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10 ways to win on appeal by derailing the appeal

An appellant's job is to prove the circuit court committed reversible error. You might therefore conclude the appellee's job is the exact opposite — to prove the circuit court committed no error.

But there are many ways for the appellee to win other than simply defending the honor of the circuit court. In fact, there are at least 10.

1. The notice of appeal was untimely. Take for example *Manning v. City of Chicago*, 407 Ill. App. 3d 849 (1st Dist. 2011). The plaintiff's appeal was dismissed because it was taken greater than 30 days after the trial court lost jurisdiction.

2. The notice of appeal was deficient on its face. In *Long v. Soderquist*, 126 Ill. App. 3d 1059 (2nd Dist. 1984), the plaintiff's brief sought reversal of a dismissal order. But it "was not included in the plaintiffs' notice of appeal and ... we have no jurisdiction to decide it." *Long*, 126 Ill. App. 3d at 1062.

3. No rule confers jurisdiction. *Rice v. Burnley*, 230 Ill. App. 3d 987 (1st Dist. 1992) is a good example. There, the circuit court dismissed certain negligence counts, but left pending other negligence counts. The circuit court then entered the findings required by Rule 304(a) to permit an interlocutory appeal.

The appellate court dismissed the appeal. "In view of the fact that the four dismissed counts advance the same theory of recovery as do two of the remaining counts, the order of dismissal can not be considered a final order and therefore is not appealable and we are without jurisdiction to consider this appeal." *Rice*, 230 Ill. App. 3d at 993.

4. The circuit court abused its discretion in conferring interlocutory appellate jurisdiction. In *AT&T v. Lyons & Pinner Electric Co.*, 2014 IL App (2d) 130577, the

circuit court made the findings necessary for an immediate Rule 304(a) appeal, but did so to facilitate appeal of a thorny legal issue best left to a discretionary Rule 308(a) appeal.

"The inclination to solicit appellate guidance on thorny legal issues is understandable, but it is not a legitimate basis for entering a Rule 304(a) finding without considering the factors set forth in *Geier*. We conclude that the trial judge abused his discretion in entering the Rule 304(a) finding and, therefore, the appeal is not properly before this court." *AT&T*, 2014 IL App (2d) 130577, p. 26.

5. The appellant's brief is stricken. "We recognize that striking an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the violations of procedural rules hinder our review. Here ... we have no choice but to strike the brief and dismiss the appeal." *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, p. 15.

6. The appellant's brief fails to argue any legal authority in support of reversal. "Plaintiff does not dispute this issue in her briefs and did not present argument on this issue at oral argument. Pursuant to Illinois Supreme Court Rule 341(h)(7) (Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013), the

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plaintiff has failed to present any argument on this issue and forfeited argument on appeal of the dismissal of these two counts." *Hasbun v. Resurrection Health Care Corp.*, 2015 IL App (1st) 140537, p. 23 (dismissing the appeal, in part, due to this forfeiture).

7. The appellant's brief contains

THE PROCEDURAL THICKET



**ANTHONY
J. LONGO**

Anthony J. Longo is a founding partner of Brennan Garvey LLC. He defends civil litigation matters in both state and federal court. He is an adjunct professor at The John Marshall Law School, lecturer at the Illinois College of Optometry and a speaker on issues of Illinois Civil Procedure.

argument in support of reversal, but its inadequate. Sometimes an appellant will make arguments in support of reversal, but the argument is deemed undeveloped by the appellate court resulting in waiver of the issue on appeal. See *Pineschi v. Rock River Water Reclamation District*, 346 Ill. App. 3d 719, 725 (2nd Dist. 2004) ("Because defendant's argument is undeveloped and unsupported by pertinent authority, it is waived").

8. The appellant's brief is fine, but she failed to provide an adequate record for review. "An appellant has the burden to present a sufficiently complete record of

be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

9. Appellant is estopped by a loss below. Sometimes an appeal can be mooted if the appellant lost a critical judgment in the circuit court precluding relief on appeal. See *HealthChicago Inc. v. Touche, Ross & Co.*, 252 Ill. App. 3d 608 (1st Dist. 1993). In

HealthChicago, the plaintiff separately alleged a tort claim and a contract claim. After the trial court dismissed the tort claim with prejudice, the plaintiff appealed its dismissal. While the tort claim was on appeal, the circuit court granted the defendant summary judgment on the contract claim. No appeal was taken on that claim.

The appellate court dismissed the appeal of the tort claim as moot since it could not grant any relief because, with the summary judgment order on the contract claim, "the substantial question between the parties was litigated to a final and now unappealable judgment in the circuit court." *HealthChicago*, 252 Ill. App. 3d at 610.

10. Appellant is estopped by a win in a lower court. Sometimes an appeal can be frustrated if the appellant won a critical judgment below that precludes more relief on appeal. See, e.g., *Bodam v. City of Chicago*, 241 Ill. App. 3d 937, 941 (1993) ("where a plaintiff has been awarded damages in a lawsuit against one tortfeasor and then seeks to hold a second tortfeasor liable for the same injury in a subsequent action, the plaintiff is estopped by the former adjudication from recovering an amount of damages greater than that awarded in the first suit").

The foregoing list is worth consideration when defending your next appeal. In each of the foregoing 10 instances, appellee prevailed without having to prove the circuit court right.