❖ 4

Now That the Trial Is Over: Preserving Issues on Appeal in the Federal Court System

Nancy Winkelman[1]
Danielle Morrison[2]

4-1 INTRODUCTION

This chapter provides a general overview of preserving issues on appeal in the federal appellate courts. By "on appeal," we mean to distinguish the subject of preserving issues "for appeal," which is dealt with in chapter 10 of this book. That chapter addresses waiver issues that arise at trial, that is, how to preserve issues "for appeal." In contrast, this chapter deals with waiver issues that arise *after* trial, starting with post-trial motions and continuing through the course of the appellate proceedings, that is, how to preserve issues "on appeal."

This chapter's focus is on civil practice; unique waiver issues may arise in criminal practice. Not addressed are waiver issues involving pro se litigants, which may involve special considerations. The reader is cautioned that because waiver law is both rule and case driven, this is an evolving area of the law and practitioners should do independent research when dealing with waiver issues. Rules may be amended, and cases decided under prior versions of the rules may no longer be good law.

4-2 POST-TRIAL WAIVER ISSUES

4-2.1 Raising the Issues

To preserve issues on appeal after trial, a party must raise the issues in post-trial motions. See *United States v. Agnes,* 753 F.2d 293, 297 (3d Cir. 1985), abrogated on other grounds by *Smith v. Borough of Wilkinsburg,* 147 F.3d 272 (3d Cir. 1998) ("Defendant preserved these claims for appeal by raising them at trial and in post-trial motions"). Of course, post-trial motions need not be filed when a final judgment has been entered prior to trial, e.g., by way of the grant of a motion to dismiss or for summary judgment. There are two general categories of post-trial motions: (1) renewed motions for judgment as a matter of law under Fed.R.Civ.P. 50(b), and (2) motions for a new trial under Fed.R.Civ.P. 59.

1. Nancy Winkelman is a partner at Schnader Harrison Segal & Lewis LLP in Philadelphia, Pennsylvania, where she has served as co-chair both of the firm's Litigation Services Department and its Appellate Practice Group. Ms. Winkelman is president of the American Academy of Appellate Lawyers and co-founder and president of the Third Circuit Bar Association.

2. Danielle Morrison is an associate at Schnader Harrison Segal & Lewis LLP in Philadelphia, Pennsylvania. She will complete a judicial clerkship with the Honorable Chief Judge Theodore A. McKee, United States Court of Appeals for the Third Circuit, in 2019–2020.

4-2.1.1 Renewed Motions for Judgment as a Matter of Law

To preserve an issue for renewed judgment as a matter of law (RJMOL) under Fed.R.Civ.P. 50(b), the moving party must have filed a timely motion for judgment as a matter of law (JMOL) under Fed.R.Civ.P. 50(a). The JMOL motion may be filed at any time before the case is submitted to the jury. See, e.g., *Lightning Lube, Inc. v. Witco Corp.,* 4 F.3d 1153, 1173 (3d Cir. 1993); *Fineman v. Armstrong World Industries, Inc.,* 980 F.2d 171, 183 (3d Cir. 1992); *Kutner Buick, Inc. v. American Motors Corp.,* 868 F.2d 614, 617 (3d Cir. 1989); compare *Yohannon v. Keene Corp.,* 924 F.2d 1255, 1262 (3d Cir. 1991) (failure to move for a JMOL "wholly waives the right to mount any post-trial attack on the sufficiency of the evidence").

Rule 50(a) requires the moving party to "specify [in its JMOL motion] the judgment sought and the law and facts that entitle the movant to the judgment." A JMOL motion must be *"sufficiently specific* to afford the party against whom the motion is directed with an opportunity to cure possible defects in proof which otherwise might make its case legally insufficient." *Lightning Lube,* 4 F.3d at 1173 (emphasis in original).

An RJMOL motion can be made only on grounds that were specifically advanced in the JMOL motion. Fed.R.Civ.P. 50 advisory committee's note; see, e.g., *Lightning Lube,* 4 F.3d at 1173; *Kutner Buick, Inc.,* 868 F.2d at 617.

An RJMOL motion must specify all grounds in support of the motion. Blanket statements, such as "there is no legally sufficient evidentiary basis for a reasonable jury to find for the Plaintiff," are insufficient to preserve issues for appeal. See, e.g., *Williams v. Runyon,* 130 F.3d 568, 572 (3d Cir. 1997).

If a party seeks a judgment in its favor based on *insufficiency of the evidence,* the party must file for judgment as a matter of law (under Rule 50) both before the case is submitted to the jury and after a verdict is returned. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.,* 546 U.S. 394, 401–07 (2006); see also *Greenleaf v. Garlock, Inc.,* 174 F.3d 352, 364 (3d Cir. 1999) ("It is well settled that a party who does not file a Rule 50 motion for judgment as a matter of law at the end of the evidence is not thereafter entitled to have judgment entered in its favor notwithstanding an adverse verdict on the ground that there is insufficient evidence to support the verdict").

