always Appealing/Supremes to CoA: Don’t Make Stuff Up

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Bar Bulletin Blog: General

Pity the appellate judge. The desire to do justice must give way to the incremental pace of our common law tradition, with its reliance on precedent, convention and procedural rules that limit the breadth and scope of appellate decisions. It calls to mind Gillian Welch’s soulful refrain, “You wanna do right, but not right now.”1

We are taught early on in law school that appellate courts are courts of review, confining their decisions to both the record and the arguments presented by the litigants in the trial court. The Washington Rules of Appellate Procedure reflect the limits of the appellate process and the scope of appellate review: An appellant must assign error to specific rulings of the trial court, RAP 10.3 (a)(4); the appellate court’s review is limited to the record made by the parties below; the court generally refuses to review a claim of error that was not raised below, RAP 2.5(a); and is encouraged to decide a case solely on the basis of the issues raised by the parties in their briefs. RAP 12.1.

On the other hand, appellate judges strive “to do substantial justice rather than decide cases upon technicalities.”2 The appellate rules begin with an overriding call to do justice: “These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). Appellate courts routinely overlook a party’s noncompliance with procedural rules, including the failure to assign error,3 and may forgive a party’s failure to raise an issue in the

trial court if it entails the failure to “establish facts upon which relief can be granted,” or is a “manifest error affecting a constitutional right.”4

The Washington Supreme Court’s recent decision in Dalton M LLC v. North Cascade Trustee Service, Inc.,5 provides a useful case study in the limits of an appellate court’s power to do the right thing. The Court reversed Division Three’s award of attorney fees to a property owner against a bank that wrongfully foreclosed on property owned free and clear of any lien or security interest of the bank. The Supreme Court held that no contract, statute or theory of equity supported the award of fees, and the Court of Appeals exceeded its authority in awarding attorney fees based on a theory of bad faith pre-litigation conduct — a theory the parties never raised below.

In Dalton M, the original owner owned two contiguous parcels, subject to a deed of trust. Only one of the two parcels was improved. The owner let the taxes go delinquent on the unimproved parcel and Spokane County foreclosed, eliminating the lender’s security interest. The property was purchased by an individual at the tax sale, who quit claimed it to his limited liability company, Dalton M.

In the meantime, though it retained an interest only in the improved parcel, the lender assigned its security interest in both parcels to U.S. Bank. When the original owner defaulted on his home loan, U.S. Bank’s trustee foreclosed on both parcels, serving the original owner but not Dalton M, whose interest was disclosed in the title report.

After Dalton M.’s efforts to resolve the title issue with U.S. Bank and the trustee failed, Dalton M sued U.S Bank to quiet title and for slander of title. The trial court ruled in favor of Dalton M and awarded attorney fees on the slander of title claim.

The Court of Appeals reversed the judgment on the ground that U.S. Bank’s act of recording its trustee’s deed was not an act or publication “with reference to some pending sale or purchase of property,” as required to establish a claim for slander of title. Sympathizing with Dalton M’s plight, however, the Court of Appeals nonetheless affirmed the trial court’s attorney fee award, on the ground that U.S. Bank’s prelitigation bad faith conduct — its “refusal to honor a valid claim, thereby forcing the plaintiff to file suit” — provided an independent basis for fees.6

The Supreme Court reversed the fee award, holding the Court of Appeals was powerless to award fees on an "entirely new theory that no party had pleaded or argued to the trial court and that the trial court had never considered" and that "depended on facts that the parties never had a chance to develop at trial."7 The Court emphasized that appellate courts "follow the rule of party presentation," addressing only those claims and issues necessary to properly resolving the case as raised on appeal by interested parties."8

The Court distinguished between its ability under RAP 12.1(b) to decide a legal issue unaddressed by the parties after giving the parties the opportunity to address the issue in supplemental briefing, and "rais[ing], adjudicate[ing], and decid[ing] in Dalton M's favor an entirely new theory of recovery that no party had raised below," particularly where it "essentially conducted its own fact-finding by 'implying' factual findings that the trial court did not make."9

As to the new theory espoused by the Court of Appeals, the Court refused to recognize "bad faith prelitigation conduct" as an equitable basis for an award of attorney fees. While there is a "bad faith" exception to the American rule (requiring each party to bear its own fees), it provides a remedy or misconduct in the course of litigation, authorizing fee-shifting as a sanction for abusive litigation practices.10

Dalton M illustrates the challenges of "doing right" within the confines of the appellate process. The Court of Appeals clearly sympathized with Dalton M's plight and sought to redress the inequity of allowing a well-heeled financial institution to run roughshod over a small property owner. But in its haste to provide a remedy, the Court of Appeals went too far, not just adopting a theory that our Supreme Court has never embraced, but doing so sua sponte, and then making its own findings in the absence of an evidentiary record in the trial court.

