Louisiana Law Review

Volume 45 | Number 1
September 1984

Damages for Frivolous Appeal

Gail Sweeney Stephenson

DAMAGES FOR FRIVOLOUS APPEAL

A Louisiana litigant who suffers delay or harassment because of an adversary's groundless appeal is afforded a remedy by Louisiana Code of Civil Procedure article 2164, which provides in pertinent part: "The court may award damages for frivolous appeal . . . ." The appellee who seeks damages under article 2164, however, must overcome a serious obstacle—the extreme reluctance of the courts to penalize an appellant unless the abuse of the appeals system is flagrant.[1] In *Parker v. Interstate Life & Accident Insurance Co.*,[2] the Louisiana Fourth Circuit Court of Appeal awarded damages under article 2164 after finding that in view of the facts and circumstances surrounding the case, the appellant must have known that he had no chance, as a matter of law, to succeed in his appeal.[3] The Louisiana Supreme Court, in its only decision interpreting article 2164, reversed the appellate court and set forth the following test as to when an award of damages is appropriate under that article:

> [D]amages for frivolous appeal are not allowable unless it is obvious that the appeal was taken solely for delay or that counsel is not sincere in the view of the law he advocates even though the court is of the opinion that such view is not meritorious. . . .
>
> . . . .
>
> . . . [W]hen counsel proclaims his sincerity, a court finds itself without just cause to disbelieve unless, and only unless, the proposition advocated is so ridiculous or so opposed to rational thinking that it is evident beyond any doubt that it is being deliberately professed for ulterior purposes.[4]

---

1. Louisiana courts have stated consistently that appeals are favored and are to be aided by the courts, and thus damages for frivolous appeals are to be awarded only in extreme cases. See In re Liquidation of Thrift Homestead Ass'n, 202 La. 309, 315, 11 So. 2d 599, 601 (1942); Goad v. May, 376 So. 2d 340, 342 (La. App. 3d Cir. 1979); Coleman Oldsmobile, Inc. v. Cobb, 366 So. 2d 994, 996 (La. App. 1st Cir. 1978); Jackson v. East Baton Rouge Parish School Bd., 348 So. 2d 739, 741 (La. App. 1st Cir. 1977).

2. 172 So. 2d 367 (La. App. 4th Cir. 1965).

3. Id. at 370.

4. Parker v. Interstate Life & Acc. Ins. Co., 248 La. 449, 455-57, 179 So. 2d 634, 636-37 (1965).

Judicial Application of Article 2164

The first penalty for frivolous appeal in Louisiana was provided in article 907 of the Code of Practice of 1825, which was retained without change in the 1870 revision of the Code of Practice. This article permitted the appellate court to assess against the appellant "such damages as it may think equivalent to the loss which [the appellee] has sustained by the delay consequent on the appeal . . . ." Damages were limited by the article to ten percent of the amount in dispute and were allowed by the courts only on a suspensive appeal[5] from a money judgment.[6]

When the Code of Civil Procedure was enacted in 1961, Louisiana Code of Civil Procedure article 2164 replaced article 907 of the Code of Practice. The new article broadened the scope of damages the court could award.[7] Louisiana courts now are free to award damages, including attorneys' fees,[8] in any amount on any type of judgment, monetary or nonmonetary, and on both suspensive and devolutive appeals.[9]

While article 2164 broadened the scope of damages against the frivolous appellant, Louisiana courts have continued to follow cases decided under article 907 in determining when those penalties should be assessed.[10] The courts historically have refused to allow damages when the appellant is in good faith,[11] when the appellant or his attorney has

5. Mutual Nat'l Bank v. Moore, 50 La. Ann. 1332, 1333, 24 So. 304, 305 (1898); Chaffe v. Carroll, 35 La. Ann. 115, 116 (1883); Harrisonburg-Catahoula State Bank v. Meyers, 185 So. 96, 98 (La. App. 2d Cir. 1938); Dubach Mill Co. v. M. M. Carroll Lumber Co., 4 La. App. 207, 210 (2d Cir. 1926).

6. Racoby v. People's Furn. Co., 175 La. 383, 387, 143 So. 334, 335 (1932); Carrano v. Colombel, 164 La. 739, 742, 114 So. 637, 637 (1927); Arrowsmith v. Rappelege, 19 La. Ann. 328, 329 (1867); Jourdan v. Hutton, 86 So. 2d 223, 225 (La. App. 1st Cir. 1956).

7. La. Code Civ. P. art. 2164, comment (e); Lanza Enters. v. Continental Ins. Co., 129 So. 2d 91, 94 (La. App. 3d Cir. 1961).