However, Rule 50 motions are not required where a party raises a purely legal issue that was dispositively adjudged at some point prior to the end of litigation. *Frank C. Pollara Group, LLC v. Ocean View Inv. Holding, LLC,* 784 F.3d 177, 186–88 (3d Cir. 2015) ("if an earlier dispositive argument is not renewed through motions for judgment as a matter of law under Rule 50(a) and Rule 50(b), the litigant propounding the argument may not seek appellate review of a decision rejecting it, unless that argument presents a pure question of law that can be decided with reference only to undisputed facts. To the extent our decision in [*Pediatrix Screening, Inc. v. Telechem Int'l, Inc.,* 602 F.3d 541 (3d Cir. 2010)] suggests otherwise, it has been overruled by [*Ortiz v. Jordan,* 562 U.S. 180 (2011)]").

Nonmoving parties should be cognizant of a particular waiver pitfall. If a party fails to make a proper JMOL motion and then moves for RJMOL, the nonmoving party must object to the moving party's failure to make a proper JMOL motion. If the nonmoving party fails to do so and the district court nonetheless grants the RJMOL motion, the nonmoving party waives the argument on appeal that the moving party improperly moved for RJMOL. *Williams v. Runyon,* 130 F.3d 568, 572 (3d Cir. 1997).

4-2.1.2 Motions for a New Trial

The filing requirements of a motion under Fed.R.Civ.P. 59 are mandatory and jurisdictional.

As such, Rule 59(b)'s 10-day filing period may not be extended by either the district court or the court of appeals. *Bowles v. Russell,* 551 U.S. 205, 214 (2007); *Schneider v. Fried,* 320 F.3d 396, 402 (3d Cir. 2003).

A motion for a new trial must follow the requirements of Fed.R.Civ.P. 7(b). *Eastern Associated Coal Corp. v. Aetna Cas. & Sur. Co.,* 475 F.Supp. 586, 590 (W.D. Pa. 1979), aff'd in part, rev'd in part on other grounds, 632 F.2d 1068 (3d Cir. 1980).

Generally, a motion for a new trial must be in writing, but an oral motion may be made during a hearing or trial. Fed.R.Civ.P. 7(b)(1)(A).

Rule 7(b)(1)(B) requires that a motion for new trial "state with particularity the grounds for seeking the order." But, "[t]he degree of specificity with which reasons for a new trial must be stated is by no means clear." *Harkins v. Ford Motor Co.,* 437 F.2d 276, 277, n.1 (3d Cir. 1970). Courts have generally given a liberal interpretation to this requirement; "the particularity called for . . . does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on." Fed.R.Civ.P. 59, advisory committee note.

4-2.2 Inconsistent Verdicts

Another post-trial issue that counsel should be aware of is that of inconsistent verdicts. Whether the issue of inconsistency is waived on appeal depends on whether the verdict is returned under Fed.R.Civ.P. 49(a) (special verdict) or Fed.R.Civ.P. 49(b) (general verdict with interrogatories).

While it is good practice to object to inconsistencies in a special verdict rendered under Rule 49(a) before the jury is discharged, a party is not required to do so in order to preserve the inconsistencies for appellate review. *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.,* 734 F.2d 133, 145 (3d Cir. 1984).

On the other hand, when a general verdict is rendered, a party is required to object to the alleged inconsistencies between the answers to the interrogatories and the general verdict under Rule 49(b) before the jury is discharged. See *Simmons v. City of Philadelphia,* 947 F.2d 1042, 1056–57 (3d Cir. 1991).

The difference is based on the language in Rule 49(b), not contained in Rule 49(a), which states, "When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict." *Malley-Duff & Assocs., Inc.,* 734 F.2d at 145.

4-2.3 Check Relevant Local Rules

Counsel should take care to check all relevant local rules with regard to requirements for post-trial motions. For example, in the Eastern District of Pennsylvania, a party's post-trial motion may be dismissed if the party does not order a transcript of the trial within 14 days after filing any post-trial motion. E.D.Pa.R.Civ.P. 7.1(e).

Some courts have exercised their discretion under this rule to permit post-trial motions to be filed even when the party has failed to order a transcript, while others have disallowed the post-trial motion. Compare *Rapine v. Harrah's Atlantic City,* Civil Action No. 2:04-CV-00590-LDD at n.3 (E.D. Pa. March 21, 2006), aff'd, No. 06-2391 (3d Cir. October 15, 2007) (allowing plaintiffs' motion for a new trial to proceed even where counsel did not order a copy of the trial transcript),

with *Windle v. City of Philadelphia,* Civil Action No. 01 CV 2289 (E.D. Pa. March 27, 2002) (dismissing motion for a new trial for failure to timely order trial transcript). (Bear in mind that if the party's post-trial motion is dismissed under this rule, then the party has waived its appellate rights as well.)

The difference in the results may be explained by the fact that in *Rapine,* the plaintiff did order a copy of the transcript, albeit 10 days late, while the plaintiff in *Windle* let 90 days elapse from the filing of her motion for new trial without either ordering a trial transcript or filing a motion showing good cause to be excused from the requirement.

Counsel should be aware that even if the district court allows the post-trial motion to proceed without a trial transcript, it is "difficult, if not impossible, to properly evaluate a post-trial motion based on the sufficiency of evidence where the trial transcript [has] not been provided." *Graves v. Women's Christian Alliance,* Civil Action No. 01-CV-5077 (E.D. Pa. July 3, 2003).

