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HELLER v. OSBURNSEN: SLAPPING DOWN THE FRIVOLOUS APPELLANT

David Gorman

I. INTRODUCTION

"[C]ounsel must realize that the decision to appeal should be a considered one . . . not a knee-jerk reaction to every unfavorable ruling."¹

Standing alone, the 1976 Montana Supreme Court decision of *Heller v. Osburnsen*² merits little more than cursory attention. The imposition of a \$1000 penalty on counsel for taking an obviously meritless appeal seems harsh, but hardly a matter of more than passing concern; but the imposition of costs and penalties for appeals that are frivolous or solely for delay, is no longer an isolated phenomenon. A minority of states, by statutes or rules of court,³ and the United States Courts of Appeals are imposing such penalties at a vastly accelerated rate. This note will discuss the circumstances in which courts have imposed penalties for frivolous appeals, and the likelihood of continued and expanded imposition of such penalties.

II. THE PENALTY

The discretionary power of the Montana Supreme Court to impose a penalty of the type in *Heller* is set forth in Rule 32, Montana Rules of Appellate Civil Procedure (hereinafter referred to as Rule 32):

Damages for Appeal Without Merit. If the Supreme Court is satisfied from the record and the presentation of the appeal, that the same was taken without substantial or reasonable grounds, but apparently for reasons of delay only, such damages may be assessed on determination thereof as under the circumstances are deemed proper.

The language of Rule 32, which became effective on January 1, 1966,

1. *Simon & Flynn, Inc. v. Time, Inc.*, 513 F.2d 832, 835 (2d Cir. 1975).
2. ___ Mont. ___, 548 P.2d 609 (1976).
3. ALA. CODE tit. 7, § 14 (1958); ARIZ. REV. STAT. § 12-2106 (1956); CAL. CIV. PROC. CODE § 907 (West Supp. 1977); FLA. APP. R. 3.17 (1977); GA. CODE § 6-602 (1971); IND. R. APP. P. 15(F) (Burns 1973); LA. CODE PRO. ANN. § 2164 (West 1961); ME. REV. STAT. tit. 14, § 1802 (1965); MASS. GEN. LAWS ANN. ch. 211A, § 15 (West 1974); MICH. COMP. LAWS ANN. § 27.4445 (1962); MISS. CODE ANN. § 11-3-23 (1972); MO. S. CT. R. 84.18 (1977); NEB. REV. STAT. § 30-1603 (1975); NEV. R. APP. P. 38 (1973); N.H. REV. STAT. ANN. § 490:14-a (Supp. 1975); OR. REV. STAT. § 19.160 (1975); PA. R. APP. P. 2744 (1976); S.D. COMPILED LAWS ANN. § 15-30-6 (6) (1967); TEX. R. CIV. P. ANN. 438 (1967); WISC. STAT. ANN. § 251.23(3) (West 1971).

is identical to that of former Montana Supreme Court Rule XIX, and is substituted for the less convoluted language of the corresponding Federal Rule of Appellate Civil Procedure: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."⁴ Because the Montana Supreme Court has not literally applied Rule 32, there has been no practical difference in application between the Federal and Montana Rules.

III. PAST AND PRESENT APPLICATIONS

A. *Montana*

Heller v. Osburnsen is a fairly typical case of frivolous appeal. The case had been before the court on two previous occasions which the court, for the purposes of its opinion, termed *Heller I*⁵ and *Heller II*.⁶ The action arose out of the sale of ranch properties by Heller to the Osburnsens.

Heller I involved a declaratory judgment action brought by Heller to adjudicate the respective rights and duties as to the ranch sale transaction. The trial court's interpretation of the contract between the parties was affirmed with directions to make a supplemental accounting. In *Heller II*, the accounting was attacked as incorrect and violative of due process. The court summarily affirmed the accounting, hinting at the absurdity of the due process argument. The court found that the Osburnsens were liable to Heller in the amount of \$16,800 together with interest on the sum of \$14,600.

After some negotiation regarding another \$5100 owing from the Osburnsens to Heller under the contract, counsel for both parties entered into a stipulation which provided that the escrow agent would compute the annual payments due and deduct the amount actually paid. The Osburnsens would then pay the sum of all arrearages with interest from the date of the actual default. The escrow agent declined to make the necessary computations, so the Osburnsens' attorney took it upon himself. He computed the amounts due on the basis of how the escrow agent had actually applied the payments, rather than how they should have been applied pursuant to the trial court judgment and accounting which had been upheld by the Montana Supreme Court. Using this novel approach, the Osburnsens' attorney reached the conclusion that they owed Heller a

4. FED. R. APP. CIV. P. 38. See also 28 U.S.C. § 1912 (1970).

5. *Heller v. Osburnsen*, 162 Mont. 182, 510 P.2d 13 (1973).

