

NO. 72146-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ALBERTA ACOSTA,
Plaintiff/Appellant,

vs.

PARC ENCHANTED PARKS, LLC,
Defendant/Respondent,

SUPPLEMENTAL BRIEF OF APPELLANT ALBERTA ACOSTA

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A. INTRODUCTION

This supplemental brief addresses additional issues following the consolidation of the current appeal with appellate case no. 72647-1-I.

Plaintiff-Appellant Alberta Acosta (“Acosta”) has previously filed an appellate brief regarding her appeal of the trial court’s May 30, 2014 summary judgment order dismissing all her claims and granting summary judgment to Defendant-Respondent Parc Enchanted Parks, LLC (“Parc Enchanted Parks”). The dismissal was based on Parc Enchanted Parks’ argument that Acosta had failed to timely commence the action by serving a registered agent or that the summons was deficient. Acosta’s December 24, 2014 appeal brief explains that there was compelling evidence that she had timely served the registered agent of Parc Enchanted Parks.

Acosta also filed a motion for relief from judgment with the trial court. On September 30, 2014, the trial court denied Acosta’s motion for relief from judgment. That decision was separately appealed. On February 20, 2015, this Court ordered that the two appeals be consolidated and Acosta was given leave to file a supplemental brief.

In this supplemental brief, Acosta will primarily address the trial court’s denial of her motion to vacate the judgment. For the reasons that follow, Acosta contends that the trial court abused its discretion in denying the motion.

B. ADDITIONAL ASSIGNMENT OF ERROR

Assignment:

The trial court abused its discretion in entering its order dated September 30, 2014, denying Acosta's motion to vacate the previously entered judgment.

Issues Pertaining to Additional Assignment of Error

No. 1. Did the trial court abuse its discretion in refusing to set aside the judgment under CR 60 (b), when the judgment was entered as a result of procedural irregularities (including the lack of a hearing even though the court had previously ordered that a hearing would be held), and when Acosta's counsel had been involved in a serious accident which left him unable to appropriately respond to such procedural irregularities or to otherwise respond to the new facts and arguments presented in the opposing memorandum?

C. SUPPLEMENT TO STATEMENT OF THE CASE

Most of the pertinent facts have been set forth in the Statement of the Case in Acosta's opening brief and will not be repeated in detail here. *See* Appellant's Brief, p. 3-8.

The primary dispute in Parc Enchanted Parks' motion for summary judgment was whether Acosta had properly commenced the action when she had a deputy sheriff take the summons and complaint to CorpDirect Agents, Inc. ("CorpDirect") on or about September 9, 2013 (which was within 90 days of the date the complaint was filed). The parties dispute whether CorpDirect was a registered agent of Parc Enchanted Parks at that time.

As noted in the initial brief, following an initial hearing during which Acosta's counsel asked for more time to respond, the court ordered that if Acosta were to produce evidence that CorpDirect was the registered agent at the time of service, a hearing would be set on the matter. Acosta presented such evidence and filed a response memorandum. Parc Enchanted Parks then filed a reply memorandum on May 23, 2014, which interjected new evidence and arguments into the case.

However, the same date that Parc Enchanted Parks submitted its reply memorandum (May 23, 2014), Acosta's counsel was involved in a fatal car accident near Portland when a suicidal person intentionally jumped in front of the vehicle Acosta's counsel was driving and was killed by the impact. Acosta's counsel's vehicle was then struck by another vehicle and he was injured along with members of his family. CP2 116.¹ For at least the following week, Acosta's counsel was consumed with

¹ The term CP2 refers to the clerk's papers that have been filed in case no. 72647-1-I, which has since been consolidated with the present appeal.

attending to his family, their injuries, his own injuries, and his own mental distress. CP2 116.

While Acosta's counsel was still dealing with the aftermath of the accident, the trial court asked Parc Enchanted Park for a proposed order on May 29, 2014. CP2 117. An order was provided on the same date by Parc Enchanted Park's counsel and the next day, May 30, 2014, the order was signed by the trial court, dismissing Acosta's action, without a hearing. CP2 117. As also noted in Acosta's initial brief, Acosta was not provided with five days' notice of presentation of the order as required under CR 54(f)(2).

Because of the tragic accident that Acosta's counsel was involved in, he was not in a position to point out to the trial court these procedural irregularities. Nor was Acosta's counsel otherwise in a position to refute to the trial court the new evidence and new arguments submitted by Parc Enchanted Parks just days before the trial court decided to dismiss Acosta's action. CP2 117-18.