4-3 NOTICE OF APPEAL

4-3.1 Requirements for Proper Filing

Compliance with the requirements of the rules of appellate procedure for proper filing of a notice of appeal is mandatory and jurisdictional; failure to comply will result in dismissal of the appeal (the ultimate waiver penalty). That said, some of the requirements of the rules are liberally construed so that "mere technicalities" do not stand in the way of considering a case on its merits. *Benn v. First Judicial Dist. of Pennsylvania,* 426 F.3d 233, 237 (3d Cir. 2005); *Lazy Oil Co. v. Witco Corp.,* 166 F.3d 581, 587 (3d Cir. 1999); see also *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 316 (1988); *EF Operating Corp. v. American Bldgs.,* 993 F.2d 1046, 1049, n.1 (3d Cir. 1993).

To qualify as a proper notice of appeal, the filing must meet the requirements of Fed.R.App.P. 3(c)(1). The notice of appeal must "(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice . . . ; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken." Fed.R.App.P. 3(c)(1); see also *United States v. Carelock,* 459 F.3d 437, 441 (3d Cir. 2006).

"An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." Fed.R.App.P. 3(a)(2).

Generally speaking, "an appeal from a final judgment that is identified in the notice will draw into question all nonfinal orders and rulings which produced the judgment." *Polonski v. Trump Taj Mahal Assocs.,* 137 F.3d 139, 144 (3d Cir. 1998); *Cortez v. Trans Union, LLC,* 617 F.3d 688, 695, n.2 (3d Cir. 2010); see also *Satterfield v. Johnson,* 434 F.3d 185, 190 (3d Cir. 2006); *Pacitti v. Macy's,* 193 F.3d 766, 776 (3d Cir. 1999). Courts go on to note that notices of appeal from a specified final judgment are construed to include unspecified orders where "(1) there is a connection between the specified and unspecified order, (2) the intention to appeal the unspecified order is apparent, and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues." See, e.g., *Pacitti,* 193 F.3d at 776–77; *Polonski,* 137 F.3d at 143–45; *Williams v. Guzzardi,* 875 F.2d 46, 49 (3d Cir. 1989).

Example: In *Pacitti v. Macy's,* 193 F.3d 766, 776–77 (3d Cir. 1999), the appellants' notice of appeal specified they were appealing only the district court's summary judgment order. The court of appeals held it also had jurisdiction to consider an in-

terlocutory discovery order because the discovery order was sufficiently related to the order granting summary judgment, the appellee had notice of the appellants' intent to appeal the discovery order because the appellants argued that issue in their opening appellate brief, and there was no prejudice to the appellee.

Example: In *Polonski v. Trump Taj Mahal Associates,* 137 F.3d 139, 143–45 (3d Cir. 1998), the district court entered three orders regarding the appellant's payment of attorney's fees. The first order determined that the appellant had breached his duty of fair representation and ordered the appellant to pay the attorney's fees as damages. The second order reversed the first order and held that the appellees were entitled to recover their attorney's fees. The third and final order determined the amount of fees to be awarded to the appellees. The appellant's notice of appeal specified only the third order. The court of appeals held it had jurisdiction to consider the second order because the second order was connected to the final order (the third order), as it established the legal basis for the award of fees, and the appellees had a full opportunity to brief the issue.

Fed.R.App.P. 4(a)(1)(A) requires the notice of appeal to be filed within 30 days after the judgment or order appealed from is entered. This is a mandatory jurisdictional prerequisite. *Ray Haluch Gravel Co. v. Central Pension Fund of Int'l Union of Operating Eng'rs,* 134 S. Ct. 773, 779 (2014); *Poole v. Family Court of New Castle County,* 368 F.3d 263, 264 (3d Cir. 2004).

Example: In *Poole v. Family Court of New Castle County,* 368 F.3d 263, 264 (3d Cir. 2004), the appellant filed his notice of appeal 14 days late due to a delay in his receipt of notice from the district court clerk's office regarding the entry of the order. The appellant had been transferred from one correctional institution to another before the order was entered, the order was sent to his original institution, and the appellant did not receive the order until 41 days after it was entered. Despite all this, the court of appeals held that the notice of appeal was not timely filed and so it lacked jurisdiction to review the appeal.

Under Fed.R.App.P. 4(a)(6), the district court may reopen the time to file an appeal for a period of 14 days if certain conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

Fed.R.App.P. 4(a)(6). A court will not consider reopening the time to file an appeal without the filing of a motion. *Poole,* 368 F.3d at 269.

The district court may not extend the time for filing a notice of appeal beyond that stated in the Federal Rules of Appellate Procedure. Even if an appellant relies on a district court's order that allows it additional time (beyond the Fed.R.App.P. 4(a)(6) 14-day period) within which to file its notice of appeal, the court of appeals does not have jurisdiction to hear the appeal. *Bowles v. Russell,* 551 U.S. 205 (2007).

In some circumstances (in addition to those specified in Fed.R.App.P. 4(a)(4)(B)(i)), "a premature notice of appeal, filed after disposition of some of the claims before a district court, but before entry of final judgment, will ripen upon the court's disposal of the remaining claims." *DL Resources, Inc. v. FirstEnergy Solutions Corp.,* 506 F.3d 209, 215 (3d Cir. 2007).

