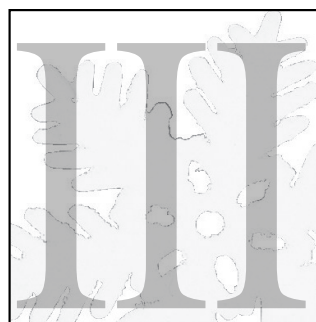
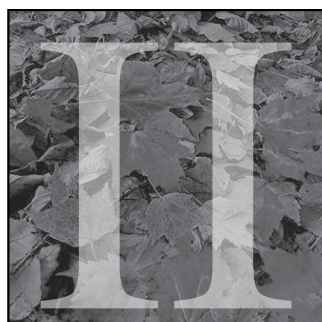

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Appellate Practice Report

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Appealing the Denial of Summary Disposition or Summary Judgment Following an Adverse Jury Verdict

A common avenue for challenging an adverse jury verdict on appeal is to argue that the trial court should have granted judgment notwithstanding the verdict (or, in federal court, a renewed judgment as a matter of law). But can a party also appeal an earlier denial of summary disposition or summary judgment by arguing that the case never should have been presented to the jury? The answer depends on whether the case is in state or federal court.

Michigan Courts

In Michigan, there is authority that a denial of summary disposition can be appealed even after a case has been submitted to a jury and a judgment entered. For example, in *McGrath v Allstate Ins Co*, 290 Mich App 434; 802 NW2d 619 (2010), Allstate Insurance Company denied coverage for damage to Mary McGrath's unoccupied home in Gaylord when some frozen pipes burst. Although McGrath's family apparently used the home for vacations, and she returned there periodically, she had been living full-time in an apartment in Farmington Hills for two years before the loss occurred. *Id.* at 437. After McGrath died some time later, the personal representative of her estate filed a lawsuit challenging Allstate's denial of coverage. *Id.* at 438.

Allstate filed two motions for summary disposition under MCR 2.116(C)(10) arguing that McGrath failed to notify Allstate of the home's unoccupied status as required under the policy. The trial court denied the motions finding that there was a genuine issue of material fact because there was evidence that, although McGrath was not residing in the home at the time the pipe burst, she intended to return. *Id.* at 438-440. A jury found in favor of the plaintiff, and a \$100,000 judgment was entered against Allstate. *Id.* On appeal, Allstate argued that the trial court should have granted its motions for summary disposition because McGrath did not "reside" in the Gaylord home under the ordinary meaning of that term. The Court of Appeals agreed and vacated the judgment on the jury verdict. *Id.* at 440-445. See also *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 271; 480 NW2d 330 (1991) ("[B]ecause plaintiff's complaint alleges a violation of the inherently dangerous activity doctrine, and thus active negligence, the trial court erred in allowing the issues of common-law and implied contractual indemnity to go to the jury. Commercial's motion for summary disposition pursuant to MCR 2.116(C)(10) should have been granted.").

Permitting a denial of summary disposition to be challenged even after a jury verdict appears to be consistent with Michigan's general rule that *all* interlocutory orders may be reviewed after a final judgment enters. See, e.g., *Shember v Univ of Mich Med Ctr*, 280 Mich App 309, 315; 760 NW2d 699 (2008) ("[A] party claiming an appeal of right from a final order is free to raise issues on appeal related to prior orders.").



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In federal court, the ability to appeal the denial of summary judgment after a jury verdict is much more limited.

One note of caution: it is important to challenge *both* the denial of summary disposition *and* the jury verdict. In *1031 Lapeer LLC v Rice*, 290 Mich App 225; 810 NW2d 293, 301 (2010), a jury found that the defendant engaged in fraud in connection with a property lease. On appeal, the defendant argued that the trial court should have granted it summary disposition on the plaintiffs' fraud claims, but did not challenge the jury verdict itself. The Court of Appeals held that the fraud claims "properly withstood summary disposition" because "questions of fact existed." *Id.* at 239. Then, in dicta, the Court went on to observe that because the defendant "did not appeal the jury verdict itself, any error by the trial court in denying defendant's motion for partial summary disposition on plaintiffs' fraud claims would be irrelevant because no matter what this Court's ruling on the summary disposition issue, the jury verdict would still stand." *Id.*

Federal Courts

In federal court, the ability to appeal the denial of summary judgment after a jury verdict is much more limited. In *Ortiz v Jordan*, 131 S Ct 884; 178 L Ed 2d 703 (2011), the Supreme Court, resolving a conflict among the circuits, held that a party generally cannot appeal an order denying a motion for summary judgment after a full trial on the merits. The *Ortiz* Court explained that such an order "retains its interlocutory character as simply a step along the route to a final

judgment," and that "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion." *Id.* at 889. See also *Gerics v Trevino*, 974 F3d 798, 803 (CA 6, 2020) ("If a case involves disputed material facts, the jury or judge properly resolves those questions on the evidence received at trial. So it makes sense that we could not after the trial review a summary judgment appeal—one 'based on the evidence presented prior to trial, not the evidence received at trial[.]'" (citations omitted).

In Michigan, there is authority that a denial of summary disposition can be appealed even after a case has been submitted to a jury and a judgment entered.

The only exception appears to be in situations where the request for summary judgment was based on a "purely legal" issue that does not require resolution of disputed facts. Such cases "typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law." *Gerics*, 974 F3d at 803, quoting *Ortiz*, 562 US at 190.

For example, in *Nolfi v Ohio Kentucky Oil Corp*, 675 F3d 538 (CA 6, 2012),

the jury rendered a verdict against the defendants for fraud in connection with the issuance of securities related to oil and gas interests. Although the Sixth Circuit recognized the general rule precluding summary judgment appeals after a jury trial, it agreed to consider whether the defendants should have been granted summary judgment based on a purely legal issue concerning whether the "plaintiffs' loss causation theory [was] actionable under § 10(b) [of the Securities Exchange Act of 1934, 15 USC 78j(b)]." *Id.* at 645. In reaching the issue, the *Nolfi* court found that the Supreme Court left open the possibility that cases "involv[ing] . . . [only] disputes about the substance and clarity of pre-existing law" may still be considered. *Id.* See also *Hurt v Commerce Energy, Inc*, 973 F3d 509, 516 (CA 6, 2020) ("Appeals of summary judgment denials after a full trial on the merits are generally precluded, though the Supreme Court has acknowledged a possible exception for 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'"), quoting *Ortiz*, 562 US at 188-190.

In short, although the Michigan Court of Appeals will consider an appeal of a denial of summary disposition after a jury trial, such review in the Sixth Circuit is far more limited, available only in cases in which the summary judgment denial involves a "purely legal" issue.