Had Acosta's counsel not been involved in the tragic collision, Acosta would have been able to effectively respond to the new evidence and arguments submitted in Parc Enchanted Parks's reply. Notably, Parc Enchanted Parks' reply memorandum relied largely on a declaration that included a "Statement of Change for Registered Agent/Office" which Parc Enchanted Parks argued was evidence that its registered agent changed from CorpDirect to National Registered Agents, Inc. ("NRAI") in January

2013. Acosta has already addressed in her opening brief why this form does not reflect a change in registered agent, but only reflects a change of address. Appellant's Brief, p. 11-13. However, the "Statement of Change for Registered Agent/Office" form was accompanied by a cover letter which Parc Enchanted Parks did not submit to the trial court (and which the trial court did not see before dismissing Acosta's action). The subject line of the cover letter states: "RE: CHANGE OF ADDRESS OF AGENT FOR SERVICE OF PROCESS." CP2 148 (emphasis added). The substance of the letter goes on to state that:

CorpDirect Agents, Inc., provides the agent for service of process in Washington for the companies named in the attached list. Please be advised that the address for service of process has been changed ... to:

CorpDirect Agents, Inc.
505 Union Ave. SE, Suite 120
Olympia, WA 98501."

CP2 148 (emphasis added). This letter would have provided important context for the proper interpretation of the "Statement of Change for Registered Agent/Office" relied on by Parc Enchanted Parks.

Furthermore, while the Division of Corporations in the Office of the Washington Secretary of State ("Corporations Division") indicated that it had changed its database to reflect that NRAI was the registered agent in January 2013 based on how it processed the aforementioned Statement of Change for Registered Agent/Address form, the Corporations

Division also indicated that from November 28, 2012 to November 14, 2013, the Corporations Division's file for Parc Enchanted Parks contained public records identifying CorpDirect as its then registered agent. CP2 146-47, 188, 200. The Corporations Division also explains that it has employees answering telephone calls from the public regarding registered agents, and that these employees rely on public records for responding to such inquiries. CP2 146-47. The Corporations Division also indicated that while it has information regarding registered agents on its Public Access System, available for search on the internet, that information is not warranted to be correct, and their disclaimer explains that the documents filed with the Division are public record. CP2 201.

Following the dismissal of her case, Acosta filed a motion to vacate the judgment on July 30, 2014. CP2 102. Acosta argued that the judgment was obtained through the aforementioned procedural irregularities, including the lack of a hearing, and that because of her counsel's accident, he was not in a position to effectively advocate for her and respond appropriately to Parc Enchanted Park's reply memorandum. Acosta's arguments were supported in part by declarations from the Corporations Division as well as the cover letter to the Statement of Change for Registered Agent/Office form.

After Parc Enchanted Parks filed a response (CP2 171) and Acosta filed her reply (CP2 195) a hearing before Judge William A. Bowman was held on September 26, 2014. Judge Bowman indicated that he did not feel that prior to the dismissal of her claim, Acosta had proved that she actually *relied* upon any documents or evidence indicating that CorpDirect was the registered agent or that Acosta had exercised reasonable due diligence in determining the registered agent. TR2 7, 36-37². Judge Bowman also stated that he did not need to have a hearing because he only intended to hold a hearing if he was “convinced” that CorpDirect was in fact the registered agent at the time of service, and that he was not convinced. TR2 34-35. Acosta’s motion was denied and an order signed and filed on September 30, 2014. CR2 205-08. Acosta filed an appeal of that order, which has now been consolidated with her appeal of the May 30, 2014 order. CR2 209.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SET ASIDE THE JUDGMENT WHEN THE JUDGMENT WAS ENTERED AS A RESULT OF PROCEDURAL IRREGULARITIES (INCLUDING THE LACK OF A HEARING EVEN THOUGH THE COURT HAD PREVIOUSLY ORDERED THAT A HEARING WOULD BE HELD), AND WHEN ACOSTA’S COUNSEL HAD BEEN

² The term TR2 refers to the transcript of the September 26, 2014 hearing that has been filed only in case no. 72647-1-I, which has since been consolidated with the present appeal.

INVOLVED IN A SERIOUS ACCIDENT WHICH LEFT HIM UNABLE TO APPROPRIATELY RESPOND TO SUCH PROCEDURAL IRREGULARITIES AND TO OBTAIN A HEARING OR TO OTHERWISE RESPOND TO THE NEW FACTS AND ARGUMENTS PRESENTED IN THE OPPOSING MEMORANDUM?