8. Moity v. Busch, 368 So. 2d 1134, 1137 (La. App. 3d Cir. 1979); Coleman Oldsmobile, Inc. v. Cobb, 366 So. 2d 994, 997 (La. App. 1st Cir. 1978); Samford v. Samford, 297 So. 2d 465, 467-68 (La. App. 2d Cir. 1974).

9. In Hodson v. Hodson, 292 So. 2d 831 (La. App. 2d Cir. 1974), the court refused to assess damages under article 2164 against a party who appealed devolutively, stating that there was no showing that the appeal was taken solely for delay, and that being only devolutive, it could serve no delaying purpose. Damages still could be awarded on a devolutive appeal, however, if the claim as advanced by appellant's attorney is not serious (given the status of the law on that topic) or where the appeal is abandoned.

10. The Louisiana Supreme Court, in Parker v. Interstate Life & Accident Insurance Co., 248 La. at 455, 179 So. 2d at 636, stated that article 2164 does not change this prior jurisprudence. See also Lanza Enters. v. Continental Ins. Co., 129 So. 2d 91, 94 (La. App. 3d Cir. 1961) (asserting the belief that article 2164 was not intended to effect a change in the jurisprudence).

11. Macaluso v. Succession of Marinoni, 184 La. 1052, 1054, 168 So. 296, 297 (1936); Jung v. Gwin, 176 La. 962, 974, 147 So. 47, 50 (1933); Connolly v. Connolly, 316 So. 2d 167, 168 (La. App. 4th Cir. 1975) (The court refused to assess penalties against a husband who prosecuted the appeal of divorce judgment in proper person with express motive

made an honest mistake,[12] when questions of fact are involved,[13] or when the judgment is modified in part on appeal.[14] Damages have long been awarded under the test stated in *Parker* (*i.e.*, when the appeal is taken solely for delay or when the appellant's attorney is not sincere in the view of the law which he advocates).[15] Damages have also been allowed when the appellant abandons the appeal, even though the grounds for appeal might have been meritorious,[16] or when the law is free from doubt, that is, when the issue has been decided previously by the Louisiana Supreme Court,[17] but not when it has merely been decided earlier by the same appellate court that is hearing the present case.[18]

Even if the appellee clearly has grounds for damages under article

---

of effecting a reconciliation, stating that a layman would not be held to the same standards of skill and judgment that must be attributed to an attorney.); Romero v. Galley, 79 So. 2d 625, 628 (La. App. 1st Cir. 1955).

12. Southern Coal Co. v. Sundbery & Winkler, 158 La. 386, 389, 104 So. 124, 125 (1925); Thomas v. Guilbeau, 35 La. Ann. 927, 929-30 (1883) (Defendant-appellant erroneously contended that a mortgage granted in 1877 by plaintiff had to be registered under the 1880 homestead act to be exempt from seizure. The mortgagor apparently was under the same mistaken belief when he attempted to register his homestead after judgment had been rendered recognizing the mortgage. Court held the mortgage was governed by the 1865 act, which did not require registration, but no penalties would be assessed since appellant's honest mistake had been superinduced by appellee's own error.).

13. Wendling v. Parnin, 170 La. 504, 507, 128 So. 291, 292 (1930); Austin & McWilliams v. Moore, 16 La. Ann. 218, 218 (1861); Hullen v. Connolly, 4 La. 18, 19 (1832); Barrow v. Unity Indus. Life Ins. Co., 18 La. App. 645, 646, 139 So. 77, 78 (Orl. 1932).

14. Starwood v. Taylor, 434 So. 2d 1236, 1238 (La. App. 1st Cir. 1983); Lynch v. Derrérry, 339 So. 2d 507, 508 (La. App. 2d Cir. 1976), rev'd on other grounds, 341 So. 2d 902 (La. 1977); Galloway v. Minckler, 63 So. 2d 891, 892 (La. App. 1st Cir. 1953); Swart v. Lisbon Iberia Oil Corp., 197 So. 152, 153 (La. App. 1st Cir. 1940).

15. Samford v. Samford, 297 So. 2d 465 (La. App. 2d Cir. 1974) (Wife appealed divorce judgment on sole basis that a judge, other than the one to whom the case had originally been assigned, heard separation suit in violation of local rules, even though her counsel had made no objection at either the separation or divorce trial. The court held that the sole reason for the appeal was to prolong payment of alimony *pendente lite* by husband-appellee and assessed penalties under article 2164.); Smith v. Most Worshipful St. John's Grand Lodge of Free & Accepted Masons, 17 La. App. 536, 537, 135 So. 675, 676 (2d Cir. 1931); Mauberet v. Mauberet, 12 La. App. 553, 554-55, 125 So. 886, 886-87 (Orl. 1930).

