Arugay v. Wolff, 5 ROP Intrm. 239 (1996)

JANE ARUGAY, et al.,
Plaintiffs,

v.

MARTIN WOLFF, et al.,
Defendants.

MARTIN WOLFF,
Third-Party Plaintiff/Appellant,

v.

KEVIN N. KIRK, et al.,
Third-Party Defendants/Appellees.

CIVIL APPEAL NO. 5-95
Civil Action No. 109-94

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: July 11, 1996

Counsel for Third-Party Plaintiff/Appellant: *Pro se*

Counsel for Third-Party Defendants/Appellees: Richard L. Johnson

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; PETER T. HOFFMAN, Associate Justice.

HOFFMAN, Justice:

BACKGROUND

This action originated as a complaint brought by the plaintiffs against Martin Wolff and Lourdesta Eldebechel. Wolff then brought a third party complaint against Kevin Kirk and David Shadel and their law firm (collectively "Kirk and Shadel"), who represent the plaintiffs in their claim against Wolff and ⊥240 Eldebechel. The third party complaint alleged claims of defamation, abuse of process, and malicious prosecution.

Kirk and Shadel moved for summary judgment on the third party complaint. Wolff filed a response opposing the motion, and both parties submitted memoranda of law in support of their respective positions. In their reply brief, Kirk and Shadel requested sanctions against Wolff,

alleging that Wolff had made numerous false and/or irrelevant factual assertions to the trial court, and that his third party complaint was frivolous.

The court held a hearing on the motion on November 7, 1994. On that same date, the trial court granted summary judgment to Kirk and Shadel, dismissing the third party complaint. In its order, the trial court also found Wolff's third party complaint to be "groundless and frivolous" and awarded attorneys' fees to Kirk and Shadel. Following submissions from Kirk and Shadel regarding the costs they incurred in defending the third party complaint, the trial court, in a separate order on January 12, 1995, determined the amount of these fees to be $7,389.54. It is the imposition of sanctions, and not the granting of summary judgment, from which Wolff now appeals.

THE NOTICE OF APPEAL

Before reaching the merits of the issues raised by Wolff, it is necessary to consider Kirk and Shadel's challenge to Wolff's notice of appeal. Wolff filed his notice of appeal on February 10, 1995, but specifically appealed only the trial court's order of January 12, 1995. The January 12, 1995 order determined only the amount of the sanctions to be imposed on Wolff while the November 7, 1994 order found Wolff's third party complaint against Kirk and Shadel to be groundless and frivolous. Kirk and Shadel contend that because the notice of appeal is limited to the January 12, 1995 order, this Court lacks jurisdiction to consider Wolff's issues on appeal challenging the November 7, 1994 order.[1]

⊥241 It is indisputably true that ROP R. App. Proc. 3(c) requires the notice of appeal to designate "the judgment, order or part thereof appealed from" and that this requirement is jurisdictional in nature. This Court may not consider an order or judgment if an intent to appeal it cannot be fairly inferred from the notice of appeal. [2] *See Lockary v. Kayfetz* , 917 F.2d 1150, 1157 (9th Cir. 1990); *Roberts v. College of the Desert* , 870 F.2d 1411, 1418-19 (9th Cir. 1988) (interpreting the identical provisions of Fed.R.App.P. 3(c)). Thus, when an appellant designates in the notice of appeal an order granting summary judgment, but fails to designate a subsequent order awarding costs and attorneys' fees, the appellate court is without jurisdiction to consider a challenge to the latter order. *Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940, 946 (8th Cir. 1994); *Pope v. MCI Telecommunications Corp.* , 937 F.2d 258, 266-67 (5th Cir. 1991); *cert. denied*, 112 S.Ct. 1956 (1992). "If an appellant . . . chooses to designate specific determinations

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[1] Kirk and Shadel further argue that in order to challenge the November 7, 1994 order, Wolff needed to file his notice of appeal within thirty days of that date and, having failed to do so, he cannot challenge that order even if his notice of appeal is construed as designating both the November 7, 1994 and January 12, 1995 orders. The simple answer to this contention is that the imposition of sanctions is not a final, appealable order until the amount of the sanctions is set. *See Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1413 n.18 (5th Cir. 1994); *Simmerman v. Corino*, 27 F.3d 58, 61 n.3 (3rd Cir. 1994).

[2] But note that a notice of appeal designating the final judgment is sufficient to support review of all earlier orders that merge in the final judgment. The general rule is that an appeal from a final judgment supports review of all earlier interlocutory orders. 16 Charles Wright, Arthur Miller & Edward Cooper, FEDERAL PRACTICE AND PROCEDURE ¶ 3949 (1995 Supp.).

in his notice of appeal--rather than simply appealing from the entire judgment--only the specified issues may be raised on appeal." *McLaurin v. Fischer*, 768 F.2d 98, 102 (6th Cir. 1985).