6. *Heller v. Osburnsen*, ___ Mont. ___, 541 P.2d 1032 (1975).

total of \$152, rather than the \$23,600 demanded by Heller. He then tendered the \$152 in full settlement of the action and debt. Heller's attorney responded with several concurrent actions. First, he declared the tender an insult and indicated that he considered the stipulation void (noting that the Osburnsens' attorney had computed the payments as though he had won both appeals). Second, he gave notice of default pursuant to a clause in the ranch sale contract. Third, he caused execution to issue on the judgment in the amount of \$23,600. The Osburnsens' attorney filed a motion to quash the execution and warned the sheriff that he would be held liable if he executed improperly. Undaunted, the sheriff executed on the Osburnsens' bank account for the full amount.

After a hearing on the motion to quash, the district court denied the motion on the grounds that the stipulation was ambiguous and that it had not been carried out by the escrow agent according to its terms. It was from this denial that the ill-fated appeal was taken.

The Montana Supreme Court held that the amounts due under the contract had already been determined, and that no stipulation could change this determination, which the court characterized as *res judicata*. It went on to say that there could be no doubt as to the propriety of a writ of execution for enforcement of a money judgment. Turning to appellee's motion to dismiss the appeal, the court held that this was a proper case to grant the motion and impose a penalty on counsel for bringing an appeal that was frivolous and without merit. It stated that, in its view the appeal was nothing more than an attempt by counsel for the Osburnsens to question the propriety of the court's previous determinations.

The Montana Supreme Court has imposed penalties under Rule 32 in a number of cases. The most recent of the cases imposing such a penalty is *Farmer's State Bank v. Iverson*.⁷ Appellants (Bouma) had not properly filed to intervene in the trial court, yet attempted to appeal the judgment to the supreme court. Appellants also tried to introduce new evidence by means of an affidavit of counsel. This ignorance, or effrontery, cost appellants \$1000. In *Sutton v. Empire Savings & Loan Association*⁸ the appellant neglected to follow the rules in the filing and perfection of his appeal. The court dismissed the appeal on this basis, and after "viewing the record as a whole,"⁹ imposed a penalty for total lack of merit. *Weinheimer v. Scott*,¹⁰ in which counsel for the Osburnsens appeared, is the best illustration of the extension of the Montana

7. 162 Mont. 130, 509 P.2d 839 (1973).

8. 147 Mont. 124, 410 P.2d 456 (1966).

9. *Id.* at 128, 410 P.2d at 458.

10. 143 Mont. 243, 388 P.2d 790 (1964).

Supreme Court's discretion under Rule 32. Appellant had already made one appeal on the merits, and the court termed this *res judicata* as to the issues raised on the second appeal. This did not, however, seem to be the crux of the court's reasoning for the imposition of the penalty. Rather, the court dwelt indignantly on counsel's calling the attention of the court to Canons 19 and 20 of the Judicial Canons of Ethics "as if to charge the court with violating them."¹¹ The court excused the appellant from the penalty, commiserating with him for having "inexperienced counsel,"¹² and charging counsel with the \$500 payment. It does not appear from the record whether counsel for appellee raised the issue of the Rule 32 penalty.

In several other cases the court discussed the penalty, but refused to impose it. These cases fall into two general categories: (1) those where the appellee has sought the penalty but the court has found some merit in the issues raised by appellant, and (2) those cases where the penalty might be warranted but the appellee failed to raise the penalty properly, if at all.

Clearly, the court's action in those cases where the appeal had some merit or raised a legitimate issue cannot be questioned. The recent case of *Hammill v. Young*¹³ sets out the standard for appeals having sufficient merit to escape the imposition of a penalty: "[T]he issues on appeal are arguable and have not heretofore been decided by this court."¹⁴ Earlier cases employed a similar test, without mentioning the "previous decision" qualification.¹⁵

The legitimacy of the second category is questionable, however, as the language of Rule 32 does not seem to require the appellee to raise the question of the penalty, nor has the court uniformly required the appellee to do so. In *Gray v. Bohart*,¹⁶ a penalty seemed clearly warranted on the facts, but the court refused to impose a penalty. The case had been before the court on two previous occasions, and the court noted that those decisions rendered the issues raised on the third appeal *res judicata*. The parallels to *Heller v. Osburnsen* are obvious, but counsel for appellee apparently failed to raise the issue of the frivolous nature of the appeal. In *Gramm v. Insurance Unlimited*¹⁷ the court, while expressing its concern with

11. *Id.* at 246, 388 P.2d at 791.