16. Hohl v. Meyer, 7 La. Ann. 18, 18 (1852) (Although evidence of defendant-appellant's indebtedness was not sufficient to support the judgment, it was affirmed with a penalty for frivolous appeal since the appellant had abandoned the appeal.); Mathews v. 8 Mile Post Plumbing Supplies, 70 So. 2d 218, 220 (La. App. Orl. 1954); Hutchinson Bros. v. Blanchard, 8 La. App. 134, 134-35 (2d Cir. 1928). An appeal is presumed abandoned when the appellant makes no appearance in the appellate court, files no brief, and makes no argument. Louisiana Knights of Pythias v. Natchitoches Lodge No. 89, 215 La. 300, 302, 40 So. 2d 472, 472 (1949); Mathews v. 8 Mile Post Plumbing Supplies, 70 So. 2d 218, 220 (La. App. Orl. 1954).

17. Calhoun v. Star Ins. Co., 159 La. 77, 81-82, 105 So. 231, 232 (1925); State v. Schonhausen, 37 La. Ann. 42, 43 (1885).

18. Southern Coal Co. v. Sundbery & Winkler, 158 La. 386, 389, 104 So. 124, 125 (1925).

2164 as interpreted by the courts, damages will be awarded only if the appellee has asked for the sanctions in his answer to the appeal[19] but has not asked for an amendment of the judgment and the judgment has been affirmed in all respects.[20] The sanctions available under article 2164 include only monetary damages—Louisiana courts will not dismiss an appeal on grounds of frivolity.[21] Further, although an appellee may obtain dismissal of an appeal which an appellant has abandoned,[22] the appellee cannot obtain damages under article 2164 unless the action has been heard on the merits by the appellate courts.[23]

Frivolous Appeal in Other Jurisdictions

Louisiana's frivolous appeal statute is similar to those found in thirty-six of Louisiana's sister states[24] and in the federal appellate

19. Cheramie v. Vegas, 413 So. 2d 1343, 1345 (La. App. 1st Cir. 1982); Prosperity Park, Inc. v. Barton, 404 So. 2d 1307, 1311 (La. App. 2d Cir. 1981); La. Code Civ. P. art. 2133.

20. Parker, Seale & Kelton v. Messina, 214 La. 203, 213, 36 So. 2d 724, 728 (1948); Dennis v. Huber, 151 La. 589, 592, 92 So. 126, 127 (1922); Whetstone v. Rawlins, 26 La. Ann. 474, 477 (1874).

21. Kendrick v. Garrene, 231 La. 462, 470, 91 So. 2d 603, 606 (1956); Dardenne v. Schwing, 111 La. 318, 319, 35 So. 583, 583 (1903); Rainers v. St. Ceran, 27 La. Ann. 112, 112 (1875); Macedonia Baptist Found. v. Singleton, 379 So. 2d 267, 268 (La. App. 1st Cir. 1979).

22. La. Cts. App. R.S. 2-8.6, 2-12.12, in West's Louisiana Rules of Court 1984. This rule has been eliminated by the Louisiana Supreme Court since the majority of that court's appeals are criminal and since the dismissal of an appeal for abandonment raises constitutional questions of inadequate representation of counsel. La. Sup. Ct. R. 5, comment (4), in West's Louisiana Rules of Court 1984.

