d 824 (Minn. 1984) (holding that trial courts must relinquish jurisdiction upon perfection of appeal, per Rule 108.03, except with regard to collateral matters).

late jurisdiction based on the final judgment rule requires that rulings on all post-trial motions affecting the judgment be made before appeal. The current discretionary use of late rulings is an awkward attempt at a solution that does little to cure the problems Rule 104.01 causes. Allowing trial courts to retain jurisdiction to decide post-trial motions timely would eliminate early appeals as well as missing and late rulings.