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Feature

***10 WHAT'S WRONG WITH APPELLATE LAW IN ARKANSAS**

Gerry Schultze

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Anyone who reads the Arkansas Advance Sheets can see that far too many appeals are resolved on procedural, rather than substantive grounds. The number of times that even talented and respected litigators in this state fall victim to procedural defects on appeal is disturbing. I feel that the most serious problems in appellate procedure arise in three areas: 1) timing of filing the notice of appeal, 2) timing of filing the record, and 3) abstracting. One solution is that all litigators who hope to go beyond the trial court familiarize themselves with these problems. But I also feel that the rules themselves are in need of change.

***11 1. TIMING OF FILING NOTICE OF APPEAL.**

John J. Watkins's article, "Notice of Appeal: Timing is Everything" [\[FN1\]](#) deals with timing issues in detail. I don't want to repeat what he said so recently and so well. I would like to use some of the problems he discussed in his article to point out the reason for my concern.

There is some uncertainty about what constitutes a final order. This is usually a problem in connection with a final order that does not release all the parties or resolve all the claims. Ark.R.Civ.P. 54(b). It is sometimes a problem when there is a question whether a particular order is collateral. [\[FN2\]](#)

NEGOTIATING THE SERBONIAN BOG.

Justice Hickman said it best:

I have come to the conclusion that it is hazardous for a lawyer to file any motion for post-judgment relief. He will enter a maze of our rules and our decisions which qualifies for the legal "Serbonian Bog" award (which, no doubt, Justice Cardozo intended to establish by his dissent in the case of [Landress v. Phoenix Mutual Life Ins. Co., 291 U.S. 491 \(1934\)](#). [\[FN3\]](#)

Frankly, the bog has only gotten more Serbonian since Justice Hickman graced us with that quote. See also, *State Farm v. Mobley*, [\[FN4\]](#) in which Judge Mayfield, concurring, noted, "The filing of a motion for new trial is fraught with great procedural danger--unnecessarily so--it seems to me."

To be sure, the Court has changed the rules since those cases, but rather than drain the swamp, they have merely repositioned the alligators.

The basic rule is that you have 30 days from the entry of judgment to appeal. If you file one of several post-trial motions, including a motion for a new trial (Rule 59), a motion for judgment notwithstanding the verdict (Rule 50), or a motion to amend findings of fact (Rule 52), then the trial court must rule on the motion within 30 days. If the trial court does not rule, the motion is deemed denied, the trial judge loses jurisdiction, and a notice of appeal must

be filed after that day. If you filed an early notice, it's no good. If you file on the 30th day, instead of after the 30th day, it's no good. [FN5] You can never be sure what type of motion will be deemed the equivalent of one of those post-trial motions. [FN6]

There are a number of cases in which the Court has dismissed appeals for problems related to motions for new trial. The Court has, on a number of occasions, resolved questions of first impression against the party filing the appeal. [FN7] The number of traps in this area is truly astounding. Consider, for example, some of the ways that a valid notice of appeal can be dislodged. [FN8] A subsequent motion for a new trial may dislodge an otherwise effective notice of appeal. In dicta in *Craig v. Traylor*, [FN9] recently, the Arkansas Supreme Court suggested that a post-judgment motion filed by one defendant would serve to invalidate a timely notice of appeal filed by another defendant. Fortunately, in that case, one technical snafu deserved another, and since the subsequent motion for new trial was not in the record, it did not dislodge the notice.

It used to be that filing too early even on the same day the judgment was entered would invalidate a notice of appeal. [FN10] Dismissing an appeal because a notice was filed too early is particularly harsh. Everyone knows what the intent of the appellant was. There is no way a litigant could be prejudiced because his opponent acted too early. To dismiss an appeal because a notice was filed too early serves no legitimate purpose and protects nobody's rights.

