always Appealing: Dot Your I's and Cross Your Appeals

Posted on: Nov 1, 2023
Bar Bulletin Blog: General

One of the most important appellate skills is narrowing down the universe of available arguments. For appellants, this is usually straightforward — you choose the trial court order(s) you want to challenge, and, save a few rare exceptions, you are limited to the issues the trial court actually considered.

Respondents, on the other hand, enjoy a distinct advantage in navigating this universe. While appellate courts are reluctant to reverse based on a claimed error not raised in the trial court, they can still affirm on any alternative basis the record supports — even if the trial court did not consider it.1 The rule recognizes that if the trial court arrived at the correct result, that result should stand even if the trial court relied on questionable reasoning to get there.2 For example, in one case, the trial court dismissed an insurance lawsuit as untimely under the insurance policies at issue. The Court of Appeals held that the lawsuit was timely, but nevertheless affirmed dismissal because the relevant policies did not cover the claimed loss.3

While the rule provides flexibility for respondents exploring alternative arguments, sometimes respondents wander too far by blurring the distinction between a request to affirm the trial court's decision and a request to modify it. Under RAP 2.4(a), courts "will grant a respondent affirmative relief by modifying" a trial court decision "only" if they file a timely notice of appeal or notice of discretionary review.4

In most cases, it is easy to distinguish between an argument to affirm on alternative grounds and "affirmative relief." A respondent seeks "affirmative relief" by requesting "anything other than an affirmation of the lower court's ruling."5 In

other words, an argument for affirmative relief requires “a change in the final result.”6

Consider Singletary v. Manor Healthcare Corp., an industrial insurance appeal.7 The Industrial Insurance Board dismissed the appellant’s claim for worker’s compensation, and, on administrative review, the Superior Court denied the appellant’s motion for summary judgment but remanded the case to the Board to allow for additional evidence on a limited issue.

The respondent argued the Court of Appeals should affirm the Board’s order dismissing the appellant’s claim altogether. Despite applying de novo review (and implicitly agreeing with the respondent’s substantive argument), the court affirmed the trial court’s order remanding the case to the Board, explaining the respondent’s request sought affirmative relief — converting the trial court’s remand order to a dismissal order — and the respondent never cross-appealed.8

In other cases, the “distinction between urging an additional ground for affirmance and seeking affirmative relief can be elusive.”9 Division One has suggested the key question is whether there is any difference between the proposed relief and the relief the trial court ordered.

In Modumetal, Inc. v. Xtalic Corp.,10 the trial court denied the defendant’s motion to dismiss for lack of personal jurisdiction only to dismiss the case later by granting the defendant’s motion for summary judgment. On appeal, the defendant argued the court should affirm on the alternative ground the trial court lacked personal jurisdiction.

But the court held the defendant’s failure to cross-appeal the order denying dismissal for lack of personal jurisdiction precluded review of the issue, explaining the defendant’s argument was “a request for affirmative relief” and “not alternative grounds for affirming summary judgment” “[b]ecause dismissal on the merits with prejudice and dismissal on jurisdictional grounds without prejudice are different forms of relief.”11

On the one hand, Division One’s reasoning comports with the language of RAP 2.4(a) insofar as resolving the case on personal jurisdiction grounds would have literally required “modifying” the trial court’s decision — instead of affirming a summary judgment order, the court would vacate the order altogether.12 But on

the other hand, it's questionable whether a respondent obtains "affirmative relief" by converting a dismissal with prejudice to a dismissal without prejudice.

