Lawyers Mutual
LIABILITY INSURANCE COMPANY OF NORTH CAROLINA®

LML TODAY

A publication for policyholders of Lawyers Mutual Liability Insurance Company of North Carolina

No "Subprime" for Lawyers

Carl Younger, President

"… the standards for us as attorneys do not change simply because times are hard financially. As professionals, we must meet 'prime' standards in all transactions, all trials, and all dealings with clients."

In a recent movie, "No Country for Old Men", Sheriff Tommy Lee Jones surveys the aftermath of a bloody encounter and notes that "if it's not a mess, it will do until one comes along." Unfortunately, the US economy, and Lawyers Mutual, are seeing a true mess – the adverse impacts of what has been described as the Subprime Mortgage Crisis. Lawyers Mutual has received a record number of claims during the first half of 2008, and over half of those claims involve real estate.

At various times over the past five years, we have attempted to remind each insured of the need to be careful in how you organize and operate your practice. We recognize the financial pressures faced by many attorneys and firms. However, the standards for us as attorneys do not change simply because times are hard financially. As professionals, we must meet "prime" standards in all transactions, all trials, and all dealings with clients.

What we see most often is that lawyers are trying to do too much too quickly. Deadlines are missed. A lien or a mortgage is overlooked. A conversation is relied upon instead of documenting a payoff or an agreement in a letter or other written communication.

WE are your professional liability company. WE remain committed to serving and insuring you. WE again implore you to be careful in your practice and, if a potential or actual claim arises, WE also implore you to contact US as soon as possible to see if WE can help you avoid that claim. Remember, there is no such thing as "Subprime" performance for you as an attorney.

Dogwood v. White Oak: Are We Out of the Woods Yet?

By Elizabeth Brooks Scherer, Smith Moore, LLP

As you have read in prior newsletters from Lawyers Mutual, dismissals for appellate rules violations have been increasing at an alarming rate since the North Carolina Supreme Court's decision in *Viar v. North Carolina Department of Transportation,* 359 N.C. 400, 610 S.E.2d 360 (2005). In March 2008, the North Carolina Supreme Court issued an important decision clarifying under what circumstances sanctions should be imposed for appellate rules violations. *Dogwood Development & Management Co. v. White Oak Transport Co.*, 657 S.E.2d 361 (N.C. 2008). While *Dogwood*

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Volume 30, Issue 2, Summer 2008

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Lawyers Mutual Liability Insurance Company of North Carolina Founded by the North Carolina Bar Association in 1978

The contents of this newsletter are intended for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is not the intent of this newsletter to establish a standard of due care for any particular situation. Rather, it is our intent to advise our policyholders to act in a manner that might well be above the standard of care in order to minimize a firm's malpractice risk.

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clarifies that most nonjurisdictional appellate rules violations should not result in dismissal, it left the doors wide open for imposition of sanctions other than dismissal. Thus, while errant practitioners may be inclined to breathe a sigh of relief, they should be aware that serious sanctions for appellate rules violations are alive and well. While dismissal of appeals for rules violations should decline post-*Dogwood*, an attorney who fails to comply with the appellate rules may be smacked with admonitions, stiff fines, or even be barred from filing future appeals.

I. *Dogwood Development & Management Co. v. White Oak Transport Co.*

In *Dogwood* an attorney committed the following appellate rules violations: failed to include record or transcript references after the assignment of error; failed to reference the assignments of error in the brief; and failed to include statements of grounds for appellate review and standards of review in the brief. The attorney also did not respond or correct his errors when served a motion to dismiss. Post-Hart, a divided Court of Appeals "declined to exercise its discretion under Appellate Rule 2" and dismissed the appeal for appellate rules violations.

In reversing the Court of Appeals, the North Carolina Supreme Court first explained that there are three types of appellate rules violations: 1) defects in appellate jurisdiction 2) waiver of error occurring in the trial court, and (3) violation of nonjurisdictional requirements. The power to excuse noncompliance with the appellate rules depends on which category a violation falls within. Jurisdictional defects, such as failure to file a timely notice of appeal or include the notice of appeal in the record on appeal, require an appellate court to dismiss an appeal. Jurisdictional errors can never be excused by an appellate court, even under Appellate Rule 2.