23. Dardenne v. Schwing, 111 La. 318, 319, 35 So. 583, 583 (1903); Thomas v. Guilbeau, 35 La. Ann. 927, 930 (1883).

24. Ala. R. App. P. 38, in Ala. Code § 23 (1975); Alaska Sup. Ct. R. 39, in Alaska Rules of Ct. Proc. & Admin. (1963); Ariz. Rev. Stat. Ann. § 12-2106 (1982); Cal. Civ. Proc. Code § 906 (West 1980); Cal. Civ. & Crim. R. 26(a), tit. 1, div. 1 (West 1981); Col. App. R. 38(d), in Colo. Rev. Stat. § 7(B) (1973); Fla. Stat. Ann. § 57.105 (West Supp. 1983); Ga. Code Ann. § 5-6-6 (1982); Hawaii Rev. Stat. § 607-14.5 (Supp. 1983); Idaho Ct. R., Civ. Proc. R. 54(e)(1), in Idaho Code (1980); Ind. Ct. R. Bk. 2, App. Proc. R. 15(G) in Ind. Code Ann. (Burns 1980); Kan. Stat. Ann. § 60-2701a, R.7.07(b) (1983); Ky. Rev. Stat. § 26A.300 (1983); Maine R. Civ. P. 76(f), in West's Maine Rules of Court 1984; Mass. R. App. P. 25, in Mass. Ann. Laws (Michie/Law. Co-op. 1982); Mass. Ann. Laws ch. 211, § 10 (Michie/Law. Co-op. 1974); Mich. Comp. Laws Ann. § 600.2445(3) (West Supp. 1984); Minn. R. Civ. App. P. 138, in West's Mnnesota Rules of Court 1984; Miss. Code Ann. § 11-3-23 (1972); Mo. R. Civ. P. 84.19, in West's Missouri Rules of Court 1984; Mont. R. App. Civ. P. 32, in Mont. Code Ann. § 21 (1983); Nev. R. App. P. 38, in Nev. Rev. Stat. (1979); N.H. Rev. Stat. Ann. § 490:14(a) (1983); N.M. Stat. Ann. § 39-3-27 (1983); N.C. R. App. P. 34, in West's North Carolina Rules of Court 1984; N.D. R. App. P. 38, in N.D. Cent. Code § 5B (1974); Ohio R. App. P. 23, in West's Ohio Rules of Court 1984; Or. Rev. Stat. § 19.160 (1981); Pa. R. App. P. 2744, in West's Pennsylvania Rules of Court 1984; R.I. Gen. Laws § 9-22-16 (1970); S.D. Codified Laws Ann. § 16-2-29.4 (Supp. 1983); Tenn. Code Ann. § 27-1-122 (1980); Tex. R. Civ. P. 438,

system.[25] Two of those states, North Carolina and South Dakota, penalize frivolous appeals by dismissal alone,[26] while the remaining states impose monetary sanctions on the appellant, and in four of those states, on his counsel as well.[27] Monetary sanctions against the appellant and his counsel are also available to the federal appellate courts.[28] Additionally, four of the states with frivolous appeal statutes also penalize frivolous civil actions at the trial court level.[29]

The penalties which may be imposed under these statutes vary widely. Rhode Island limits the penalty which the appellee may recover to treble costs.[30] Five states award punitive interest, ranging from five to twelve percent per annum,[31] while a penalty of ten percent of the judgment may be imposed in seven states.[32] Mississippi awards only five percent of the judgment as a penalty,[33] but larger penalties are imposed in Utah, where twenty-five percent of the judgment can be assessed against the appellant,[34] and Hawaii, where reasonable attorneys' fees of up to twenty-five percent of the original *ad damnum* may be awarded.[35] Many of the other states and the federal system have open-ended penalties; these statutes provide for "reasonable," "just," or "proper" damages and may include attorneys' fees, costs, and other expenses on appeal.[36]

---

in West's Texas Rules of Court 1983; Utah R. Civ. P. 73(1), in Utah Code Ann. § 9(B) (1977); Va. Code § 16.1-113 (1982); Wash. R. App. P. 18.9(a), in Washington Court Rules (1978); Wis. Stat. Ann. § 809.25(3) (West Supp. 1983); Wyo. R. App. P. 10.05, in Wyoming Court Rules Ann. (1979).

25. Fed. R. App. P. 38; 28 U.S.C. § 1912 (1982).

26. N.C. R. App. P. 34, in West's North Carolina Rules of Court 1984; S.D. Codified Laws Ann. § 16-2-29.4 (Supp. 1983).

27. Ala. R. App. P. 38, in Ala. Code § 23 (1975); Cal. Civ. Proc. Code § 906 (West 1980); Wash. R. App. P. 18.9(a), in Washington Court Rules; Wis. Stat. Ann. § 809.25(3) (West 1983).

28. Fed. R. App. P. 38; 28 U.S.C. § 1912 (1982).

29. Fla. Stat. Ann. § 57.105 (West Supp. 1983); Hawaii Rev. Stat. § 607-14.5 (Supp. 1983); Idaho R. Civ. P. 54(e)(1), in Idaho Code (1980); S.D. Codified Laws Ann. § 16-2-29.4 (Supp. 1983).

