

**IN THE COURT OF APPEALS OF IOWA**

No. 3-790 / 12-1666  
Filed November 6, 2013

**RICHARD ARTHUR PUNDT,**  
Plaintiff-Appellee,

**vs.**

**THE GAZETTE COMPANY, GAZETTE  
COMMUNICATIONS, INC., and TRISH MEHAFFEY,**  
Defendants-Appellants.

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Appeal from the Iowa District Court for Linn County, Ian K. Thornhill,  
Judge.

The defendants appeal from the district court's order denying summary  
judgment in their favor on the plaintiff's claims. **APPEAL DISMISSED.**

Sarah W. Anderson and John M. Bickel of Shuttleworth & Ingersoll,  
P.L.C., Cedar Rapids, for appellant.

Larry J. Thorson of Ackley, Kopecky & Kingery, L.L.P., Cedar Rapids, and  
Leslie E. Stokke of Leslie E. Stokke Law Office, Cedar Rapids, for appellee.

Heard by Vaitheswaran, P.J., and Tabor, J., and Sackett, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**VAITHESWARAN, P.J.**

We must decide whether this court has jurisdiction of this interlocutory appeal.

***I. Background Proceedings***

Richard Pundt sued The Gazette Company, Gazette Communications, Inc., and Trish Mehaffey (collectively, the Gazette) for libel per se and libel per quod stemming from internet and newspaper articles published by the Gazette. The Gazette moved for summary judgment. The district court denied the motion, finding that genuine issues of material fact precluded summary judgment.

The Gazette did not seek interlocutory review within thirty days of the ruling. See Iowa R. App. P. 6.104(b)(2) (“An application for interlocutory appeal must be filed within 30 days after entry of the challenged ruling or order . . .”). Instead, the Gazette elected to file a motion for amended or enlarged findings and conclusions pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court denied the motion.

At that point, the Gazette applied for leave to pursue an interlocutory appeal of the district court’s summary judgment and rule 1.904(2) rulings. The application was filed within thirty days of the rule 1.904(2) ruling but more than thirty days after the date of the summary judgment ruling.

The Iowa Supreme Court initially granted the application but later, on its own motion, directed the parties to address “a possible jurisdictional issue,” namely, whether the Gazette’s rule 1.904(2) motion following the district court’s

summary judgment ruling extended the time for seeking interlocutory review.<sup>1</sup> The court transferred the case to this court for disposition either on the jurisdictional issue or on the merits. We find the jurisdictional issue dispositive.<sup>2</sup>

## **II. Jurisdiction**

As noted, the general rule is that “[a]n application for interlocutory appeal must be filed within 30 days after entry of the challenged ruling or order.” Iowa R. App. P. 6.104(b)(2).<sup>3</sup> However, where a party timely files a rule 1.904(2) motion, the thirty-day period tolls until the court enters a ruling on that motion. *Id.*; *Sierra Club Iowa Chapter v. Iowa Dep’t of Transp.*, 832 N.W.2d 636, 640 (Iowa 2013) (reciting similar rule and “tolling exception” for time for filing a notice of appeal under Iowa Rule of Appellate Procedure 6.101(1)(b)).

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<sup>1</sup> The court specifically requested examination of whether “Iowa Rule of Civil Procedure 1.981(3), which provides that ‘if summary judgment *is rendered on the entire case*, rule 1.904(2) shall apply.’” The court did not ask the parties or this court to revisit the question of whether the Gazette was able to show that “substantial rights” were affected, “why the ruling or order will materially affect the final decision, and why a determination of its correctness before trial on the merits will better serve the interests of justice.” See Iowa R. App. P. 6.104(d); *Mason City Prod. Credit Ass’n v. Van Duzer*, 376 N.W.2d 882, 886-87 (Iowa 1985).

<sup>2</sup> The Gazette argues Pundt waived the jurisdictional issue by failing to raise it. However, issues of subject matter jurisdiction cannot be waived. See *Dico, Inc. v. Emp’rs Ins. of Wausau*, 581 N.W.2d 607, 611 (Iowa 1998) (characterizing the “deadlines” to file an appeal and a motion to amend or enlarge as “mandatory and jurisdictional”); *Doland v. Boone Cnty*, 376 N.W.2d 870, 876 (Iowa 1985) (“It is our duty to refuse, *on our own motion*, to entertain an appeal not authorized by rule.” (emphasis added)); *Robco Transp., Inc. v. Ritter*, 356 N.W.2d 497, 498 (Iowa 1984) (“A timely appeal is jurisdictional, and cannot be conferred by consent, much less the silence of the appellee.”).

An opinion cited by the Gazette, *Federal American Int’l, Inc. v. Om Namah Shiva, Inc.*, 657 N.W.2d 481, 484-85 (Iowa 2003), does not require a contrary conclusion. There, the court reiterated that a notice of appeal not filed within thirty days of a final judgment divested the appellate court of jurisdiction. *Fed. Am. Int’l, Inc.*, 657 N.W.2d at 483. While the court noted that the case involved another type of jurisdiction that could be waived, the court found no waiver because the defendant raised the issue as soon as it could be raised. *Id.* at 484.

<sup>3</sup> This rule has been applied to denials of summary judgments. See *MC Holdings, L.L.C. v. Davis County Bd. of Review*, 830 N.W.2d 325, 328 n.1 (Iowa 2013).

The Gazette filed its application for interlocutory appeal sixty-six days after the district court denied its motion for summary judgment. Accordingly, the Gazette's application was untimely unless "the tolling exception applies." See *Sierra Club*, 832 N.W.2d at 640.

