always Appealing - Frivolous Appeals: What's Good for the Goose Is Good for the Gander

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Bar Bulletin Blog: General

By Valerie Villacin

"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

An appellate court has authority under RAP 18.9 to impose sanctions or award attorney fees "on its own initiative or on motion of a party" against "a party or counsel," who "files a frivolous appeal." The purpose of sanctions is to deter frivolous appeals and, when the sanctions are in the form of an award of fees to respondent, to compensate the respondent for being forced to defend against the frivolous appeal.

As former Justice Steven Breyer stated when he was a federal circuit judge, a frivolous appeal "hurts other litigants and interferes with the courts' overall mission of securing justice."[1] Frivolous appeals "can steal yet more time from more serious cases."[2] Therefore, imposing sanctions for frivolous appeals "may

encourage self-policing by attorneys and strengthen the hand of those attorneys who would discourage clients from taking legal positions totally lacking in merit."[3] This column questions why, when "about half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop,"[4] our appellate courts rarely include sanctions against counsel who pursue a frivolous appeal on behalf of an appellant.

Because a civil appellant has a right to appeal under RAP 2.2, the standard for finding an appeal frivolous is high. In deciding whether an appeal is frivolous, appellate courts will view the record as a whole and resolve all doubts in the appellant's favor.[5] An appeal that is unsuccessful simply because the arguments are rejected is not necessarily frivolous.[6] An appeal is frivolous only if it raises no debatable issues upon which reasonable minds might differ, and is so totally devoid of merit that there is no reasonable possibility of reversal.[7] Appellate courts will not impose sanctions for a frivolous appeal if the appeal raises at least one debatable issue.[8]

As all doubts are resolved in favor of finding an appeal is not frivolous, sanctions for a frivolous appeal are not common. But even when appellate courts find appeals frivolous, and despite being granted express authority under RAP 18.9 to also impose sanctions against appellants' counsel, they, in the majority of cases, impose sanctions against appellants alone.

Orwick v. Fox is one of the few published decisions in which appellant's counsel was also sanctioned for filing a frivolous appeal.[9] In sanctioning counsel, Division One stated, "We are mindful that not every attorney who files appeals is an appellate expert and we are concerned that there not be a chilling effect on the right to appeal by too vigorous an application of sanctions. We are also mindful that parties who are unschooled in the law should not be unnecessarily sanctioned for relying upon what may be the erroneous legal advice of their attorneys as to the merits of proceeding with an appeal."[10] Nevertheless, in deciding that appellant's counsel should be joint and severally liable for respondent's attorney fees, Division One reasoned "it is the attorney who, in the final analysis, must inform his or her client as to the advisability of an appeal and it is the attorney who is charged with the initial determination of whether an appeal raises meritorious, that is, debatable issues."[11]

The reason there are so few published appellate decisions sanctioning appellant's counsel for a frivolous appeal may be that respondents limit their request for sanctions against appellant only, because while respondents may believe appellant pursued the frivolous appeal for bad faith reasons, such motives cannot necessarily be imputed to appellant's counsel. Even if that were the case, however, RAP 18.9 authorizes the appellate courts to consider sanctions for a frivolous appeal "on its own initiative." I suggest that once the appellate court finds an appeal frivolous, it should more readily consider whether sanctions should also be imposed against appellant's counsel.

I make this suggestion because many of the reasons appellate courts have found appeals to be frivolous can be laid at the feet of appellant's counsel, whose job it is to perfect the record on appeal and make arguments that will, at the bare minimum, raise a debatable issue on appeal. For instance, in Guardianship of Cobb, another rare instance where appellants' counsel was sanctioned along with appellants, Division Two found the appeal frivolous because it was "not based on legal authority or even arguable facts or law. And it was done with an apparent lack of research about or the knowledge of the proper role of the appellate court."[12] Division Two therefore ordered appellants and their counsel to pay sanctions of $500 to respondent.[13]

Orwick and Cobb are outliers. More often than not, only appellant is sanctioned, even when the reasons the appeal were found frivolous clearly implicate counsel - such as when appellant's brief "cites no judicial authority and no authority for reversal based on existing law,"[14] when appellant relied on "case law that does not support his position and has been overruled,"[15] when appellant's "brief on appeal is totally devoid of any relevant authority to support its arguments,"[16] when appellant asserted arguments "that lack any support in the record or are precluded by well-established and binding precedent that he does not distinguish,"[17] when appellant challenged trial court's decision as "arbitrary and without any factual basis, yet fails to address the ample evidence on which the superior court relied in its ruling,"[18] and when appellant's failure to perfect the record prevented the appellate court from reviewing the issue raised on appeal "and thereby foreclosed any possibility of reversal."[19] Yet, while it was counsel who was responsible for presenting these appeals, which were found frivolous, only their clients bore the financial consequence.