2. TIMING OF FILING RECORD.

The record must be filed within 90 days of the filing of the first notice of appeal. If you designated any testimony to be typed, you can get an extension for up to seven months. "In no event shall the time be extended more than seven (7) months from the date of the entry of the judgment, decree or order, or from the date on which a timely post-judgment motion under Rule 4(b) is deemed to have been disposed of under Rule 4(c), whichever is later." [FN11] To see how dangerous this is, see *Pennington v. Harvest Foods*. [FN12] In that case, judgment was entered against defendants on October 25, 1994. Defendants Pennington, Armstrong, and Service Brokerage filed post-judgment motions on November 4, 1994. Other defendants filed their post-judgment motions on November 7, 1994. On December 7, 1994, the trial court entered an order denying all the post-judgment motions. Pennington filed a notice of appeal on December 15, 1994. Armstrong and Service Brokerage filed their notice on December 19.

The court reporter was unable to prepare the record in 90 days, so, on February 22, 1995, the appellants asked for an extension to file the record until what they believed was the last possible day, July 7, 1995. The record was filed on July 7, 1995.

In a 4-3 decision, in a case of first impression, the Arkansas Supreme Court dismissed the appeals of Pennington, Armstrong, and Service Brokerage because the record was filed too late as to those appellants. The Court reasoned:

In this case, the motions filed by Mr. Pennington, Mr. Armstrong, and Service Brokerage on November 7, 1994, are listed in Rule 4(b). However, according to Rule 4(c), they were "deemed denied" on December 4, 1994. Therefore, each of these parties had until July 5, 1995 in which to file their record. Although Mr. Armstrong and Service Brokerage filed Motions for Remittitur, they cannot claim December 7, 1994, as the starting date for their seven-month extension because such a motion is not contemplated by Rule 4(b). *Id.* at 823.

*12 There are enough traps in the system without the kind of rulings we see in *Pennington*. Sometimes records get thrown out because the order extending time is "entered" [FN13] late, even though the motion is made and the order signed within the 90 days. If there is nothing to transcribe, an order extending the time to file more than 90 days is invalid.

The Court has said time and time again that it is the lawyer's responsibility to see to it that the record is prepared on time. But, in fact, we don't pay the court reporters' salary and we can't fire them. In the not-too-uncommon event that the court reporter tells us that he or she simply can't get the record ready in time, the law is insufficiently clear on what to do about it. The Motion for Certiorari to complete the record is fraught with peril.

3. ABSTRACTING.

Abstracting is a major problem. Insufficient abstracting, or failing to abstract information from the record that the Court would like to have, will doom an appeal. To me, the obvious thing to do with a bad abstract is to send the brief back to the lawyer and tell the lawyer to return the brief properly abstracted along with an affidavit that there was no charge to the client for the extra work. To the Court, the obvious thing to do is refuse to consider the issues. It is difficult to explain to the public why an appellate court would fail to reach the issues because of an abstracting error. It's especially bad in high-profile cases like the Jocelyn Elders case [\[FN14\]](#). The Boren [\[FN15\]](#) case is also a good recent example of what a nightmare abstracting inefficiencies can cause (failure to abstract a complaint led to one case remaining undecided while a companion case was decided in such a way as to make whatever might have been in the complaint immaterial).

Abstracts are too damn long because we have to abstract everything that has marginal relevance to the issues or the validity of the appeal. The plain language of the rules suggests otherwise. The appellant's abstract or abridgement of the record should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision. [\[FN16\]](#) In fact, the only italicized word in these rules is "only." But, in practice, the Court often refuses to consider an issue because something wasn't abstracted. To play it safe, the lawyer must abstract everything that might be marginally relevant. It creates more billable hours for attorneys, but more work for the Court and it slows down the wheels of justice. The Court's tendency to avoid the merits because of materials left out of the abstract or appendix is probably what doomed the appendix experiment six years ago. [\[FN17\]](#)

Another problem is that the Court will raise technicalities on its own motion. My best personal example occurred during the appendix experiment. In *Egg City of Arkansas v. Rushing* [\[FN18\]](#), the Court refused to consider an appeal of a refusal to impose sanctions for a frivolous motion on the ground that the appellee had not cross-appealed. Neither appellant had raised that issue, not the appellant *Egg City*, who did not abstract plaintiff's notice of cross-appeal, nor appellant *Raby*, who did include the notice of cross-appeal in his appendix. Appellee and cross-appellant did not abstract his notice of cross-appeal because it was in *Raby's* appendix. After the opinion of the Court came down, appellee instructed his lawyers not to petition rehearing on the cross-appeal. After all, he had just had a \$450,000 judgment affirmed in his favor and he didn't want to take any chances. But the lesson here is that the Court raised a procedural issue on its own motion.