12. *Id.* at 247, 388 P.2d at 792.

13. ___ Mont. ___, 540 P.2d 971 (1975).

14. *Id.* at ___, 540 P.2d at 974.

15. *Larry Larson & Assocs. v. John R. Daily, Inc.*, 158 Mont. 231, 490 P.2d 355 (1971); *St. Paul Fire & Marine Ins. Co. v. Thompson*, 150 Mont. 182, 433 P.2d 795 (1967); *State ex. rel. Valley Center Drain Dist. v. Board of County Commissioners*, 105 Mont. 290, 72 P.2d 461 (1937).

16. 131 Mont. 522, 312 P.2d 529 (1957).

17. 141 Mont. 456, 378 P.2d 662 (1963).

the legal basis of the appeal, refused to impose a penalty, based on the fact that appellee had not raised the issue until the oral arguments, and that counsel for appellant did not have sufficient notice to meet the issue. In *Whitcomb v. Helena Water Works Co.*,¹⁸ the court dismissed an appeal from an interlocutory order, but refused to impose a penalty on the novel grounds that the appellee had failed to charge or prove the frivolous nature of the appeal despite the fact that counsel had raised the issue both in his brief and at oral argument. Fortunately, it appears that this quirk in the requirements of Rule 32 no longer presents a problem, as the court has not invoked the requirement of pleading and proof in the last twelve years.

In conclusion, the broad guidelines for the imposition of a Rule 32 penalty which seem to emerge from the Montana cases are:

1. A Rule 32 penalty should be both briefed and argued.¹⁹
2. The penalty is more likely to be imposed where
 - a) the issues raised are *res judicata*;²⁰ or
 - b) the court is offended by the conduct of counsel for the appellant
 - (1) impugning the correctness of an earlier decision on the merits,²¹ or
 - (2) attempting to introduce new matter at the appellate level;²² or
 - c) the appeal is taken from a non-appealable, interlocutory order;²³ or
 - d) the appeal was improperly filed;²⁴ or
 - e) specifications of error are groundless.²⁵
3. A penalty will not be granted where the appeal presents arguable and previously undecided questions.²⁶
4. The failure of the appellee to raise the issue is a factor which may work against the imposition of a penalty.²⁷

18. 142 Mont. 171, 382 P.2d 822 (1963).

19. *Whitcomb v. Helena Water Works Co.*, 142 Mont. 171, 382 P.2d 822 (1963); *Gramm v. Insurance Unlimited*, 141 Mont. 456, 378 P.2d 662 (1963); *Gray v. Bohart*, 131 Mont. 522, 312 P.2d 529 (1957).

20. *Heller v. Osburnsen*, _____ Mont. _____, 548 P.2d 607 (1976); *Weinheimer v. Scott*, 143 Mont. 243, 388 P.2d 790 (1964).

21. *Weinheimer v. Scott*, 143 Mont. 243, 388 P.2d 790 (1964).

22. *Farmer's State Bank v. Iverson*, 162 Mont. 130, 509 P.2d 839 (1973).

23. *Whitcomb v. Helena Water Works Co.*, 142 Mont. 171, 382 P.2d 822 (1963).

24. *Sutton v. Empire Savings & Loan Ass'n.*, 147 Mont. 124, 410 P.2d 456 (1966).

25. *Benson v. Benson*, 121 Mont. 439, 193 P.2d 824 (1948).

26. *Hammill v. Young*, _____ Mont. _____, 540 P.2d 971 (1975).

27. *Libin v. Huffine*, 124 Mont. 361, 224 P.2d 144 (1950).

B. Other Jurisdictions

Since the Montana Supreme Court has not attempted to define the outer limits of circumstances that it will consider in deciding whether to impose a Rule 32 penalty, the decisions of other jurisdictions which have imposed such penalties may be instructive, not only in areas in which the Montana court has already imposed penalties, but also in those areas where the Montana court has not yet had the opportunity or the impetus to rule. Some of the situations explored in these decisions will never arise in Montana courts, such as appeals from National Labor Relations Board orders,²⁸ desegregation orders,²⁹ and arbitrator's awards.³⁰