Example: In *DL Resources, Inc. v. FirstEnergy Solutions Corp.,* 506 F.3d 209, 214–16 (3d Cir. 2007), the appellant filed its notice of appeal after the district court determined the appellant's liability, but before the district court entered judgment regarding the amount of damages. (A finding of liability that does not also specify damages generally is not a final and appealable order.) The court of appeals held that the appellant's premature notice ripened when the district court entered judgment quantifying the damage award, and therefore, it had jurisdiction to hear the appeal.

An appeal will not be dismissed due to technicalities. Under Fed.R.App.P. 3(c)(4), "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice."

This 1993 amendment of Rule 3(c) was in response to the Supreme Court's decision in *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 316–17 (1988), which held that an appellant's failure to be named a party in the notice of appeal was a jurisdictional bar to appellate review as to that appellant. Now, as long as it is objectively clear that the unnamed party is intended to be included in the notice of appeal, the unnamed party has fulfilled the requirements of Rule 3(c)(1). Fed.R.App.P. 3, 1993 amendment, advisory committee note; see, e.g., *Air Line Pilots Ass'n v. Continental Airlines (In re Continental Airlines),* 125 F.3d 120, 129 (3d Cir. 1997).

If a notice does not fully conform to Rule 3, there is still appellate jurisdiction if the appellant has filed the "functional equivalent" of a proper notice. *Benn,* 426 F.3d at 237.

Example: In *Benn v. First Judicial District of Pennsylvania,* 426 F.3d 233, 237 (3d Cir. 2005), the district court entered two different orders. The appellant filed his timely notice of appeal, but failed to specify the correct order that was being appealed, and mistakenly attached the incorrect order. The court of appeals found this to constitute the "functional equivalent" of a proper notice of appeal, and thus that it had jurisdiction to review the appeal.

Failure to pay the appellate docketing fee under 3d Cir. L.A.R. 3.3(a) within 14 days after docketing can result in dismissal of the appeal. 3d Cir. L.A.R. Misc. 107.1(a); *Wisniewski v. Director, Office of Workers' Comp. Programs,* 929 F.2d 952, 955 (3d Cir. 1991); *Lee v. Superintendent Houtzdale SCI,* 798 F.3d 159, 164–65 (3d Cir. 2015).

Failure to pay the docketing fee also may result in the administrative closing of the case. If the case is administratively closed (as opposed to dismissed), it may be reopened. *Porter v. Department of the Treasury,* 564 F.3d 176, 178 (3d Cir. 2009).

4-4 DOCKETING STATEMENTS

There is no Third Circuit local appellate rule governing docketing statements. The current form correspondence that counsel receives from the Third Circuit's Clerk's Office after it files its notice of appeal requires the appellant to describe the nature of the suit and list the issues that will be raised on appeal. This is known as the Civil Appeals Information Statement and Concise Summary of the Case. This is primarily used for the purpose of screening for the Third Circuit Mediation Program. See 3d Cir. L.A.R. 33.2, 33.3.

The appellant should make every effort to include all of the issues that will be presented to the court of appeals in the docketing statement. However, the docketing statement does not limit the issues that may ultimately be raised on appeal. The appellant may raise additional issues not included on the docketing statement in its brief.

4-5 THE RECORD AND APPENDIX ON APPEAL

4-5.1 The Record

The record on appeal, as distinguished from the appendix, contains everything that was filed in the district court, that is, everything that appears on the district court's docket. *In re Capital Cities/ABC, Inc.'s Application,* 913 F.2d 89, 96 (3d Cir. 1990). The appellant is responsible for providing a complete record that contains everything needed by the court to resolve the issues on appeal. Fed.R.App.P. 10, 11(a); *Salazar v. "Atlantic Sun,"* 881 F.2d 73, 79 (3d Cir. 1989). The appellee must also ensure that the record contains all documents and exhibits necessary to support the decisions challenged on appeal and the appellee's arguments. See chapter 10, page 125, of this book. The court of appeals may not consider information that is not part of the record in deciding an appeal. See, e.g., *New Jersey Tpk. Auth. v. PPG Industries, Inc.,* 197 F.3d 96, 111 (3d Cir. 1999); *Federal Ins. Co. v. Richard I. Rubin & Co.,* 12 F.3d 1270, 1284 (3d Cir. 1993); *United States v. Donsky,* 825 F.2d 746, 749 (3d Cir. 1987); *United States ex rel. Bradshaw v. Alldredge,* 432 F.2d 1248, 1250 (3d Cir. 1970).

If the appellant fails to order a transcript of the parts of proceedings that are necessary to comply with Fed.R.App.P. 10(b), Rule 3(a)(2) permits the court of appeals to dismiss the appeal. See *Horner Equip. Int'l, Inc. v. Seascape Pool Ctr., Inc.,* 884 F.2d 89, 92–93 (3d Cir. 1989)); *Lehman Bros. Holdings, Inc. v. Gateway Funding Diversified Mortg. Servs., L.P.,* 785 F.3d 96, 101 (3d Cir. 2015) (dismissing one of an appellant's arguments for failing to provide a relevant transcript); section 4-2.3, above.