Perhaps in deference to the potential of this rule to serve as a trap for the inept or inattentive lawyer, appellate courts have mitigated its harshness by looking to whether an appellee has been misled or prejudiced in any way by the failure to designate a challenged order explicitly in the notice of appeal. *See Foman v. Davis*, 83 S.Ct. 227, 229-30 (1962).

> [T]he courts of appeals have consistently given a liberal interpretation to the requirements of Rule 3(c) that the notice of appeal designate the judgment or part thereof appealed from. The rule is now well settled that a mistake in designating a judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred ⊥242from the notice and the appellee is not misled by the mistake.

9 James W. Moore et al., MOORE'S FEDERAL PRACTICE ¶ 203.17[2] (2d ed. 1996)(footnotes omitted).

Here the January 12, 1995 order setting the amount of the sanction specifically refers to the November 7, 1994 order imposing the sanction. The two orders directly relate to each other leading to the conclusion that an intent to appeal from the November 7, 1994 order can be fairly inferred from Wolff's notice of appeal. *See In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1096 (5th Cir. 1977). Nor have Kirk and Shadel been prejudiced in any way by Wolff's failure to designate the November 7, 1994 order in his notice of appeal. All of the issues raised by Wolff have been briefed fully by both sides. We will therefore consider the merits of Wolff's appeal.

AUTHORITY

Wolff contends the trial court failed to specify under what authority it was imposing sanctions thereby denying this Court effective review of the trial court's actions. Wolff is correct that the trial court failed to cite to the authority under which it was proceeding, an omission the trial court should take pains to avoid repeating in the future. It is further true that this Court has held that "[w]ithout a basis to discern on what authority the trial court relied, we have no ability to review the sanction." *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 114 (1995). Nevertheless, even if the trial court does not identify the basis for the imposition of sanctions, if this Court can make such a determination from the record below, any resulting error is harmless. *See* ROP R. Civ. Proc. 61; *Tmetuchl v. Kohn*, 5 ROP Intrm. 81, 84 (1995); *see generally Glassman Construction Co. v. United States*, 421 F.2d 212, 214 (4th Cir. 1970).

Kirk and Shadel requested the trial court to sanction Wolff under ROP R. Civ. Proc. 11 [3]

[3] ROP R. Civ. Proc. 11 states, in pertinent part, that:

> The signature of an attorney or trial assistant constitutes a certificate by him that

and 14 PNC § 702. [4] Since the trial ⊥243 court's order specifically found Wolff's third party complaint against Kirk and Shadel to be "groundless and frivolous" and this terminology is used only in § 702, the record establishes that this was the authority under which the trial court was proceeding.

Wolff does not point to any prejudice caused him by the trial court's omission nor can we on our own initiative discern any. Any error is of a technical nature only. *See Finchum v. Ford Motor Co.*, 57 F.3d 526, 530 (7th Cir. 1995).

Wolff also appears to be arguing that the trial court failed to specify on what basis it was finding the third party complaint to be frivolous. *See Wolff*, 5 ROP Intrm. at 113. We are baffled by this argument given the trial court's lengthy discussion of the merits of Wolff's third party complaint and of how his allegations failed to measure up to the applicable legal standards. We reject this argument without further discussion.

FRIVOLOUSNESS OF THE THIRD PARTY COMPLAINT

Wolff argues that the trial court erred in imposing sanctions because Wolff's third party complaint was not groundless or frivolous. In considering Wolff's argument, we are mindful that we review all aspects of the trial court's imposition of sanctions under an abuse of discretion standard. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 113 (1995); *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 219 ⊥244 (1994); *see Dalton v. Heirs of Borja*, 5 ROP Intrm. 95, 98 (1995) (criminal contempt citations reviewed under abuse of discretion standard).

Wolff alleged three claims in his third party complaint: defamation, abuse of process, and malicious prosecution. All three claims arose directly or indirectly out of Wolff's prosecution in 1994 for possession of firearms, charges of which he was ultimately acquitted.

As to the first claim, defamation, Wolff alleged that

> he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion, or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney or trial assistant's fee.

[4] 14 PNC § 702 provides, in pertinent part, that "when, in its discretion, the court finds that a complaint in a civil case is groundless, frivolous, or brought in bad faith, it shall award reasonable attorney's fees in favor of the prevailing defendant . . . ."