Some areas in which other jurisdictions impose penalties for frivolous appeals are similar to those in which penalties are imposed in Montana. An appeal from a non-final order is held in general disrepute, and has even been the occasion of penalties in the United States Supreme Court,³¹ as well as in the state courts of Washington.³² *Res judicata* is another area where penalties are generally imposed, decisions to this effect having recently been made in the First³³ and Fifth³⁴ Circuits, and in California. The California case, *Howarth v. Howarth*,³⁵ is something of a landmark in this area. The case was heard twice in both the California Supreme Court and United States Supreme Court, when the intermediate appellate court decided that enough time had been wasted and slapped the appellant with a statutory penalty. Counsel was undaunted, however, and appealed the penalty to both Supreme Courts as well. The penalty stuck, and the case was not heard of again. Improper filing has received attention in other courts, notably in Nevada³⁶ and Texas.³⁷ In the Texas case, the court refused to impose a penalty, saying that ineptness of counsel, standing alone, did not justify the imposition of the penalty, despite the fact that the case had been before the court on two previous occasions and that the appellant

28. *Collected in* NLRB v. Lucy Ellen Candy Div. of F & F Lab., Inc., 517 F.2d 551 (7th Cir. 1975).

29. *Eaton v. New Hanover Bd. of Educ.*, 459 F.2d 684 (4th Cir. 1972); *Northcross v. Board of Educ. of Memphis City Schools*, 489 F.2d 19 (6th Cir.), *cert. denied*, 416 U.S. 962 (1974).

30. *Davis v. Calaway*, 48 Cal. App.3d 309, 121 Cal. Rptr. 570 (1975).

31. *Slaker v. O'Conner*, 278 U.S. 188 (1929).

32. *Arlt v. Arlt*, 3 Wash.2d 462, 101 P.2d 336 (1940).

33. *Local 2, Int'l. Bhd. of Tel. Workers v. International Bhd. of Tel. Workers*, 416 F.2d 414 (1st Cir. 1969).

34. *Monroe Auto Equip. Co., Hartwell Div. v. NLRB*, 511 F.2d 611 (5th Cir. 1975).

35. 146 Cal. App.2d 694, 304 P.2d 147, *cert. denied*, 354 U.S. 926 (1957).

36. *Varnum v. Grady*, ___ Nev. ___, 528 P.2d 1027 (1974).

37. *International Security Life Ins. Co. v. Robichau*, 510 S.W.2d 132 (Tex. Civ. App. 1974).

insurer had a notable track record for similar inept appeals.

Several areas potentially present opportunities for imposition of penalties by the Montana court in the future. Assertion of error as to matters to which the appellant had stipulated in the trial court, has resulted in the imposition of penalties in California³⁸ and New Mexico.³⁹ An Indiana court has imposed a penalty where the appellant attacked jury instructions at the appellate level to which he had not properly objected at trial.⁴⁰ Another likely area for future development is in the case of improper or punitive joinder of a party to an appeal. The leading case is *Compass Realty & Investment Corp. v. A A Refrigeration & Heat, Inc.*,⁴¹ in which the Arizona court imposed the statutory maximum penalty on an appellant who joined a party in an appeal in which appellant asserted no issues that related to the appellee.

More frequent than these clearly justified penalties are those in which the appellate courts state generally that the appeal has no legal basis. These usually arise where the law has become "so clear and well established that persistence in a course could be determinative of bad faith."⁴² Many of the appeals dismissed and penalized on this ground are second or third tries by the appellant, or cases where "calculated delay and a thrashing about . . . for theories — even of dubious or no value . . ." ⁴³ is evident. The dictum in *Gramm v. Insurance Unlimited*,⁴⁴ noting the court's concern with the appellant's legal theory, indicates that the Montana Supreme Court would be willing to act in this type of situation. Several United States courts of appeals⁴⁵ and the Oregon court⁴⁶ have based penalties on these grounds within the last seven years.

What emerges from the collection of frivolous appeal cases from other jurisdictions is that courts in general, and especially the United States Courts of Appeals, have imposed penalties in a somewhat broader range of circumstances than has Montana's court. The

38. *Lawler v. Bannerman*, 8 Cal. App.3d 893, 87 Cal. Rptr. 757 (1970).

39. *Anderson v. Jenkins Constr. Co.*, 83 N.M. 47, 487 P.2d 1352 (1971).

40. *Bradford Homes, Inc. v. Long*, 221 Ind. 309, 47 N.E.2d 609 (1943).

41. 21 Ariz. App. 214, 517 P.2d 1107 (1974).

42. *NLRB v. Lucy Ellen Candy Div. of F & F Lab., Inc.*, 517 F.2d 551 (7th Cir. 1975).

43. *Oscar Gruss & Son v. Lumbermens Mut. Cas. Ins. Co.*, 422 F.2d 1278 (2d Cir. 1970).