Example: In *Lehman Bros. Holdings, Inc. v. Gateway Funding Diversified Mortgage Services, L.P.,* 785 F.3d 96, 101 (3d Cir. 2015), the appellant appealed the district court's decision that it had abandoned a contractual defense during oral argument. There was a transcript of that argument, but the appellant failed to order and file a copy of the transcript with the court of appeals. The court held that the appellant had violated Fed.R.App.P. 10(b) and thus the appellant's appeal with respect to that claim was "forfeited." The court reasoned that the appellant's violation "at best shows a remarkable lack of diligence and at worst indicates an intent to deceive this Court."

Although the courts disfavor dismissing an appeal for failing to comply with a procedural rule, the appellant's failure to comply with 3d Cir. L.A.R. 11.1, which requires the appellant to deposit with the court reporter the estimated cost of the transcript, will be grounds for dismissal of the appeal. 3d Cir. L.A.R. Misc. 107.1(b); see *Miles v. Aramark Corr'l Serv.,* 236 Fed. Appx. 746, 750 (3d Cir. 2007).

The appellant must be certain that all documents necessary to the appeal are contained in the record. The court of appeals may consider material that is in the record even if it is not in the appendix. See *Gilmore v. Macy's Retail Holdings, Inc.,* 385 Fed. Appx. 233, 240 (3d Cir. 2010). However, if the material is not in the record, while the court in rare cases may still attempt to evaluate the appeal, the likely result will be a loss for the appellant, for the simple fact that it has not provided the court the tools necessary to decide its case. See, e.g., *Time Share Vacation Club v. Atlantic Resorts, Ltd.,* 735 F.2d 61, 64–66 (3d Cir. 1984).

4-5.2 The Appendix

The appendix is a subset of the record, consisting of (1) the relevant docket entries in the proceeding below, (2) the relevant portions of the pleadings, charge, findings, or opinion, (3) the judgment, order, or decision in question, and (4) other parts of the record to which the parties wish to direct the court's attention. Fed.R.App.P. 30(a)(1).

It is the appellant's duty to prepare and file the appendix. The parties cross-designate those portions of the record that they desire to include in the appendix. See Fed.R.App.P. 30(b)(1). When the appellant serves its designation on the appellee, it must also provide a statement of the issues it intends to present for review. See id. Our research has not revealed a case where an appellant's failure to include an issue in its statement under Rule 30(b)(1) resulted in waiver.

If an appellant fails to comply with the Federal Rules of Appellate Procedure or the Third Circuit local rules with respect to the timely filing of a brief and appendix, the clerk is authorized, after the seventh day following the due date, to dismiss the appeal for want of timely prosecution. 3d Cir. L.A.R. Misc. 107.2(b).

The clerk may accept for filing a motion, brief, or appendix that does not comply with the Federal Rules of Appellate Procedure or the Third Circuit local rules, and will notify the party of the need to promptly correct the deficiency. If the party fails or declines to correct the deficiency, the court may, in its discretion, impose sanctions it deems appropriate, including the dismissal of the appeal or striking of the document. 3d Cir. L.A.R. Misc. 107.3; see, e.g., *United States v. Ntreh,* 546 Fed. Appx. 105, 106 (3d Cir. 2014) ("We note with displeasure that Ntreh … has failed to include the relevant order in the appendix, in violation of [Appellate Rule] 30(a)(1)(C). That failure appears to warrant dismissal of the appeal").

4-5.3 Omissions from or Misstatements in the Record

Under Fed.R.App.P. 10(e), if anything material is omitted from or misstated in the record by error or accident, the parties by stipulation, the district court, or the court of appeals, on proper suggestion or of its own initiative, may correct the omission or misstatement. *In re Capital Cities/ABC, Inc.'s Application,* 913 F.2d 89, 96–97 (3d Cir. 1990); see also *Goins v. Echostar Communications Corp.,* 148 Fed. Appx. 96, 98 (3d Cir. 2005); compare *Brody v. Spang,* 957 F.2d 1108, 1114, n.4 (3d Cir. 1992) (noting that jurisdictional defects cannot be cured by a stipulation). Correction of the record may occur at any time, but it is recommended that a party move to correct or modify the record as soon as possible. Generally, the court of appeals may not add to the record on appeal matters that the district court did not consider. *In re Application of Adan,* 437 F.3d 381, 389, n.3 (3d Cir. 2006); *Acumed LLC v. Advanced Surgical Servs., Inc.,* 561 F.3d 199, 226 (3d Cir. 2009).

4-6 BRIEFS

Fed.R.App.P. 28 and 3d Cir. L.A.R. 28.1–28.2 govern appellate briefs. The most basic point is that, to avoid the possibility of waiving an issue on appeal, parties must comply with all the requirements set forth in the rules. If a party fails to comply with the requirements set forth in the Federal Rules of Appellate Procedure and the local appellate rules on a particular issue, the issue need not be addressed by the court of appeals. *United States v. Pelullo,* 399 F.3d 197, 222 (3d Cir. 2005); *Kost v. Kozakiewicz,* 1 F.3d 176, 182 (3d Cir. 1993).