30. R.I. Gen. Laws § 9-2-16 (1970).

31. Mass. Ann. Laws ch. 211 § 10 (Michie/Law. Co-op. 1974) (12%); N.H. Rev. Stat. Ann. § 490: 14-1 (1983) (12%); Pa. R. App. P. 2744, in West's Pennsylvania Rules of Court 1984 (6% plus $25 attorneys' fees); Va. Code § 16.1-113 (1982) (10%); Wyo. R. App. P. 10.05, in Wyoming Court Rules Ann. (1979) (5% on suspensive appeal of money judgment).

32. Ariz. Rev. Stat. Ann. § 12-2106 (1982); Ga. Code Ann. § 5-6-6 (1982); Ind. R. App. P. 15(G), in Ind. Code Ann. (Burns 1980); Ky. Rev. Stat. § 26A.300 (1983); N.M. Stat. Ann. § 39-3-27 (1983); Or. Rev. Stat. § 19.160 (1981); Tex. R. Civ. P. 438, in West's Texas Rules of Court 1983.

33. Miss. Code Ann. § 11-3-23 (1972). The penalty is assessed against all unsuccessful appellants.

34. Utah R. Civ. P. 73(1), in Utah Code Ann. § 9(B) (1977).

35. Hawaii Rev. Stat. § 607-14.5 (Supp. 1983).

36. Allowable items of "just" or "proper" damages are set forth statutorily in many states. In other states, and in the federal system, allowable damages are determined

While many of these statutes set forth the possible penalties with specificity, few define the term "frivolous" or set forth a test as to when damages should be awarded. The exceptions are the statutes of Oregon and Washington. The Oregon statute states that damages of ten percent of the judgment "shall be given . . . unless it appears evident to the appellate court that there was probable cause for taking the appeal,"[37] while the Washington statute states that an appeal is frivolous when:

> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for the purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.[38]

In the remaining states and under the federal rules, where the meaning of "frivolous" has been left to the courts, there seems to be no uniformity of judicial definition.[39] The tests vary widely, ranging from objective to extremely subjective. For example, the California Supreme Court stated that an appeal is frivolous "when any reasonable attorney would agree that the appeal is totally and completely without merit,"[40] while the Indiana courts will award damages for frivolous appeal only upon "a strong showing of bad faith."[41] No consensus on this issue is apparent among the federal appellate circuits, or even among different panels of the same circuit.[42] Appeals taken in bad faith have been penalized by federal courts,[43] as have appeals taken when the existing federal case law

---

jurisprudentially. See Fed. R. App. P. 38, advisory committee notes, in 28 U.S.C. at 492 (1982); A/S Krediit Pank v. Chase Manhattan Bank, 303 F.2d 648 (2d Cir. 1962); Exhibitor's Poster Exchange, Inc. v. National Screen Serv. Corp., 78 F.R.D. 192 (E.D. La. 1978).

37. Or. Rev. Stat. § 19.160 (1981).

38. Wash. R. App. P. 18.9(a), in Washington Court Rules (1978).

39. See Oberman, Coping with Rising Caseload II: Defining the Frivolous Civil Appeal, 47 Brooklyn L. Rev. 1057, 1061 (1981); Note, Penalties for Frivolous Appeals, 43 Harv. L. Rev. 113, 114 (1930).

40. In re Marriage of Flaherty, 31 Cal. 3d 637, 638, 646 P.2d 179, 187, 183 Cal. Rptr. 508, 516 (1982).

41. Annee v. State, 256 Ind. 686, 692, 274 N.E.2d 260, 261 (1971).

42. Judges of the second circuit appear to be divided on whether a showing of bad faith is required before sanctions can be imposed. In West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir. 1971), cert. denied, 404 U.S. 871 (1971), the court stated that a "clear showing of bad faith" was required. In Miracle Mile Associates v. City of Rochester, 617 F.2d 18, 21-22 (2d Cir. 1980), the court refused to penalize the appellant because there was no finding of bad faith. Yet in Bank of Canton v. Republic National Bank, 636 F.2d 30 (2d Cir. 1980), the court found *sua sponte*, without reference to bad faith or vexatious conduct by the appellant, that the appeal was completely frivolous.

43. See, e.g., Ruderer v. Fines, 614 F.2d 1128 (7th Cir. 1980); Browning Debenture Holders' Comm. v. DASA Corp., 605 F.2d 35 (2d Cir. 1978).

clearly and unambiguously supported the judgment.[44] For example, the Ninth Circuit Court of Appeals has stated that an appeal is frivolous "when the result is obvious . . . or the arguments are 'wholly without merit'."[45] Other judicial definitions of the term "frivolous" (none of which is particularly enlightening) include "manifestly and palpably without merit,"[46] "flagrantly groundless,"[47] and "perilously close to being an abuse of process."[48] Ultimately, the question of whether or not damages are awarded to an appellee is left by the various state legislatures to the sound discretion of the appellate courts.

