SILLY LAWYER TRICKS

By Tom Donlon – May 10, 2016

The latest column in our continuing series on real mistakes by real lawyers on appeal.

Park Bank v. Jackson, 2015 Wisc. App. LEXIS 891 (Ct. of App. Dist. 4, December 23, 2015).

This case is an example of what can happen where the appellate counsel does almost everything right. Wachovia Bank brought an action seeking to equitably subordinate Park Bank's mortgage. Wachovia won at the trial court, placing its $166,900 mortgage ahead of Park's. On appeal, Wachovia won on multiple complex legal issues and even prevailed on a balance of the equities.

However, Park had made one last argument – if its mortgage was subordinated, it should only be in the amount of $31,000 initially advanced. "Wachovia did not respond to this argument," even though it appeared under its own heading in Park's brief. *Id.*, at 43. The court of appeals held that Wachovia "conceded this point by failing to respond." *Id.* Thus, Wachovia lost over $135,000 value from its victory in the trial court – even though the appellate court recognized this constituted a "windfall" to Park. *Id.* The court said it was more important to maintain the principle that "the court will not create arguments for the parties when the parties themselves fail to do that." *Id.*

The mistake here was clearly that of the lawyer. Either through inadvertence or a bad tactical choice, the lawyer snatched a substantial defeat from the jaws of total victory.

Creighton v. State, 2016 Nev. LEXIS 54 (February 12, 2016).

In contrast to the attorney in *Park Bank*, here the appellate counsel did almost everything wrong! The Supreme Court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction. Appellant's counsel obtained an extension of time to respond, but no response appeared by the new due date. The court eventually discovered that "appellant's counsel made a clerical error" and filed his response under the wrong docket number. *Id.*, at 1 n.1. The court considered his response anyway. Counsel argued that he had mistakenly filed a notice of appeal of the lower court's order denying reconsideration (which was not appealable). Counsel explained that he meant to file a notice of appeal

from the original judgment. But counsel still lost, because he filed the notice after the time to appeal had run. "Thus, either way, we lack jurisdiction to consider these appeals," the court concluded. *Id.*, at 1. This might have qualified as a comedy of errors but for the unappealed criminal conviction the client had at the end. Perhaps the defendant will have better luck in the inevitable habeas petition based on ineffective assistance of counsel.

Archer v. Tunnell, 2016 Tex. App. LEXIS 1334 (Ct. of App. 5th Dist., February 9, 2016).

Some cases have entertaining facts as well as educational practice tips. Media reports on this case refer to it as the "Cow In The Road Case." From an appellate lawyer's point of view, the case is less about pursuing cattle that got loose and more about chasing your legal theory too far.

The plaintiff was injured when a pickup truck in which he was a passenger struck a cow that had strayed onto the road. The owner of the cow herd – a doctor – moved to dismiss the subsequent negligence suit arguing that any claim based on safety standards involving a medical professional fell under Texas' health care liability statute, and the plaintiff had failed to file a medical expert's report. The trial court granted summary judgment to the plaintiff rejecting this legal theory, and the doctor took an interlocutory appeal.

Less than a month later, the Texas Supreme Court issued a decision limiting the statute to cases with a nexus between the safety standard involved and the provision of health care. The plaintiff-appellee wrote to appellant's counsel asking that the appeal be withdrawn in light of this decision. Instead appellant's counsel filed a status report with the court of appeals, acknowledging that his claim under the health care law had to be dropped, but asserting that he could still proceed with the interlocutory appeal on a different ERISA ground. This attempted fix had two problems. First, the trial court had never issued a written decision on the ERISA argument and, second, even if it had, the ERISA argument was not one on which an interlocutory appeal could be brought. The court agreed, dismissed the appeal, and granted sanctions for continuing a frivolous appeal "based on non-existent orders that this Court lacked jurisdiction to consider." *Id.*, at 11. The attorney (and his client) would have been better served by abandoning his appeal once the Supreme Court issued its decision foreclosing the 'creative' argument that running into a cow involved health care safety.

Stolfo v. Kinder Care Learning Centers, 2016 Ill. App. LEXIS 138 (1st Dist. 1st Div., March 14, 2016).

In this case an attorney became so focused on escaping a trial court's sanctions, he ignored warnings from the higher court making his situation worse. The attorney's troubles began when his client's admissions during deposition doomed his employment action, resulting in summary judgment. His appeal of summary judgment was deemed frivolous, with the appellate court stating it was "tempted to award sanctions" and advised counsel to be "much more circumspect in bringing matters before this Court." *Id.*, at 4. In the meantime, the defendants had sought, and received, attorney's fees in the trial court for proceeding with the lawsuit after the deposition showed "[his client's] case was hopeless." *Id.*, at 5. Before the trial court entered judgment, counsel filed an appeal of the non-final order, which the appeals court dismissed for lack of jurisdiction and imposed a sanction of $4,000 in attorneys' fees.