The Court just happened to have its facts wrong. The Court's error on the facts was easily understandable. Appendixes were bulky, unwieldy, and it was hard to find things in them. But the point is that if the Court would depend on the parties to raise technicalities, in order to give the other party notice of the issue and a chance to respond, this type of error would not occur.

Anyone can complain. But my duty to "seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession" [\[FN19\]](#) requires that I do more than complain. The Supreme Court is the body which, in the first instance, has the right and the *13 duty to amend the rules as needed to improve the administration of justice. Quite frankly, I'm not sure that anyone has ever asked the Court to consider revising the rules. I believe the rules need to be "humanized" to sharply curtail the number of appeals which are never decided on the merits. I'm asking the Court to do so now. I propose amendments to the rules [\[FN20\]](#) to remedy the problems I believe cause the most trouble. I invite others to suggest other improvements.

Every time the Court avoids the merits on a procedural technicality justice is denied. It creates dissatisfaction and disrespect for the legal system and a potential malpractice claim against the attorney. If these instances were rare, perhaps my complaint would be ill-founded. But you can hardly pick up an advance sheet without finding an abstracting error here, a 54(b) [\[FN21\]](#) or 4(c) [\[FN22\]](#) ruling there, and two or three procedural snafus in criminal cases referred to the Committee on Professional Conduct.

I have no quarrel with the concept that lawyers ought to read and follow the rules. I am certainly aware that failure to follow the rules makes the already difficult job of our appellate courts even harder. I recognize that in many areas, in particular the speed with which cases are decided after submission, Arkansas litigants are among the most fortunate in the nation. [\[FN23\]](#) But it seems to me that procedural defects prevent the appellate courts from

reaching the merits far too often in Arkansas. I believe that resolution of cases on the merits is in the best interests of the law, the litigants, and the legal system. I agree with the sentiment in [Rule 1 of the Arkansas Rules of Civil Procedure](#) that the rules should "be construed to secure the just, speedy, and inexpensive determination of every action." Too many cases turn on procedural problems. That suggests to me that something is wrong with the rules. I address this petition for redress of grievances to the justices, judges, and lawyers of this state. Please consider revising the rules in order to achieve substantial justice.

Note 1. **Gerry Schulze** is an attorney with the firm of Gary Eubanks and Associates. He was the Institute Chair of the Arkansas Bar Association's 1996 Appellate Advocacy Institute and is a member of the Appellate Practice Committee of the Arkansas Bar Association. He has handled over 50 cases at the Arkansas Appellate Court level. He is the host of "Law Talk," on KARN, and performs the "Legal Briefs" commentaries on the Arkansas Radio Network.

[\[FN1\]](#). 31 Ark. Lawyer 12 (Spring 1996).

[\[FN2\]](#). Some examples of collateral orders are: a motion for attorney's fees, [Marsh & McLennan of Arkansas v. Herget](#), 321 Ark. 180, 900 S.W.2d 195 (1995); a motion for sanctions, [Spring Creek Living Ctr. v. Sarrett](#), 318 Ark. 173, 883 S.W.2d 820 (1994); a motion to tax interest, [Smith v. Smith](#), 51 Ark.App. 20, 907 S.W.2d 755 (1995).

[\[FN3\]](#). [Poole v. Poole](#), 298 Ark. 550, 551-52, 768 S.W.2d 544 (1989).

[\[FN4\]](#). 5 Ark.App. 293, 296, 636 S.W.2d 299 (1982).

[\[FN5\]](#). [Kimble v. Gray](#), 313 Ark. 373, 853 S.W.2d 890 (1993).