In states which have no frivolous appeal sanctions, the courts rely on the integrity and common sense of the bar. The West Virginia Supreme Court stated in *Hinkle v. Black*[49] that restraints on frivolous cases are unnecessary because attorneys recognize that such suits fall on deaf ears, and consequently an attorney will not waste time and money in a vain process.[50] Additionally, the Code of Professional Responsibility imposes ethical restraints on attorneys relative to filing frivolous appeals. An attorney ethically may not continue to represent a client who wants to appeal solely to harass an opponent.[51] Also, an attorney must treat all persons involved in the legal process with consideration and avoid inflicting needless harm.[52]

When a client desires to appeal after he has been advised by his attorney that he has but a slight chance of success, however, the attorney is faced with an ethical dilemma. He is bound to represent his client zealously within the bounds of the law under Canon 7 of the Code of Professional Responsibility. Even if he has advised his client against an appeal, he ethically may continue to represent the client and take the appeal as long as the legal position taken is not "frivolous."[53] A nonfrivolous position, according to the Code of Professional Responsibility, is one that can be supported by a "good faith argument for an extension, modification, or reversal of the law."[54] "Good faith" would seem to require some chance, however slight, of success on appeal. In a state

44. Exhibitors Poster Exchange v. National Screen Serv. Corp., 543 F.2d 1106 (5th Cir. 1976); Furbee v. Vantage Press, Inc., 464 F.2d 835 (D.C. Cir. 1972).

45. NLRB v. Catalina Yachts, 679 F.2d 180, 182 (9th Cir. 1982) (quoting Libby, McNeill & Libby v. City Nat'l Bank, 592 F.2d 504, 515 (9th Cir. 1978)).

46. Morrison-Knudsen Co. v. Makahuena Corp., 670 P.2d 760, 767 n.5 (Hawaii 1983).

47. Freitag v. Freitag, 318 N.W.2d 760, 762 (N.D. 1982).

48. Good Hope Refs. v. Brashear, 588 F.2d 846, 848 (1st Cir. 1978).

49. 262 S.E.2d 744 (W.V. 1979).

50. 262 S.E.2d at 749.

51. La. Code of Prof. Resp. DR 7-102 (found in Articles of Incorp., La. State Bar Ass'n art. XVI; La. R.S. tit. 37, ch. 4, app. (1974)) [hereinafter cited as Code of Prof. Resp.].

52. Code of Prof. Resp. EC 7-10.

53. Code of Prof. Resp. EC 7-05.

54. Code of Prof. Resp. EC 7-22, DR 7-102.

such as Oregon, where good faith is not sufficient to prevent the imposition of penalties for frivolous appeal, an attorney would be well advised to inform his client of the possibility of penalties before the decision to appeal is made.

Constitutionality of Penalizing Frivolous Appeals

Attorneys have argued that when penalties under such statues are involved in the decision of whether or not to bring an appeal, an unconstitutional "chilling effect" of the litigant's right to appeal results. In *Davis v. Jonti*,[55] the appellant argued that article 907 of the Louisiana Code of Practice inhibited the exercise of his right of appeal granted by the Louisiana Constitution of 1812. The court found no violation of the appellant's constitutional rights, stating that the right of appeal was limited by restrictions which the rights of others rendered necessary.[56] Further, the Orleans Circuit Court of Appeal found in *Mauberet v. Mauberet*[57] that the Louisiana Constitution of 1921, article I, section 6, *supported* article 907.[58] Section 6 guaranteed "adequate remedy by due process of law" and further provided that justice was to be administered without "unreasonable delay." Thus, these same guarantees, now found in article I, section 22 of the Louisiana Constitution of 1974, seem to support the current Louisiana frivolous appeal statute, Code of Civil Procedure article 2164.

