The Appellate Advocate:

A Recap of Recent Decisions by NJ's Appellate Courts

Fou v. Kevin Kerveng Tung, PC
No. A-0557-23

When I clerked at the Appellate Division, one of the first appeals I worked on was a matter involving Rule 1:4-8. I had never heard of that Rule before. At the start of my clerkship, I only had a loose understanding of the Court Rules in general. But because Rule 1:4-8 played such a key role in my introduction to the practice of law, it is on my Mount Rushmore of most iconic Court Rules (perhaps an idea for a future blog post). So that all explains why I had to read this opinion when it came across the newsfeed.

Most of the time, persistence is a commendable personal quality. But there might be such a thing as too persistent. Our main character, Kevin Kerveng Tung, was a lawyer who simply did not know the meaning of the word quit. And that, dear reader, turned out to be a costly lesson.

Once upon a courtroom, Tung represented a woman named Janet Yijuan Fou in her divorce. Things went south, lawsuits started flying, and Fou successfully sued Tung for malpractice. But Tung would not accept defeat.

Tung appealed. He appealed the appeal. He went to the New Jersey Supreme Court and the United States Supreme Court—ending in unfavorable decisions and denials. But today's appeal is not about all those other appeals. Today's appeal is about Tung's effort to hit the RESET button.

After his unsuccessful appeals, Tung filed a motion to vacate the final judgment with the trial court. The trial court, appearing to cite the proverbial "enough is enough" view, entered a sanction against him for $7,965 in attorneys' fees.

Tung appealed from that sanction order, and the Appellate Division affirmed. At first glance, Tung appeared to have a decent argument this time around. Tung contended that Rule 1:4-8 requires a stringent process of pre-sanction notices and safe harbors to withdraw potentially frivolous papers.

Not so fast, said the Appellate Division (I'm paraphrasing). Tung was acting as a malpractice-litigant, was therefore subject to the Frivolous Litigation Statute, and the FLS does not carry the same technical requirements. Instead, Rule 1:4-8(f) states that its technical requirements only carry over to the FLS "[t]o the extent practicable." According to the Appellate Division, this gave sufficient leeway to excuse any absence of pre-sanction notice or safe harbor.

All in all, today's lesson: Don't file frivolous papers ever. And if you are alleged to have filed frivolous papers, be mindful of the minute differences between Rule 1:4-8 and the FLS.

About Thomas Cotton

Thomas Cotton is a litigation partner at Schenck Price, representing clients in trial and appellate courts throughout the United States. In addition to his practice, he authors *The Appellate Advocate*, a semi-weekly blog offering thoughtful yet accessible commentary on recent appellate rulings.

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