always Appealing: “Activating” RAP 18.9—Conditioning Appeals on Compliance with Valid Orders

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By Catherine Smith

“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.

Following up on my partner Valerie Villacin’s column last month about the award of attorney fees as sanctions for frivolous appeals, and why sanctions are rarely imposed on appellant’s counsel (even when they should be), this article examines another underutilized provision of RAP 18.9.

In addition to authorizing fees for frivolous appeals, if a party “uses these [appellate] rules for the purpose of delay . . . or fails to comply with these rules,” RAP 18.9(a) authorizes an award of “terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.” The rule goes on to give the appellate court the authority to “condition a party’s right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party.” RAP 18.9(a).

After 40 years prosecuting and defending civil appeals, our firm represents a lot of respondents on appeal. Although I often joke that the best way to prevail on appeal is to represent the respondent, it is still disheartening to be brought into a case to defend a judgment where the appeal seems largely motivated not by any meritorious issue, but by a desire to harass or embarrass the respondent, or to confound enforcement of the trial court's decision. Yet I have rarely seen (or heard of) these provisions being invoked, even when conditioning review might prevent respondents from having to respond to a non-meritorious appeal.

Although in theory a judgment can be enforced pending appeal if it is not stayed, RAP 7.2(c), in practice many appellants also resist orders intended to aid enforcement. Perhaps the most obvious circumstance in which the appellate court should consider conditioning an appeal on compliance with an enforcement order is when appellant has appealed but not stayed enforcement of a judgment pending appeal, usually (while having the wherewithal to pay counsel) having taken steps to insulate assets from execution. Appellants also sometimes rely upon the pendency of an appeal to cloud title to real property (because as a practical matter title insurers often won't insure title when a judgment affecting real property is on appeal) but refuse to take steps to clear title.

The California courts have occasionally turned to the "disentitlement" doctrine to address such recalcitrance. The most obvious, and earliest, use of the doctrine is when an appellant is in contempt. As the California Supreme Court held in MacPherson v. MacPherson,[1] "A party to an action cannot, without right or reason, as the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes." Although the appellant had been held in contempt for violation of a postjudgment order in MacPherson, the doctrine has been applied without a contempt finding, when the appellant has engaged in "willfull disobedience or obstructive tactics." See Alioto Fish Co. v. Alioto ("Although the power to stay or dismiss an appeal is typically exercised when the litigant is formally adjudicated in contempt of court, the same principle applies to willful disobedience or obstructive tactics without such an adjudication.").[2]

The California courts have in more recent years held in several instances that an appellant was "disentitled" from continuing with an appeal because of the failure

to cooperate with efforts to enforce a judgment that appellant had not stayed. For instance, the appellate court dismissed an appeal from a judgment the defendants had not stayed after they failed to comply with an order compelling responses to "postjudgment discovery designed to obtain information to aid in the enforcement of the judgment being appealed" in Stoltenberg v. Ampton Investments, Inc.[3] And the appellate court dismissed an appeal of a judgment stemming from the purchase of real property when appellant repeatedly violated postjudgment orders enjoining them from selling or transferring assets, concluding "defendants [were] seeking the benefits of an appeal while willfully disobeying the trial court's valid orders" in Gwartz v. Weilert.[4]

In the appropriate case, Washington should consider using the same principles by conditioning further participation in an appeal on compliance with valid court orders. RAP 18.9(a) could, and should, be utilized to condition the right to file an opening or reply brief, or to participate in argument, on compliance with enforcement orders. Employing any, or all of these conditions could prevent a respondent from having to defend an appeal that an appellant has paid his attorney to prosecute, while making no efforts to stay enforcement of the judgment. And that would, in most instances, in my view be a good thing.

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1 13 Cal.2d 271, 277, 89 P.2d 382 (1939).

2 27 Cal. App. 4th 1669, 1683, 34 Cal. Rptr. 2d 244 (1994).

3 215 Cal. App.4th 1225, 1232, 159 Cal. Rptr. 3d 1 (2013)

4 231 Cal. App. 4th 750, 180 Cal. Rptr. 3d 809 (2014).