Kentucky has eliminated challenges under section 115 of its constitution, which grants litigants a first appeal as matter of right, by providing in Kentucky Revised Statute 26A.300(1) that no damages shall be assessed on a first appeal of right. On any suspensive appeal of a money judgment other than a first appeal of right, however, a penalty of ten percent of the amount of the judgment is imposed against the appellant if the judgment is affirmed or the appeal is dismissed.[59]

In Florida, an appellant argued that the state's frivolous appeal statute impinged on the Court of Appeals' procedural rulemaking authority under the state constitution. This argument was rejected by the Florida court, which held that an award of attorney's fees is a matter of substantive law properly under the aegis of the legislature.[60] A more successful constitutional argument was made in California. In *In re Marriage of Flaherty*,[61] the California Supreme Court, sitting *en banc*, found that the *sua sponte* application against appellant's attorney of the California

55. 14 La. 95 (1839).
56. 14 La. at 96.
57. 12 La. App. 553, 125 So. 886 (Orl. 1930).
58. 12 La. App. at 554-55, 125 So. at 886-87.
59. Ky. Rev. Stat. § 26A.300(2) (1983).
60. Whitten v. Progressive Cas. Ins. Co., 410 So. 2d 501, 504 (Fla. Dist. Ct. App. 1982).
61. 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982).

frivolous appeal statute (Code of Civil Procedure article 907) deprived the attorney of property without due process of law in violation of both the United States and California constitutions. The court stated that fundamental fairness required that sanctions against an attorney be imposed only after notice, an opportunity to respond, and a hearing.[62] Louisiana's frivolous appeal statute has no such constitutional infirmities because notice is given in the answer to appeal,[63] the appellant may respond in a rebuttal brief[64] and in oral argument, and a hearing on the merits is required before penalties can be assessed.[65]

The Future of Louisiana's Frivolous Appeal Statute

Although Code of Civil Procedure article 2164 may be free from constitutional problems, the Louisiana appellate practitioner will find that article 2164 suffers from three jurisprudentially created problems which prevent it from reaching its full potential in deterring frivolous appeals. The first problem is that of the partially frivolous appeal in which the appellant has one meritorious ground for appeal and other clearly frivolous grounds. The appellee's attorney is forced to rebut the frivolous grounds in his answer to the appeal, which may involve additional legal research, thus increasing the attorneys' fees which must be paid by the appellee if his counsel is charging on an hourly basis. While Louisiana courts have awarded damages when the defendant appeals suspensively from an entire judgment which includes sums admittedly due,[66] the courts have otherwise refused to award damages when partially frivolous grounds are urged on appeal if the appellant is accorded at least part of the relief requested based on his meritorious ground.[67] It seems unfair that the appellee should be denied damages at least equal to his increased attorneys' fees in such cases. While the courts may feel that when an issue is blatantly frivolous the additional attorneys' fees involved in rebutting the issues are nominal, even the imposition of nominal damages might serve to deter appellant's counsel from urging these frivolous grounds.

A more serious problem created by the courts' interpretation of article 2164 arises when an appellant abandons an appeal obviously taken solely for delay, as when a defendant appeals a default judgment but files no appellate brief. The appellee has two choices in this situation—he

62. 183 Cal. Rptr. at 517-19, 646 P.2d at 188-90.

63. La. Code Civ. P. art. 2133.

64. La. Cts. App. R. 2-12.6, in West's Louisiana Rules of Court 1984.

65. Thomas v. Guilbeau, 35 La. Ann. 927, 930 (1883).

66. Elkins' Heirs v. Elkins' Executor, 11 La. 224 (1837); Galland v. National Union Fire Ins. Co., No. 83-746, slip op. (La. App. 3d Cir. June 27, 1984); Dwyer Lumber Co. v. Murphy Lumber & Supply Co., 116 So. 2d 64 (La. App. 1st Cir. 1959).

67. Starwood v. Taylor, 434 So. 2d 1236, 1238 (La. App. 1st Cir. 1983); Galloway v. Minckler, 63 So. 2d 891, 892 (La. App. 1st Cir. 1953).

may have the appeal dismissed as abandoned or he may file an answer and await affirmance. If he follows the first course of action, he incurs additional legal expense for preparation of the motion to dismiss the appeal and the supporting memorandum. He may also be damaged by the delay,[68] which may be as much as eighty-five days.[69] Yet only if he follows the second course of action may he obtain damages under article 2164.[70]

If the purpose of sanctions for frivolous appeals is to compensate the victim of a wholly non-meritorious appeal and penalize a party who has wasted the court's time and resources, the rule seems to defeat these purposes. Unless the appellee incurs additional delay and expense and answers the appeal, he cannot be compensated for the original delay and loss, and the frivolous appellant is not penalized. Yet such an appellant *should* be penalized, and it would be judicially efficient to encourage dismissals of abandoned suits by awarding damages under article 2164 in such a situation.