In contrast, waiver involves a party's failure to properly preserve an issue for appellate review by making a timely objection to the trial court's rulings. Waiver issues arise when a litigant makes new arguments to the appellate court not made to the trial court or when a party fails to follow Appellate Rule 10(b) specific instructions for preserving objections to erroneous jury instructions and the sufficiency of the evidence. Legal arguments involving waiver defects will ordinarily not be reviewed on appeal. However, in criminal appeals only, an appellate court will review errors not raised at the trial level utilizing the doctrine of plain error review. In addition, an appellate court in "exceptional circumstances" can review an issue not raised at the trial level under Appellate Rule 2 to "prevent manifest injustice to a party" or to "expedite decision in the public interest."

The final category of appellate rules violations involves nonjurisdictional rules designed primarily to keep the appellate process "flowing in an orderly manner." Examples of nonjurisdictional violations include the "form of assignments of error" under Appellate Rule 10(c) and the contents of appellant's brief under Appellate Rule 28. The *Dogwood* court created a three-part test for dealing with nonjurisdictional rules violations. First, under Appellate Rules 25 and 34, an appellate court must decide whether the appellate rules violations were either "substantial "or "gross" violations. The determination of whether appellate rules violations are gross or substantial is a fact-specific inquiry which considers, among other factors, 1) whether and to what extent the noncompliance impairs the court's task of review, 2) whether and to what extent review on the merits despite the violations would frustrate the adversarial process, and 3) the number and degree of violations. Appellate court may not even consider sanctions unless the rules violations are "gross" or constitute a "substantial failure to comply" with the Appellate Rules.

Second, if the appellate court determines that the rules violations are gross or substantial, the appellate court should then determine "which, if any sanction" to impose under Appellate Rule 34(b). While dismissal is one of the sanctions contemplated by Appellate Rule 34(b), "noncompliance with the rules falls along a continuum, and the sanction imposed should reflect the gravity of the violation." *Dogwood* stressed that the sanction of dismissal should be reserved for the more egregious of appellate rules violations.

Finally, even if the appellate court determines that under Appellate Rule 34(b) dismissal for nonjurisdictional rules violations is an appropriate sanction, the Court may still hear the appeal under Appellate Rule 2 to "prevent manifest injustice to a party" or to "expedite decision in the public interest."

II. Don't Breathe a Sigh of Relief Yet.

While *Dogwood* stressed that most nonjurisdictional appellate rules violations should not ordinarily lead to dismissal, the opinion left many questions unanswered: Can defects in assignments of error ever rise to the level of a jurisdictional or waiver problem? What type and degree of violations constitute substantial or gross violations? What types of factors may the Court consider in selecting appropriate sanctions under Rule Appellate Rule 34? What types of violations will warrant dismissal of an appeal under Appellate Rule 34?

Critically, however, the Supreme Court has not changed its stance regarding compliance with the appellate rules. The appellate rules are mandatory. The appellate courts have made clear that the

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prevalence of rules violations in filings made to the appellate courts is what is at the root of this appellate rules drama. While the Supreme Court appears willing to grant the appellate bar a provisional reprieve from the wave of post-Viar dismissals, the Court's patience with inattentiveness to the appellate rules is not infinite. If attorneys continue to submit documents which are not in compliance with the appellate rules, the Court can (and likely will) impose serious sanctions, which could include substantial fines, attorneys fees, or restricting offending attorneys from practicing in the appellate courts.

Therefore, remain vigilant when dealing with appellate rules violations. Your claims counsel has experience helping attorneys emerge from the appellate arena unscathed. If a motion to dismiss is filed or if you are unsure whether you have complied with the rules, call your claims counsel. There is no shame in admitting that you made a mistake. In most instances, violations can be corrected without prejudice to you or your client, if they are recognized and dealt with early on. ■

CALENDAR

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A publication for policyholders of Lawyers Mutual Liability Insurance Company of North Carolina

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