"[A]bsent extraordinary circumstances, briefs must contain statements of all issues presented for appeal, together with supporting arguments and citations." *Simmons v. City of Philadelphia,* 947 F.2d 1042, 1065 (3d Cir. 1991). Moreover, the appellant must designate in the statement of issues where in the proceedings each issue was preserved for appeal. 3d Cir. L.A.R. 28.1(a)(1).

The issue may be considered waived if it is not clearly articulated. Fed.R.App.P. 28(a)(5).

When an issue is either not set forth in the statement of issues presented or not pursued in the argument section of the brief, the issue is waived. *Cruz-Bautista v. Attorney Gen.,* 607 Fed. Appx. 211 (3d Cir. 2015); *Bowers v. National Collegiate Athletic Ass'n,* 475 F.3d 524, 535, n.11 (3d Cir. 2007); *Mitchell v. Cellone,* 389 F.3d 86, 92 (3d Cir. 2004); *Nagle v. Alspach,* 8 F.3d 141, 143 (3d Cir. 1993).

To ensure an issue is preserved on appeal, it is imperative that the issue be presented in the argument section of the brief, supported by citations to proper authority; otherwise, the court may deem the issue waived. Fed.R.App.P. 28(a)(9)(A); 3d Cir. L.A.R. 28.3; *Interface Group-Nevada, Inc. v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.),* 145 F.3d 124, 133 (3d Cir. 1998); see *Jackson v. Phelps,* 575 Fed. Appx. 79, 82, n.3 (3d Cir. 2014).

An argument consisting of no more than a conclusory assertion will be deemed waived. *Pennsylvania Dep't of Pub. Welfare v. U.S. Department of Health & Human Servs.,* 101 F.3d 939, 945 (3d Cir. 1996); *Simmons v. City of Philadelphia,* 947 F.2d 1042, 1066 (3d Cir. 1991); *Interface Group-Nevada, Inc. v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.),* 145 F.3d 124, 133 (3d Cir. 1998).

Arguments mentioned in passing but not squarely argued will also be deemed waived. *United States v. Hoffecker,* 530 F.3d 137, 162 (3d Cir. 2008) ("Judges are not like pigs, hunting for truffles buried in briefs") (quoting *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991)). *Pennsylvania Dep't of Pub. Welfare v. U.S. Department of Health & Human Servs.,* 101 F.3d 939, 944–45 (3d Cir. 1996). Where important and complex issues are presented, a more detailed exposition of argument is required in order to preserve the issue. *Frank v. Colt Industries, Inc.,* 910 F.2d 90, 99–100 (3d Cir. 1990).

Example: In *Pennsylvania Department of Public Welfare v. U.S. Department of Health & Human Services,* 101 F.3d 939, 944–45 (3d Cir. 1996), the appellant appealed the district court's decision that the statute of limitations was not tolled. The appellant's argument was that its claim was not ripe, and therefore, the statute of limitations period was tolled and had not expired before it filed the lawsuit. The appellant's opening brief regarding the statute of limitations issue consisted only of a conclusory statement without any substantial argument to support its position. The court of appeals held that the appellant's statute of limitations argument was waived.

Example: *Frank v. Colt Industries, Inc.,* 910 F.2d 90, 99–100 (3d Cir. 1990), involved multiple appeals regarding severance plans, continuance agreements, and ERISA. The appellants attempted to assert a new argument in the second appeal that raised issues of first impression regarding the ability of an employer to reserve complete discretion over employee eligibility for benefits under ERISA. The court of appeals noted that while it was conceivable that the appellants' previous arguments logically incorporated their new argument, the appellants had waived that argument; "[p]articularly where important and complex issues of law are presented, a far more detailed exposition of the argument is required to preserve an issue."

Example: In *Jackson v. University of Pittsburgh,* 826 F.2d 230, 236–37 (3d Cir. 1987), the district court granted summary judgment to the appellees on the appellant's federal and pendent state employment discrimination claims. The appellant mentioned the state claims only on the final page of his brief, asking the court to remand "for trial on the pendent state claims." The court of appeals held that the appellant had waived this issue on appeal.

Finally, an issue mentioned only in a footnote generally is deemed to be waived. *United States v. Centeno,* 793 F.3d 378, 388, n.9 (3d Cir. 2015); *United States v. Hoffecker,* 530 F.3d 137, 162 (3d Cir. 2008); *John Wyeth & Brother Ltd. v. Cigna Int'l Corp.,* 119 F.3d 1070, 1076, n.6 (3d Cir. 1997); *Kost v. Kozakiewicz,* 1 F.3d 176, 182 (3d Cir. 1993). That said, the court of appeals has on occasion reached an argument made only in a footnote. For example, when the party articulates in a footnote its argument describing how the district court erred, see, e.g., *Black Box Corp. v. Markham,* 127 Fed. Appx. 22, 23 (3d Cir. 2005), or when a party cites and disagrees with a precedential opinion, see, e.g., *NLRB v. Fedex Freight, Inc.,* No 15-2585 (3d Cir. August 9, 2016). But take heed of Judge Jordan's concurrence in *Fedex Freight, Inc.,* which contended that the court's consideration of an argument advanced only in a footnote impermissibly lowered the waiver standard.