> [s]ometime prior to Wolff's trial, David Shadel advised members of the community that Martin Wolff was guilty and would be going to jail as Shadel had seen Wolff in KR Hardware purchasing wood carving tools.[5]

The trial court correctly held that Shadel's alleged statements were not defamatory because they were obviously intended as a joke, *see Falwell v. Penthouse Intern. Ltd.*, 521 F.Supp. 1204, 1208 (W.D. Va. 1981); Restatement of Torts (Second) § 566 Comment d (1977) (communication not defamatory if "the communication may be understood only as good-natured fun, not intended to be taken seriously and in no way intended to reflect upon the individual"), and even if not intended as a joke, were fair comment on a highly publicized trial and therefore were not legally defamatory. *See* Restatement (Second) of Torts at § 566. Wolff has failed to offer a sufficient legal justification for concluding such statements were defamatory. The trial court did not abuse its discretion in determining the claim was frivolous.

The second claim, abuse of process, alleges that Kirk and Shadel agreed to represent the plaintiffs in their claim against Wolff and, as Wolff stated in his summary judgment brief, brought the action on their behalf merely to cause Wolff "further grief." The trial court held, again correctly, that when a plaintiff presents a cognizable claim against a defendant, the mere fact that plaintiff's counsel holds a personal animus toward the defendant is irrelevant. *See* Restatement (Second) of Torts at § 682 Comment b. Again, the trial court did not abuse its discretion in determining the second claim was frivolous.

Wolff's final claim, malicious prosecution, alleges that Kirk and Shadel and their law firm assisted the plaintiffs in making ⊥245 false accusations which resulted in the bringing of criminal charges against Wolff. In response to the motion for summary judgment, Mr. Kirk submitted an affidavit to the effect that he did not meet with the plaintiffs until several days following Wolff's arrest on criminal charges. This affidavit was not contradicted by Wolff. More importantly, the issue of probable cause for arresting and charging Wolff had been determined against Wolff in the criminal proceedings. The lack of probable cause for bringing criminal charges is an essential element of a claim for malicious prosecution. *See* Restatement (Second) of Torts at § 653. The trial court was correct in determining this claim to be frivolous as well.

Wolff offers the defense that the validity of his claims were all issues of first impression in this jurisdiction. From this, he argues, it follows that sanctions should never be imposed in cases of first impression. Wolff misapprehends the state of the law in Palau.

The sources of our law have been set forth by the Olbiil Era Kelulau in 1 PNC §§ 301-303. Section 303, in particular, governs the validity of Wolff's claims against Kirk and Shadel [6]

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[5] It is a well known fact in Palau that many inmates at the Koror Jail carve storyboards for sale to tourists and others.

[6] 1 PNC § 303 provides, in part, that:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of

and requires that we apply the law expressed in the American Law Institute's Restatements. Under the Restatements, Wolff's claims have no merit. We are statutorily bound to follow the Restatements in considering the merits of Wolff's claims, as was Wolff in determining whether he had valid claims to assert against Kirk and Shadel. Moreover, we decline to adopt the rule Wolff promotes, whereby the trial court could never find a claim frivolous unless the Appellate Division had produced case law specifically on point. Such a rule would vitiate the trial court's power to sanction frivolous claims where the Restatements speak directly to their validity.

⊥246 OPPORTUNITY TO BE HEARD

Wolff next claims he was denied due process of law because he was never given the opportunity to brief the issue of sanctions being imposed against him. This claim also is without merit.

Kirk and Shadel first requested sanctions in their reply brief regarding their motion for summary judgment. Wolff never filed any brief or opposition to the request nor did he ever request leave of court to do so. The motion for summary judgment came on for hearing on November 7, 1994 and the issue of sanctions was argued at that time. [7] Although the issue of sanctions was raised twice during Kirk and Shadel's argument at the hearing, Wolff never requested an opportunity to brief the issue nor did he object to any denial of his right to do so.

By failing to raise the objection below, Wolff waived any error for purposes of appeal. *See Sugiyama v. Ngirausui*, 4 ROP Intrm. 177, 179 (1994); *KSG v. Tmetuchl*, 3 ROP Intrm. 314, 322 (1993). We will not countenance litigants remaining silent before the trial court and then raising claimed errors for the first time on appeal thereby denying opposing counsel the chance to respond and the trial court the opportunity, if necessary, to correct any error.

Even if Wolff had raised the matter by timely objection, his argument is still without merit. This Court has held that while a party has the right to respond to the proposed imposition of sanctions, "the opportunity to respond need not fit any ritualistic formula . . . . All that is required is that the party have a forum to contest the imposition of sanctions." *Wolff*, 5 ROP Intrm. at 115. The hearing of November 7, 1994 provided Wolff with the necessary opportunity, an opportunity of which he chose not to avail himself. Due process requires no more.