[\[FN6\]](#). For example, a motion to vacate judgment may or may not be [Jackson v. AP & L](#), 309 Ark. 572, 832 S.W.2d 224 (1992) (it was); [Fuller v. State](#), 316 Ark. 341, 872 S.W.2d 54 (1994) (it was not); motion to reconsider order granting summary judgment, [Williams v. Hudson](#), 320 Ark. 635, 898, S.W.2d 465 (1995); [Guthrie v. Twin City Bank](#), 51 Ark.App. 201 (1995); Petition for Rehearing, [Schaeffer v. City of Russellville](#), 52 Ark.App. 184, 916 S.W.2d 134 (1996).

[\[FN7\]](#). Two examples are Poole, supra, and [Pennington v. Harvest Foods](#), 322 Ark. 820, 913 S.W.2d 758 (1995).

[\[FN8\]](#). [Mitchell v. Mitchell](#), 40 Ark.App. 81, 842 S.W.2d 66 (1992).

[\[FN9\]](#). [323 Ark. 363, 915 S.W.2d 257 \(1996\)](#).

[\[FN10\]](#). [Lawrence Bros., Inc. v. R.J. "Bob" Jones Excavating Contractor, Inc.](#), 318 Ark. 328, 884 S.W.2d 620 (1994) (per curiam), and [Kelly v. Kelly](#), 310 Ark. 244, 835 S.W.2d 869 (1992). At least the Supreme Court has fixed that rule as to notices of appeal filed on the same day but at an earlier hour than the order being appealed. Rule 4(f) (1995). In spite of language in the comment, however, I don't think the amendment to the rule necessarily fixed [Kimble v. Gray](#), 313 Ark. 373, 853 S.W.2d 890 (1993), an only slightly more frightening decision.

[\[FN11\]](#). Ark.R.App.P., Civil, Rule 5.

[FN12]. [322 Ark. 820, 913 S.W.2d 758 \(1995\)](#).

[FN13]. "Entered" means filed with the clerk of the trial court. Ark.R.App.P. 4(e). If the order granting the extension is not "entered" within 90 days, it's too late.

[FN14]. [Winters v. Elders, 324 Ark. 246, --- S.W.2d ---- \(1996\)](#).

[FN15]. [Boren v. Worthen National Bank, 324 Ark. 416, --- S.W.2d ---- \(1996\)](#).

[FN16]. Ark.R.S.Ct. 4-2.

[FN17]. The Court experimented with the "appendix" method instead of abstracting several years ago. On June 10, 1991, the Court ended the experiment. Appendices were too long for the same reason abstracts are too long. Litigants were afraid of leaving anything out and having a defective appeal.

[FN18]. [304 Ark. 562, 803 S.W.2d 920 \(1991\)](#).

[FN19]. Model Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities.

[FN20]. My proposed amendments: [Rules of Appellate Procedure--Civil, Rule 1\(b\)](#). No appeal shall be dismissed because a notice of appeal was filed too early. No appeal shall be dismissed for failure to make a timely filing of a notice of appeal or for failure to file the record in a timely manner except upon motion by the appellee. The appellee must show prejudice in order to prevail. There will be a rebuttable presumption of prejudice if no notice of appeal has been filed within 30 days of the entry of judgment and service of the judgment on the parties.

Rules of the Supreme Court and Court of Appeals, Rule 4-1(b). In the event the court finds that a party's abstract or supplemental abstract is or may be deficient, the court shall direct the attorney for the party to file a supplemental abstract at his or her own expense, and shall file therewith an affidavit that he or she has not charged his or her client any additional fee for the preparation of the supplemental abstract. If after the filing of the opening briefs either party feels that relevant material has been omitted from the abstract, he or she may supplement the abstract within ten days of filing of the last opening brief. The opposing party may supplement the abstract within ten days of receipt of the supplemental abstract.

[FN21]. Ark.R.Civ.P. 54(b)

[FN22]. Ark.R.App.Pro. 4(c)

[FN23]. In spite of a rather overwhelming caseload, the Court still hands down decisions soon after submission. The most recent statistics I could find indicated that civil cases are decided, on average, 19 days after submission and criminal cases are decided 17 days after submission. See <http://www.state.ar.us/supremecourt/arksct.htm>.

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