Federal courts, for example, require a cross-appeal only when a party seeks "either to enlarge its own rights or lessen the rights of an adversary."13 Although Division One relied on a Third Circuit case,14 other circuits — including the Ninth Circuit — have called that case into question insofar as the Third Circuit held the failure to cross-appeal meant the court lacked jurisdiction even to consider the issue.15

Other federal courts apply the rule more flexibly. As the Seventh Circuit explained, courts should not "unnecessarily police the sometimes blurry line between arguments that seek to expand the judgment and those that do not," and instead should resolve doubts in favor of an appellee's "right to argue an alternative ground."16 Thus, courts will sometimes excuse an appellee's failure to cross-appeal in certain circumstances.17

For example, in Shatsky v. Palestine Liberation Org.,18 the D.C. Circuit addressed a situation nearly identical to Modumetal but came to a different result. The district court denied the appellee's motion to dismiss for lack of personal jurisdiction but dismissed the case on summary judgment. Despite failing to cross-appeal the issue, the appellee argued the D.C. Circuit could affirm on an alternative basis by holding the district court lacked personal jurisdiction.

The D.C. Circuit concluded that issue was not an appropriate alternative basis to affirm the district court's summary judgment order because dismissal on personal jurisdiction grounds would "enlarge" the appellee's rights due to its preclusive effect on subsequent litigation. Specifically, the court explained that "repeat" defendants derive a greater benefit from "a preclusive determination that such litigation cannot proceed at all," than from "a preclusive determination that they can be forced to answer in court but that, as it happens, they are not liable in a particular case."19

But despite concluding the appellee was "required to file a cross-appeal," the court considered the personal jurisdiction issue anyway. The parties had fully briefed the issue in both the district court and their appellate briefs, and the appellant did not object to the cross-appeal issue until after all briefs were submitted; thus, the court held the circumstances justified excusing the appellee's

noncompliance because the interests underlying the procedural cross-appeal requirement simply weren't implicated.20

Washington courts undoubtedly have the discretion to excuse noncompliance,21 but that outcome seems unlikely in most cases given the specific, mandatory language in RAP 2.4(a). Accordingly, when an appellant files a notice of appeal or notice of discretionary review, respondents should keep Modumetal in mind and consider whether potential arguments might require a different form of relief than the relief the trial court ordered. If so, a timely cross-appeal is necessary to preserve those issues.

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1 RAP 2.5(a).

2 See Pub. Utility Dist. No. 2 of Pacific Cnty. v. Comcast of Wash. IV, Inc., 8 Wn. App. 2d 418, 455-56, 71-72, & n.41, 438 P.3d 1212 (2019).

3 Port of Seattle v. Lexington Ins. Co., 111 Wn. App. 901, 48 P.3d 334 (2002).

4 RAP 2.4(a); RAP 5.1(d).

5 Singletary v. Manor Healthcare Corp., 166 Wn. App. 774, 787, ¶ 24, 271 P.3d 356 (2012)

6 State v. Sims, 171 Wn.2d 436, 442, ¶ 12, 256 P.3d 285 (2011)

7 166 Wn. App. 774, 271 P.3d 356 (2012).

8 Id. at 787, 23-24.

9 Douglas J. Ende, 15A Wash. Prac. Handbook on Civil Procedure, § 85.17 Cross Review (2023 ed.)

10 4 Wn. App. 2d 810, 425 P.3d 871 (2018).

11 Id. at 836, ¶ 57.

12 Id. at 835-36, ¶ 56.

13 Save Bull Trout v. William, 51 F.4th 1101, 1107 (9th Cir. 2022).

14 See Modumetal, 4 Wn. App. 2d at 835-36, 55-56 (citing EF Operating Corp. v. Amer. Bldgs., 993 F.2d 1046 (3d Cir. 1993)).

15 Mendocino Env't Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1289 & n.27 (9th Cir. 1999) (noting circuit split and declining to follow EF Operating Corp.)

16 Oneida Nation v. Village of Hobart, 968 F.3d 664, 686 (7th Cir. 2020).

17 See Rubinstein v. Yahuda, 38 F.4th 982, 999-1000 (11th Cir. 2022).

18 955 F.3d 1016 (D.C. Cir. 2020).

19 Id. at 1029.

20 Id. at 1030-31.

21 See RAP 2.4(a)(2); RAP 1.2(a).