44. 141 Mont. 456, 378 P.2d 662 (1963).

45. *First Nat'l. Ins. Co. of America v. Lynn*, 525 F.2d 1 (1st Cir. 1975); *Fluoro Elec. Corp. v. Bradford Assocs.*, 489 F.2d 320 (2d Cir. 1973); *Oscar Gruss & Son v. Lumbermens Mut. Cas. Ins. Co.*, 422 F.2d 1278 (2d Cir. 1970); *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860 (7th Cir.), *cert. denied*, 419 U.S. 1027 (1974); *Furbee v. Vintage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972); *United States v. Certain Land in Squares 532 and 570*, 473 F.2d 94 (D.C. Cir. 1972).

46. *Stirling v. Dari-Delite, Inc.*, 262 Ore. 359, 494 P.2d 252 (1972).

areas where penalties under Rule 32 may be imposed in the future are:

1. Improper joinder of a party in an appeal,⁴⁷
2. Appeals from matters stipulated to in trial court,⁴⁸
3. Appeals where foundation in the record has not been properly laid,⁴⁹ and
4. Appeals having no legal basis.⁵⁰

IV. WHY THE FRIVOLOUS APPEAL PENALTY IS HERE TO STAY—AND FLOURISH

As late as 1957, courts were still noting “[w]e are thoroughly familiar with the holdings that appellate courts are reluctant to hold that an appeal is frivolous,”⁵¹ but, with few exceptions,⁵² appellate courts in the cases arising since then have turned their collective backs on such traditional holdings. Such indications may even be found in Montana decisions, for the court, as noted above, has not refused imposition of a penalty on the grounds of lack of pleading or proof for more than a dozen years.

It is no secret that judicial hearts are warming to the imposition of a penalty for a frivolous appeal. The key to this trend is time. There is a wealth of judicial language in the cases cited above which buttresses this conclusion. As Chief Judge Bazelon of the District of Columbia Court of Appeals has written: “Appellate courts are burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken.”⁵³ Judges in less temperate moods have characterized frivolous appeals as being “a shameful waste of judicial manpower.”⁵⁴ The number of cases on appellate court dockets has increased dramatically in the last decade and a half, and the frequency of penalties for frivolous appeals has grown accordingly. The emphasis of this note on cases arising in the 1970’s is to be expected—most of the cases involving penalties for frivolous appeals have arisen in these few years. As a relatively

47. *Compass Realty & Inv. Corp. v. A A Refrigeration & Heat, Inc.*, 21 Ariz. App. 214, 517 P.2d 1107 (1974).

48. *Lawler v. Bannerman*, 8 Cal. App.3d 893, 87 Cal. Rptr.757 (1970); *Anderson v. Jenkins Constr. Co.*, 83 N.M. 47, 487 P.2d 1352 (1971).

49. *Bradford Homes, Inc. v. Long*, 221 Ind. 309, 47 N.E.2d 609 (1943).

50. *Stirling v. Dari-Delite, Inc.*, 262 Ore. 359, 494 P.2d 252 (1972); *Furbee v. Vintage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972) (collecting cases).

51. *Howarth v. Howarth*, 146 Cal. App.2d 694, 304 P.2d 147, 149, *cert. denied*, 354 U.S. 926 (1957).

52. *International Security Life Ins. Co. v. Robichau*, 510 S.W.2d 132 (Tex. Civ. App. 1974).

53. *Furbee v. Vintage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972).

54. *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860 (7th Cir. 1974).

small state in terms of population and litigation, Montana is just now beginning to feel the pressure of an overburdened appellate docket. As early as the mid-1960's, the California appellate courts were beginning to penalize frivolous appeals on a regular basis.⁵⁵

With no decrease in the growth of appellate case load in sight, and barring unexpected judicial reform, the Montana bar should expect to see the flag of frivolous appeal waved with growing frequency. As the demands on the court's time increase, its tolerance for waste of that time will diminish correspondingly. In such a climate, the court would not be likely to hesitate to impose penalties on grounds pioneered by other jurisdictions.

Obviously, the best solution to the problem lies with counsel unsuccessful in the trial court. Appeal should not be a reaction, but a carefully considered tactic, with all the possible gains and losses, including the penalties discussed here, carefully weighed. For those cases where counsel for the appellant persists, it would behoove counsel for the appellee, in the aid of the court and his client, to raise in his brief the issue of frivolity. There may be substantial rewards.

55. See Kamine, *Frivolous Appeals*, 47 J. ST. BAR CAL. 307 (1972).