The appellant may not raise issues for the first time in its reply brief. Issues not raised and discussed in the appellant's opening brief normally will not be considered by the court. *In re Fosamax (Alendronate Sodium) Products Liab. Litig. (No. II),* 751 F.3d 150 (3d Cir. 2014); *Pell v. E.I. du Pont de Nemours & Co.,* 539 F.3d 292, 309 (3d Cir. 2008); *United States v. Pelullo,* 399 F.3d 197, 222 (3d Cir. 2005); *Frank v. Colt Industries, Inc.,* 910 F.2d 90, 100 (3d Cir. 1990); *Wisniewski v. Johns-Manville Corp.,* 812 F.2d 81, 88 (3d Cir. 1987); *Lunderstadt v. Colafella,* 885 F.2d 66, 78 (3d Cir. 1989).

Except in the case of new authority, issues not raised in the first appeal generally will not be considered on remand, rehearing, or in a subsequent appeal. *Skretvedt v. E.I. du Pont de Nemours & Co.,* 372 F.3d 193, 202–03 (3d Cir. 2004); *Royce v. Hahn,* 151 F.3d 116, 126 (3d Cir. 1998); *Wisniewski v. Johns-Manville Corp.,* 812 F.2d 81, 88 (3d Cir. 1987).

Generally, an appellant or appellee may adopt by reference part of the brief of a co-appellant or co-appellee. Fed.R.App.P. 28(i); *United States v. Mussare,* 405 F.3d 161, 164, n.1 (3d Cir. 2005); *Southwestern Pennsylvania Growth Alliance v. Browner,* 121 F.3d 106, 122 (3d Cir. 1997). Adoption is not suitable where the argument relies on facts specific to the co-appellant's or co-appellee's own case. *United States v. Dorival,* 378 Fed. Appx. 248, 251, n.4 (3d Cir. 2010).

An intervenor generally may argue only the issues raised by the parties in their principal briefs and may not enlarge those issues. However, a principal party may adopt by reference an argument that an intervenor fully briefs. In that situation, the intervenor may argue the question just as if the principal party had fully briefed the issue itself. *Southwestern Pennsylvania Growth Alliance v. Browner,* 121 F.3d 106, 122 (3d Cir. 1997).

4-7 INTERLOCUTORY ORDERS

An aggrieved party is not required to appeal an interlocutory order. Failure to seek appellate review of an interlocutory order under 28 U.S.C. § 1292(a) or (b), mandamus, or the collateral order rule, does not waive the right to appeal after final judgment. *Ernst v. Child & Youth Servs.,* 108 F.3d 486, 492 (3d Cir. 1997); *EEOC v. Corry Jamestown Corp.,* 719 F.2d 1219, 1225 (3d Cir. 1983); 6A *Federal Procedure,* Lawyers Ed., § 12:465 (Thomson West 2005). Interlocutory orders and decrees from which no appeal has been taken are merged in the final decree. *Camesi v. University of Pittsburgh Med. Ctr.,* 729 F.3d 239, 244–47 (3d Cir. 2013); *Pineda v. Ford Motor Co.,* 520 F.3d 237, 243 (3d Cir. 2008). Although other circuits have recognized a bad-faith exception to this rule, the Third Circuit has not adopted such an exception. *Chao v. Roy's Constr., Inc.,* 517 F.3d 180, 186–88 (3d Cir. 2008); *In re Westinghouse Secs. Litig.,* 90 F.3d 696, 706 (3d Cir. 1996).

A practical note of caution is that if an issue becomes moot prior to final judgment, there will be no appeal. David G. Knibb, *Federal Court of Appeals Manual* 17 (Thomson West 5th ed. 2007).

Example: If an injunction expires prior to the time of the district court's final decision, the district court's initial grant of the injunction is moot, and thus, is unappealable. *Integrated Cash Mgmt. Servs. v. Digital Transactions, Inc.,* 920 F.2d 171, 174 (2d Cir. 1990).

Fed.R.Civ.P. 54(b) permits an immediate appeal in the following situation: "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."

The time for appeal begins to run upon the entry of a final judgment of the Rule 54(b) order. Therefore, a Rule 54(b) final certification order must be immediately appealed or the issue will be waived. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liab. Litig.*, 401 F.3d 143, 161–62 (3d Cir. 2005); *Johnson v. Orr,* 897 F.2d 128, 130–32 (3d Cir. 1990).

Example: In *Johnson v. Orr,* 897 F.2d 128, 130 (3d Cir. 1990), the plaintiffs filed a complaint containing three claims. The court dismissed the first claim and granted summary judgment for the plaintiffs on the second claim. The third claim remained viable in the district court. The district court then entered final judgment under Fed.R.Civ.P. 54(b) on the second claim, and entered an order awarding certain fees and costs to the plaintiffs. Approximately one year later, the parties settled the third claim, and the plaintiffs then filed a notice of appeal from the district court's

fee order regarding the second claim. The court of appeals held that the plaintiffs' appeal was untimely because the fee order on that second claim was a final judgment, which triggered the time for appeal.