⊥247 ABILITY TO PAY

Wolff contends the trial court in imposing sanctions should have considered his ability to

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decision in the courts of the Republic of Palau in applicable cases, in the absence of written law applicable under section 301 of this chapter or local customary law applicable under section 302 of this chapter to the contrary . . . .

[7] We note that Wolff failed to order a transcript of the November 7, 1994 hearing thereby leaving this Court to its own devices in determining whether he made a timely objection. This failure alone would justify us in rejecting Wolff's contention, *see Grimard v. Carlston*, 567 F.2d 1171, 1173 (1st Cir. 1978), but we have chosen to review the tape of the hearing on our own initiative. We are unlikely to be so accommodating in the future.

pay. We reject this argument for three reasons.

First, the statutory authority under which sanctions were imposed, 14 PNC § 702, makes no reference to the sanctioned party's ability to pay. [8] One important distinction between § 702 and Rule 11 is the purpose of imposing sanctions. The United States Supreme Court, in interpreting the 1983 version of Fed.R.Civ.P. 11, which is identical to ROP R. Civ. Proc. 11, stated the central goal of the rule is deterrence. *Cooter & Gell v. Hartmarx Corp.* , 110 S.Ct. 2447, 2454 (1990); *see* Fed.R.Civ.P. 11 (1983) Advisory Committee Note. In contrast, § 702, by its terms, is aimed at compensating a defendant who has incurred costs because of a groundless or frivolous complaint or one brought in bad faith. This distinction leads us to conclude that while the trial court, when applying § 702, may in its discretion consider the ability of the attorney to pay, such consideration is not mandatory. We therefore reject Wolff's argument to the contrary.

Second, Wolff had the burden of proving his inability to pay if he was urging the trial court to consider this as a factor in determining the amount of the sanction to be awarded. *See Gaskel v. Weir*, 10 F.3d 626, 629 (9th Cir. 1993); *Brandt v. Schal Associates, Inc.* , 960 F.2d 640, 652 (7th Cir. 1992); *Brubaker v. City of Richmond* , 943 F.2d 1363, 1387-88 (4th Cir. 1991). At the hearing on November 7, 1994, Wolff offered no evidence whatsoever on his ability to pay nor did he request the opportunity to do so.

Finally, the time to object to the trial court's failure to consider ability to pay was when the issue was before the trial court. As has been previously discussed, any objection Wolff now makes has been waived.

⊥248 BIAS AND PREJUDICE

Wolff's last argument is that Kirk and Shadel appealed to the trial judge's biases and prejudices by making accusations in their brief against Wolff that were unsupported by the evidence and designed to mislead the court. Without deciding whether the arguments cited found support in the record or were improper appeals to bias and prejudice, suffice it to say that we have full confidence in the ability of the trial courts to disregard improper argument. Absent some indication that the trial court has been influenced by an improper argument, such arguments will be considered harmless error on appellate review. *See* ROP R. Civ. Proc. 61; *Ramsey v. Culpepper*, 738 F.2d 1092, 1100 (10th Cir. 1984); *Gray v. Shell Oil Co.*, 469 F.2d 742, 751-52 (9th Cir. 1972). Here the trial court's order did not refer to the arguments claimed by Wolff to be improper nor does the order appear to be in any way based on or influenced by such arguments.

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[8] All of the cases cited by Wolff in support of his contention arose under Fed.R.Civ.P. 11. While most of the United States Circuit Courts require the district courts to consider ability to pay when imposing sanctions under Rule 11, *see, e.g., Brubaker v. City of Richmond*, 943 F.2d 1363, 1387-88 (4th Cir. 1991); *Jones v. Pittsburgh National Corp.*, 899 F.2d 1350, 1359 (3d Cir. 1990); *Jackson v. Law Firm of O'Hara*, 875 F.2d 1224, 1230 (6th Cir. 1989), others have left it to the trial court's discretion. *See Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987). We need not decide today which line of authority, if either, shall be followed by the courts of Palau.

Arugay v. Wolff, 5 ROP Intrm. 239 (1996)

INTEREST AND ATTORNEY FEES

Kirk and Shadel have requested this Court, pursuant to ROP R. App. Proc. 37, to award them interest on the trial court's order and, pursuant to ROP R. App. Proc. 38, to grant them attorney fees and other damages because Wolff brought a frivolous appeal. Unless a judgment is modified or reversed on appeal, Rule 37 is self-acting and requires no action by this Court. We also cannot say this appeal is frivolous given the lack of development of the law regarding the parameters of the trial court's discretion in imposing sanctions. We therefore decline to award an attorney fee on appeal.

For the foregoing reasons, we affirm the trial court's imposition of sanctions on Wolff.