How does the appellate court do the right thing in such circumstances? That the Court of Appeals is bound by Supreme Court precedent,11 doesn't render its judges powerless to change the law. Court of Appeals judges, in concurring or dissenting decisions, can urge the Supreme Court to change or clarify the law.12 Judges taking the effort to write separately are occasionally rewarded when the Supreme Court later adopts their reasoning.13 More often than not,

though, changing the law takes years, reflecting the incremental and laborious pace of the appellate process.14

Perhaps that is how it should be. At least, that's what the Dalton M court thought: — appellate courts can't just make stuff up. Our nation's most powerful judicial officers would do well to heed that lesson and take a step back before stretching prudential considerations of standing,15 the rule of "party presentation"16 or, for that matter, history and precedent.17

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1 Gillian Howard Welch, David Todd Rawlings, "Look at Miss Ohio," Soul Journey, track 1, Wixen Music Publishing, Universal Music Publishing Group (2003).

2 Coleman v. Altman, 7 Wn. App. 80, 85, 497 P.2d 1338 (1972).

3 See State v. Olson, 126 Wn.2d 315, 893P.2d 629 (1995).

4 RAP 2.5(a).

5 No. 101149-1, 2023 WL 5615756 (2023).

6 Id. at para. 3

7 Slip Op. 2-3.

8 Slip Op. 16, quoting Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd., 177 Wn.2d 136, 145, 298 P.3d 704 (2013).

9 Slip. Op. 19

10 Slip Op. 27-30

11 Matter of Arnold, 189 Wn. 2d 1023, 408 P.3d 1092 (2017); Godefroy v. Reilly, 146 Wash. 257, 259, 262 P. 639 (1928).

12 E.g., State v. Stewart, 12 Wn. App. 2d 236, 243-53, 457 P.3d 12123 (2020) (Dwyer, J., concurring) (test for sufficiency of the evidence in criminal bench trials established by Washington Supreme Court conflicts with U.S. Supreme Court precedent); Daniels v. State Farm Mutual Automobile Insurance Co., 4 Wn. App. 2d 268, 278-301, 421 P.3d 996 (2018) (Becker, J., dissenting) (insurer should

have to reimburse insured for deductible before retaining any portion of subrogation recovery), rev'd, 193 Wn.2d 563, 444 P.3d 582 (2019).

13 Daniels, 193 Wn.2d at 572-74 (agreeing with Judge Becker's dissent, and overruling Averill v. Farmers Ins. Co. of Wash., 155 Wn. App. 106, 229 P.3d 830 (2010).

14 See State v. Davis, 175 Wn.2d 287, 388-400, 290 P.3d 43 (2012) (Wiggins, J. dissenting from sentence of death based on its disproportionate application to African-American defendants) and State v. Gregory, 192 WNn.2d 1, 18-19, 427 P.3d 621 (2019) ("It is now apparent that Washington's death penalty is administered in an arbitrary and racially biased manner.")

15 Biden v. Nebraska, __ U.S. __, 143 S. Ct. 2355, 216 L. Ed. 2d 1063 (2023) (Missouri has standing to challenge Secretary of Education's waiver of federal student loan debt); Creative LLC v. Elenis, __ U.S. __, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023) (website designer concerned that Colorado Anti-Discrimination Act would force her to design sites for same-sex weddings has standing to bring pre-enforcement action for injunction).

16 Compare Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. __, 143 S. Ct. 2141, 2217 n.9, 216 L. Ed. 2d 857 (2023) (Gorscuh, J. concurring) with Id. at 2239, n.21 (Sotomayor, J., dissenting)

17 See Dobbs v. Jackson Women's Health Org., __ U.S. __, 142 S. Ct. 1228 (2022).