For summary judgment rulings, Iowa Rule of Civil Procedure 1.981 answers the question of whether the tolling exception applies. The rule states in pertinent part:

**1.981(3) *Motion and proceedings thereon.*** . . . The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . *If summary judgment is rendered on the entire case, rule 1.904(2) shall apply.*

(Emphasis added.) This rule plainly and unambiguously provides that rule 1.904(2) motions are available in summary judgment proceedings only when "summary judgment is rendered on the entire case." See *id.*; *Merriam-Webster's Collegiate Dictionary* 1054 (11th ed. 2005) ("Render" means "to hand down (a legal judgment)"); *Black's Law Dictionary* 1298 (7th ed. 1999) (defining render as "(Of a judge) to deliver formally."). No legal judgment was rendered on the entire case or, indeed, on any part of the case because the district court found that genuine issues of material fact precluded the entry of such a judgment. Accordingly, the Gazette could not avail itself of the rule 1.904(2) tolling exception to extend the time for filing an application for interlocutory appeal. See *Tenney v. Atlantic Assocs.*, 594 N.W.2d 11, 14 (Iowa 1999) (reiterating that rule 1.904(2) applies if summary judgment is rendered on the entire case); *Kunau v. Miller*, 328 N.W.2d 529, 530 (Iowa 1983) ("Rule amendments effective July 1,

1980, extended the applicability of rule 179(b) to summary judgment entered on an entire case and to district court decisions on judicial review of agency action in contested cases. See Iowa R. Civ. P. 237(c) and 333(c). Otherwise rule 179(b) would not apply in those situations.” (citations omitted)).

Our opinion could end with the express language of rule 1.981(3). See e.g., *Drahaus v. State*, 584 N.W.2d 270, 274 (Iowa 1998) (applying general principles of statutory construction when considering rules promulgated by courts and stating “when the text of a statute [or rule] is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction”). However, we feel compelled to address the Gazette’s argument that the quoted language of the summary judgment rule is not dispositive given the language in the interlocutory appeal rule stating “if a motion is timely filed under Iowa R. Civ. P. 1.904(2), the application must be filed within 30 days after the filing of the ruling on such motion.” See Iowa R. App. P. 6.104(b)(2). According to the Gazette, this language authorizes the tolling of the time to seek review of “any interlocutory ‘ruling or order.’”

Were we to read Rule 6.104(b)(2) in a vacuum, we would agree that any timely rule 1.904(2) motion would extend the time for filing an application for interlocutory appeal. However, the Gazette’s facially appealing argument faces two roadblocks.

First, “[u]nder our rules of statutory construction, if two provisions of a statute [or rule] conflict, the more specific statute prevails over the general statute.” *Griffin Pipe Prods. Co., Inc. v. Bd. of Review*, 789 N.W.2d 769, 775-76 (Iowa 2010). The more specific rule is the summary judgment rule and, as

discussed, it extends the time for filing a notice of appeal only where judgment is rendered on the entire case.

Second, rule 6.104(b)(2), like its counterpart relating to appeals of final judgments, is subject to a judicial gloss. As the Iowa Supreme Court recently reiterated, a rule 1.904(2) motion tolls the time for filing a direct appeal of a final judgment [or application for interlocutory appeal] only if the motion was filed for a proper reason. *Sierra Club*, 832 N.W.2d at 640 (“[T]he tolling exception only applies if the posttrial motion was filed for the proper reason”); *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 904-05 (Iowa 1998) (“A motion relying on [rule 1.904(2)], but filed for an improper purpose, will not toll the thirty-day period for appeal.”).

The Gazette’s rule 1.904(2) motion was insufficient to toll the time for appeal because all four arguments raised in the motion were previously raised in the Gazette’s reply memorandum in support of its motion for summary judgment. The motion was simply “a rehash of legal issues previously raised.” *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 668-69 (Iowa 2013) (citing *Explore Info. Servs. v. Court Info. Sys.*, 636 N.W.2d 50, 57 (Iowa 2001)). Accordingly, the motion was filed for an improper purpose. See *Bellach*, 573 N.W.2d at 905 (“IMT’s motion amounted to no more than a rehash of legal issues raised—and decided adversely to it—by way of summary judgment before trial” and by way of other rulings).<sup>4</sup>

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<sup>4</sup> The Gazette also contends that, even if its rule 1.904(2) motion was not proper, we should treat it as a motion to reconsider or as a renewed motion for summary judgment. This would not help the Gazette because its challenge is to the denial of its summary judgment motion, and the district court did not change its original ruling in its ruling on the rule 1.904(2) motion. See *Carroll v. Martir*, 610 N.W.2d 850, 857 (Iowa 2000) (“Until the district court has rendered a final order or decree, it has the power to correct any of

For both these reasons, we conclude that the tolling exception set forth in rule 6.104(b)(2) does not save the Gazette's application for interlocutory appeal.

The Gazette had thirty days from the date of the district court's denial of its summary judgment motion to file an application for interlocutory appeal. Because the Gazette did not file its application for interlocutory appeal within that time frame and because its rule 1.904(2) motion did not extend the time for filing its application, the appeal is untimely and must be dismissed.

**APPEAL DISMISSED.**

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the rulings, orders or partial summary judgments it has entered."); *Bellach*, 573 N.W.2d at 905 ("[A]n appeal ordinarily must be taken from the ruling in which the error is said to lie." (quoting *Beck v. Fleener*, 376 N.W.2d 594, 596 (Iowa 1985))).