4-8 UNIQUE WAIVER ISSUES INVOLVING APPELLEES

4-8.1 When an Appellee Must File a Cross-Appeal

An appellee must file a cross-appeal when it seeks to attack a district court decision with a "view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *Massachusetts Mutual Life Ins. Co. v. Ludwig,* 426 U.S. 479, 480 (1976); *Nationwide Mutual Ins. Co. v. Cosenza,* 258 F.3d 197, 205 (3d Cir. 2001); *Bacon v. Sullivan,* 969 F.2d 1517, 1522 (3d Cir. 1992). In other words, where the appellee seeks a new or different form of relief than it previously obtained in the district court, a cross-appeal is necessary.

Although this is not uniformly the case in every circuit, in the Third Circuit, the requirement of a notice of cross-appeal is a rule of jurisdiction, not a rule of practice. *EF Operating Corp. v. American Bldgs.,* 993 F.2d 1046, 1048–49 (3d Cir. 1993). Therefore, if an appellee seeks to enlarge its own rights, lessen the rights of the appellant, or present an alternative argument that would result in a different form of relief, the appellee must comply with Fed.R.App.P. 4(a)(3) and file its cross-appeal "within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by . . . Rule 4(a), whichever period ends later."

4-8.2 When an Appellee Need Not File a Cross-Appeal

An appellee does not need to file a cross-appeal when it is not seeking a different form of relief, but instead is raising alternative arguments for affirmance of the decision being appealed. *Smith v. Johnson & Johnson,* 593 F.3d 280, 283, n.2 (3d Cir. 2010); *United States v. Atiyeh,* 402 F.3d 354, 372, n.18 (3d Cir. 2005). An appellee may, without taking a cross-appeal, "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Phillips v. Pennsylvania Higher Educ. Assistance Agency,* 657 F.2d 554, 567 (3d Cir. 1981) (quoting *Massachusetts Mutual Life Ins. Co. v. Ludwig,* 426 U.S. 479, 481 (1976)); *Dandridge v. Williams,* 397 U.S. 471, 475, n.6 (1970).

Example: In *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township,* 331 F.3d 386, 394–95 (3d Cir. 2003), the court of appeals held that the appellee did not need to file a cross-appeal regarding a discrimination claim that had been rejected by the district court because the discrimination claim was an alternative theory to affirm the district court's decision regarding the validity of a zoning ordinance.

If the court of appeals reverses and remands the case to the district court, an appellee generally does not waive issues on remand by not having raised them as alternative grounds for affirmance on appeal. See, e.g., *Eichorn v. AT&T Corp.,* 484 F.3d 644, 657–58 (3d Cir. 2007). "[T]he failure of an *appellee* to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver. The urging of alternative grounds for affirmance is a privilege rather than a duty." *Transamerica Ins. Co. v. South,* 125 F.3d 392, 399 (7th Cir. 1997).

Only a party aggrieved by a final judgment may appeal. *AT&T Communications of New Jersey, Inc. v. Verizon New Jersey, Inc.,* 270 F.3d 162, 171 (3d Cir. 2001); *Rhoads v. Ford Motor Co.,* 514 F.2d 931, 934 (3d Cir. 1975). An appellee who received all of the relief requested, who disagrees with a district court ruling that had no bearing on the outcome of the case, or who disagrees with the district court's rationale underlying an order in that party's favor, is not an aggrieved party.

The rationale for the rule that an appellee does not need to cross-appeal all possible alternative grounds for affirmance in order to prevent waiver of those issues is to prevent needlessly increasing the scope and complexity of initial appeals. *Eichorn v. AT&T Corp.,* 484 F.3d 644, 657–58 (3d Cir. 2007); *EEOC v. Kronos, Inc.,* 694 F.3d 351, 370 (3d Cir. 2012). Thus, the "[Circuit] Court may affirm the District Court on any basis which finds support in the record and/or that as long as the issue raised is merely an alternative argument relative to the judgment below, a cross-appeal on that issue is unnecessary." *Nationwide Mutual Ins. Co. v. Cosenza,* 258 F.3d 197, 205 (3d Cir. 2001).

4-9 ORAL ARGUMENT

Oral argument is used as a supplement to the written brief, and therefore does not need to (and should not) cover every issue the parties have discussed in their briefs. Accordingly, failure to discuss at oral argument an issue that is argued in the brief does not waive the issue on appeal.

However, if a party concedes an issue during oral argument, that issue is waived on appeal. See *Hammond v. Commonwealth Mortg. Corp. of America (In re Hammond),* 27 F.3d 52, 53, n.1 (3d Cir. 1994).

4-10 PRESERVING ISSUES FOR EN BANC OR SUPREME COURT REVIEW

Even if an issue is foreclosed by Third Circuit precedent, in order to preserve the issue for en banc or Supreme Court review, the party should raise the issue in its appellate brief and notify the court of appeals that it is raising the issue for the purpose of preservation even though the party is aware that the panel is bound by its prior precedent to rule against it on the issue. *United States v. Thornton,* 327 F.3d 268, 273 (3d Cir. 2003).

Although a party preserving an issue for en banc or Supreme Court review is aware that the court of appeals is bound to reject its argument, the argument for the reversal of existing law that is made to preserve the issue for review is not sanctionable. *Gilmore v. Shearson/American Express, Inc.,* 811 F.2d 108, 111–12 (2d Cir. 1987).