The last and perhaps greatest difficulty in the application of article 2164 is the extremely subjective test set forth by the Louisiana Supreme Court in *Parker v. Interstate Life & Accident Insurance Co.*[71] as to when damages may be awarded. Under that test, if the appellant's counsel professes sincerity in the position he advocates, a court may award damages only if "the proposition advocated is so ridiculous or so opposed to rational thinking that it is evident beyond any doubt that it is being deliberately professed for ulterior purposes."[72] This test is so difficult for an appellee to meet that article 2164 is rendered almost meaningless except to those seeking damages for delay caused by an abandoned appeal. This is evidenced by the paucity of awards made to appellees under article 2164.

While appeals taken in bad faith certainly should be penalized, a proclamation of good faith should not relieve the appellant from all penalties in all situations. For example, an appellant who asserts a position

---

68. For example, when a plaintiff frivolously appeals a judgment in favor of a defendant insurer, the insurer incurs additional administrative expenses in keeping its file open and maintaining its reserves. When a defendant delays payment of a judgment by a frivolous suspensive appeal, the plaintiff is denied the use of the funds to which he is entitled during the pendency of the appeal. If conventional interest exceeds legal interest during this time, as it has during recent periods of high inflation, the plaintiff loses the interest he could have earned.

69. Code of Civil Procedure article 2125 provides that the return day shall be 60 days from the date the appeal is granted. The appellant then has 25 days after the record is lodged to file his brief. La. Cts. App. R. 2-12.7, in West's Louisiana Rules of Court 1984. Extensions of time are allowed both for the return date and for filing the appellant's brief. La. Code Civ. P. art. 2125; La. Cts. App. R. 2-12.8, in West's Louisiana Rules of Court 1984.

70. See supra text accompaning note 23.

71. 248 La. 449, 179 So. 2d 634 (1965).

72. 248 La. at 457, 179 So. 2d at 637.

repeatedly rejected by the Louisiana courts should not escape liability for subjecting his opponent to the expense and delay of an appeal by professing his personal belief that the law is wrong. Similarly, an appellant whose counsel fails to do necessary legal research and consequently bases an appeal on an incorrect view of the law should not be allowed to escape penalties under article 2164 by asserting good faith. Denying damages in such a situation simply rewards incompetency.

Perhaps the appellate courts are reluctant to find that an attorney has advocated a ridiculous or irrational position because to do so would be tantamount to finding that the attorney has failed to exercise the degree of care and skill exercised by a prudent practicing attorney, *i.e.*, that he has committed legal malpractice.[73] Whatever the reason, it appears that Louisiana appellate courts, by maintaining a standard for the appellate practitioner which encourages incompetency, have ignored the plea of Chief Justice Burger that the "serious problem of advocate competency" be addressed.[74]

A balance must be struck between the appellant's right to take an appeal and the appellee's right to be free from harassing, vexatious litigation. Imposition of liability whenever the appellate court finds the appeal lacks merit would tip the balance too far in favor of the appellee, but the *Parker* test tips the balance too far in favor of the appellant. A more objective test of whether any *reasonable* attorney would conclude that the appeal is totally devoid of merit would be a more effective deterrent to frivolous appeals, yet would not favor the appellee to such a degree as to "chill" the assertion of the right to appeal.

If the obstacles to the application of article 2164 are to be alleviated, it appears legislative action will be necessary. *Parker* is the only case to have reached the Louisiana Supreme Court since the enactment of the Louisiana Code of Civil Procedure more than twenty years ago, and it is unlikely that the court will have the opportunity to review *Parker* in the near future. As long as the courts of appeal follow *Parker* and award damages only in the most flagrant cases of abuse of the appellate process, it is unlikely that an appellant who knowingly advocated a ridiculous position in bad faith and was consequently assessed with damages under article 2164 will apply for writs and risk the imposition of additional penalties by the supreme court. It is even more unlikely that an appellee whose judgment has been affirmed will apply for and be granted writs solely on the issue of whether damages under article 2164 should have

73. Although an attorney is not required to exercise perfect judgment in every instance, he is obligated to exercise at least the degree of care, skill, and diligence that is exercised by prudent practicing attorneys in his locality. Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 269 So. 2d 239 (1972).

74. Burger, Some Further Reflections on the Problem of Adequacy of Trial Counsel, 49 Fordham L. Rev. 1, 19-20 (1980).

been awarded, since the penalties he might recover probably will not offset the additional delay involved in the appeal.

An amendment to article 2164 setting forth a more objective standard and specifically providing that damages are allowable upon dismissal for abandonment, whether an answer has been filed or not, would revitalize the article and would help relieve congested appellate court dockets. This writer strongly suggests that such an amendment should be considered by the legislature in the near future.

Gail Sweeney Stephenson