

All Things Reconsidered: Getting It Right the First Time

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Litigation often offers multiple opportunities to inject an argument or an issue into a case. Pleadings, motions, and responses to motions allow parties to frame the issues. Unfortunately, there are times when an adverse ruling provides the spark that prompts a party to raise what might have been the winning argument, had it been raised earlier. Whether an argument raised for the first time on a motion for reconsideration is considered timely and — our focus here — preserved for appeal depends very much on case law, which may limit a party's ability to raise new issues on a motion for reconsideration. Consider the Sixth Circuit's recent decision in *Johnson v. Ford Motor Co.* The plaintiff in *Johnson* sued her former employer for hostile work conditions. When the employer moved for summary judgment on that claim, the plaintiff did not argue that the harassment was severe or pervasive until the trial court granted the defendant's motion and the plaintiff then moved for reconsideration. The employer's response addressed the argument on its merits, and the trial court denied the reconsideration motion. On appeal, the plaintiff argued that she showed the harassment was sufficiently severe or pervasive, and the defendant challenged that argument as forfeited. The Sixth Circuit explained that arguments raised for the first time in a motion for reconsideration are untimely and forfeited. That general rule, however, is not jurisdictional, and the Sixth Circuit looks to various factors to determine whether to deviate from the general rule in exceptional cases or when the rule would produce a miscarriage of justice. Those factors include: (1) whether the newly raised issue is a question of law or fact; (2) whether the proper resolution is clear and beyond doubt; (3) whether failing to address the issue on appeal will result in a miscarriage of justice or a denial of substantial justice; and (4) the parties' right to have the issues considered by both the district court and the appellate court. Applying these factors, the Sixth Circuit held that any forfeiture was excused under the circumstances of the case. The court found the sufficiency of the evidence question to be one of law, that the issue had been fully briefed, and that failing to address the issue would result in a miscarriage of justice.

Tips

- Always attempt to be as thorough as possible when arguing in the first instance, to avoid raising something for the first time in a motion for reconsideration.

- If you must raise an issue for the first time on reconsideration and your jurisdiction generally considers such arguments waived on appeal, know your jurisdiction's rules on preservation of error or forfeiture of arguments.
- In the Sixth Circuit, attempt to frame potentially forfeited arguments as questions of law, with a clear answer, and attempt to show that any failure to address the argument would result in a miscarriage of justice.

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