It is clear that any reticence appellate courts have in sanctioning counsel for frivolous appeals is not due to a deference to fellow members of the legal community or to "protect" lawyers from sanctions. Appellate courts have shown a willingness to sanction counsel for other transgressions, such as when counsel made "repeated and blatant oral misrepresentations of the content of the record,"[20] and even more willing to sanction counsel when their transgressions exact "a heavy and unwarranted toll on the court's resources,"[21] such as when errors in respondents' "laissez-faire" brief "wasted the time of opposing counsel and hampered the work of the court,"[22] when the "numerous misrepresentations and inappropriate quotations taken out of context" in appellant's brief caused the court "to waste considerable time checking for their accuracy,"[23] and when the lack of record citations in appellant's brief placed "an unacceptable burden on opposing counsel and on this court."[24]

In proposing that appellate courts consider sanctioning appellant's counsel for frivolous appeals, I am mindful of Division One's concern in Orwick, that it may have a "chilling effect on the right to appeal."[25] Excessive use of sanctions can "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories" and cause attorneys to turn down appeals that seek to have new rights recognized for fear of being sanctioned.[26] Particularly in appellate law, one must consider that "[i]ncremental changes in settled rules of law often results from litigation."[27] The "ability of the law to serve the public interest is itself dependent upon the willingness of appellate courts to rethink propositions often basic in nature and reject prior judicial expressions when necessary."[28] Thus, excessive sanctions may "discourage innovation and inhibit the opportunity for periodic reevaluation of controlling precedent."[29] However, as cases "of first impression that present debatable issues of substantial public importance are not frivolous,"[30] I believe the current standard for assessing whether an appeal is frivolous, where all doubts are resolved in favor of the appellant, reduces, if not removes, the risk that sanctions will have a chilling effect on attorneys.

It is not clear if the public stigma of being associated with a frivolous appeal is enough to deter counsel from pursuing the next frivolous appeal. Therefore, if frivolous appeals are to be deterred, appellate courts should more often consider exercising its authority under RAP 18.9 to impose sanctions against appellant's counsel, and not just their client. As federal circuit courts have noted, "to impose

damages and costs upon [appellant] alone will not guarantee that his attorney will be directly affected or that he will be deterred from bringing similar frivolous appeals in the future,"[31] and sanctioning counsel is proper to protect the court's "ability to serve litigants with meritorious cases and in order to make lawyers give thoughtful consideration to whether there are grounds for an appeal before filing an appeal. This is not a new principle. The filing of an appeal should never be a conditioned reflex. 'About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.'"[32]

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1 Natasha, Inc. v. Evita Marine Charters, Inc., 763 F.2d 468, 471 (1st Cir. 1985).

2 Natasha, 763 F.2d at 471.

3 Natasha, 763 F.2d at 471.

4 Wixom v. Wixom, 190 Wn. App. 719, 728, 360 P.3d 960 (2015) (internal quotations and alterations omitted) (addressing trial court attorney fees) (quoting Watson v. Maier, 64 Wn. App. 889, 891, 827 P.2d 311 (1992) (awarding fees on appeal against attorney who appealed CR 11 sanctions imposed against him).

5 Lee v. Kennard, 176 Wn. App. 678, 692, 310 P.3d 845 (2013).

6 Lee, 176 Wn. App. at 692.

7 Lee, 176 Wn. App. at 692.

8 Advocates for Responsible Dev. v. W. Washington Growth Mgmt. Hearings Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

9 Orwick v. Fox, 65 Wn. App. 71, 828 P.2d 12 (1992).

10 Orwick, 65 Wn. App. at 90.

11 Orwick, 65 Wn. App. at 92.

12 Guardianship of Cobb, 172 Wn. App. 393, 406-07, 292 P.3d 772 (2012).

13 I will leave to another day whether imposing de minimis sanctions is an actual deterrent against frivolous appeals.

14 Delany v. Canning, 84 Wn. App. 498, 510, 929 P.2d 475 (1997).

15 Manteufel v. Safeco Ins. Co. of Am., 117 Wn. App. 168, 178, 68 P.3d 1093 (2003).

16 Fidelity Mortgage Corp. v. Seattle Times Co., 131 Wn. App. 462, 474, 128 P.3d 621 (2005).

17 Andrus v. State, Dep't of Transp., 128 Wn. App. 895, 900-01, 117 P.3d 1152 (2005).

18 In re Settlement/Guardianship of AGM, 154 Wn. App. 58, 86, 223 P.3d 1276 (2010).

19 Tacoma South Hospitality, LLC v. National General Insurance Company, 19 Wn. App.2d 210, 223, 494 P.3d 450 (2021).

20 Welfare of R.H., 176 Wn. App. 419, 430, 309 P.3d 620 (2013).

21 Litho Color, Inc. v. Pac. Employers Ins. Co., 98 Wn. App. 286, 306, 991 P.2d 638 (1999).

22 Hurlbert v. Gordon, 64 Wn. App. 386, 401, 824 P.2d 1238 (1992).

23 Lynn v. Labor Ready, Inc., 136 Wn. App. 295, 313, 151 P.3d 201 (2006).

24 Lawson v. Boeing Co., 58 Wn. App. 261, 271, 792 P.2d 545 (1990).

25 Orwick, 65 Wn. App. at 90.

26 Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992).

27 Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070, 105 S. Ct. 1824, 1825, 85 L. Ed. 2d 125 (1985) (concurrence).

28 J. Thomas Sullivan, Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority, 59 U. Miami L. Rev. 341, 345 (2005).

29 Orr v. Turco Mfg. Co., Inc., 512 N.E.2d 151, 152 (Ind. 1987).

30 Moorman v. Walker, 54 Wn. App. 461, 466, 773 P.2d 887 (1989).

31 Hagerty v. Succession of Clement, 749 F.2d 217, 222 (5th Cir. 1984).

32 Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1202 (7th Cir. 1987).