The trial court then entered judgment of $140,000 in its sanctions action. Counsel's appeal of the judgment was found frivolous, brought only to delay, harass or cause needless expense. As a sanction for counsel's actions, the court dismissed the appeal with yet another warning. Undeterred, counsel then filed a petition to vacate the trial court's judgment, which had just been affirmed on direct appeal. When the trial court dismissed the petition on the basis of *res judicata,* counsel brought another appeal leading to the most recent decision.

The appellate court's opinion points out counsel's failures to comply with the court's rules. Counsel's brief had a less than one page statement of facts, containing no citations to the record, which did not contain the information necessary for an understanding of the case. *Id.*, at 18. Further, the opinion stated "much of the argument … is rambling, repetitious and consists of jumbled run-on sentences, many of which are not decipherable." *Id.* In a footnote, the court pointed out that such writing was a recurring problem for this attorney, noting its decision on his earlier appeal in this case had stated his brief was "rambling, jumbled and mostly incoherent" and "rife with grammatical and punctuation errors." *Id.*, at 18 n.1. The court could have struck the brief for these violations of its rules, but elected to reach the merits – not necessarily a good thing for the attorney.

On the merits, the appellate court upheld the trial judge's ruling that the petition to vacate was barred by *res judicata*. In considering its own sanctions, the appellate court pointed to counsel's "long history of frivolous conduct" in the matter, including "numerous frivolous appeals, despite repeated warnings and

sanctions." *Id.*, at 32. The court concluded "[e]specially in light of [counsel's] blatant disregard for our court's prior admonitions, we have no difficulty in finding that this current appeal is frivolous and not taken in good faith, warranting sanctions…" The court awarded $22,900 in attorneys' fees and ordered counsel to obtain leave of court before submitting any further filings. His persistent ignoring of the appellate court's warnings proved costly. The total sanctions imposed on the attorney by the trial and appellate court reached over $166,000.

McDonald v. Flake, 2016 U.S. App. LEXIS 3627 (6th Cir., February 29, 2016).

This decision arose from an interlocutory appeal of a denial of qualified immunity. Following discovery and setting of a trial date, the defendant police officer, and his employer city, moved for summary judgment asserting immunity. The City moved for continuance, since only a month remained before the trial date. The trial court denied this request, informing the parties it would be issuing an order denying summary judgment and trial would proceed as scheduled.

The trial court promptly issued its decision, ruling that issues of fact precluded summary judgment on the basis of qualified immunity. The police officer filed a notice of appeal. Plaintiff responded by moving to have the trial court declare the appeal frivolous and allow trial to proceed as scheduled, only 10 days later. The trial court denied this motion and stayed the trial, noting one argument raised what could be construed as a purely legal issue *"so long as defendant accepts as true for the purpose of the motion Plaintiff's version of the facts."* *Id.*, at 9 (emphasis in original).

On appeal, however, the officer "barely even feign[ed] an attempt at accepting plaintiffs' version of the facts … and instead propound[ed] his own version of the facts and the inferences he would draw from them." *Id.*, at 14. The circuit court affirmed the trial court's decision, and then addressed plaintiff-appellee's motion for sanctions. The court agreed that the appeal was based solely on a factual challenge, "which was both contrary to settled law and in flagrant disregard of the district court's direct admonition…" (*id.*, at 22), and, thus, the "unmistakable futility of these appeals is compelling." *Id.*, at 23. Noting the appeals were filed just days before the scheduled trial, the court concluded that the defendants had relied on factual arguments "in complete disregard of the law and the district court's warnings, thus ensuring they had no chance of success but nonetheless obtaining the postponement of the trial that the district court had denied them…," causing plaintiffs unnecessary expense and wasting judicial resources. *Id.*, at 25. Given the tenor of the court's comments, appellants (and

their attorneys) were lucky they were before the Sixth Circuit, not the Illinois state court that heard *Stolfo*, since they only had to pay $1,500 apiece in sanctions.

State v. Garland, 2016 Ga. LEXIS 173 (January 19, 2016).

The last case arises in the context of post-trial motions, yet presents a scenario that involves appellate counsel frequently. After conviction, the unhappy defendant fired his trial counsel and retained new counsel to handle his appeal. New counsel (who the decision refers to as "appellate counsel") filed a motion for new trial, claiming ineffective assistance by the trial attorney with regard to defendant's mental status.

While that motion was pending, the defendant was sent back to prison on a probation violation. To obtain his release from confinement, counsel worked out a deal, agreeing to withdraw the motion for new trial in exchange. Counsel made only one mistake – he did not inform his client that withdrawing the motion for new trial was part of the deal. Not surprisingly, on a subsequent habeas petition, the defendant asserted ineffectiveness of appellate counsel. His claim was strengthened by uncontradicted expert testimony that a series of mini-strokes some years before the alleged criminal conduct left him with a mental health condition that made him incompetent to stand trial and constituted a valid defense to the charged crime.

The habeas court found the appellate counsel's performance deficient on a number of bases. On appeal, the State conceded that appellate counsel was deficient but argued counsel's actions were not prejudicial. The court of appeals rejected this argument and affirmed. Here, at least, the client ultimately was able to overcome his lawyer's mistakes without anyone paying a monetary sanction – but he did serve four years' probation that he should have avoided.

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