A trial court's decision on a motion to vacate under CR 60(b) is reviewed on an abuse of discretion standard. Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). “An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.” Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) *citing* State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

Acosta’s motion to set aside the judgment was based on CR 60 (b), which permits a court to relieve a party from judgment under various circumstances. Specifically, Acosta claimed that the judgment should be set aside on the basis of “excusable neglect,” “irregularity in the obtaining a judgment or proceeding” (CR 60 (b)(1)), “unavoidable casualty or misfortune” (CR 60 (b)(9)), and “other reason[s] justifying relief from the operation of the judgment (CR 60 (b)(11)).

Irregularities In Obtaining Judgment or Proceeding

For the reasons set forth in Acosta's opening brief, the judgment in this case was obtained through multiple procedural irregularities.

Amongst these irregularities was the trial court's decision to decide the matter without a hearing, even though the court had clearly indicated that a hearing would be held if Acosta were to "provide[] evidence" that CorpDirect was a registered agent of Parc Enchanted Parks at the time of service. CP2 44. Although Acosta provided such evidence (CR2 50-51), no hearing was held.

It appears that the trial court decided not to have a hearing because Acosta never established that she or her counsel had actually *relied* on the evidence she had produced which reflected that CorpDirect was a registered agent of Park Enchanted Parks. The trial court also seemed to be influenced by the fact that a database kept by the Corporations Division reflected that NRAI was Parc Enchanted Parks' registered agent. TR2 7. Accordingly, the trial court held that the lack of a hearing did not represent a procedural irregularity.

The trial court did not correctly analyze the situation. First, of all, the trial court had expressly ordered that a hearing would be held if Acosta produced evidence that CorpDirect was a registered agent at the time of service, but did not hold a hearing despite the evidence that was produced.

Instead, the trial court reasoned that Acosta actually needed to show that she relied on the documents that she produced. However, the issue of whether CorpDirect was a registered agent for Parc Enchanted Parks at the time of service is a separate issue from whether Acosta or her counsel had acted reasonably or with due diligence in determining who the registered agent was at the time. Similarly, to the extent the trial court was influenced by the information in a database run by the Corporations Division, that database should not be determinative of the registered agent of an entity. A database can obviously be incomplete or contain errors. In fact, the searchable information available on the Corporation Division's website comes with a disclaimer that the information is not warranted to be complete or correct, and informs the public that the documents filed with the Corporations Division are public records. In order to determine who a company's registered agent is, one should look to the source documents, filed with the state, which come directly from a corporation or its representative. Such documents are publicly available and the meaning and effect of those documents can be determined by factfinders. But this is not what the trial court looked to. Therefore, the trial court applied incorrect legal standards in analyzing whether CorpDirect was Parc Enchanted Parks' registered agent at the time of service.

Since the trial court's decision to deny Acosta's motion to vacate was based on incorrect legal standards, the decision constitutes an abuse of discretion. Of course, had a hearing been held, Acosta would have been able to appropriately respond to new arguments and evidence presented in Parc Enchanted Parks' reply memorandum submitted just before the trial court decided the case. This would have included providing a copy of the cover letter to the January 2013 Statement of Change for Registered Agent/Address. CP2 148. This cover letter clearly contradicts Parc Enchanted Parks' interpretation of the document, which was its primary evidence in support of its contention that CorpDirect was not its registered agent at the time of service. Furthermore, Acosta could have countered statements made in support of Parc Enchanted Parks' reply, with declarations from the Corporations Division indicating that at the time of service, public records in Parc Enchanted Parks' file reflected that CorpDirect was the registered agent. *See e.g.* CP2 CP2 146-47, 200. Under the circumstances, Acosta's claim should not have been dismissed without a hearing on the merits and without an opportunity to respond to the new arguments and evidence contained in Parc Enchanted Parks' reply.

Unavoidable Casualty or Misfortune / Excusable Neglect / Other Reasons
for Justifying Relief

Acosta also asked the trial court to set aside the judgment based on “unavoidable casualty or misfortune preventing the party from prosecuting or defending,” “excusable neglect,” and “other reason[s] justifying relief from the operation of the judgment.” CR 60 (b)(1),(6), & (11).

A trial court may provide relief from judgment based on “unavoidable casualty or misfortune” when “events beyond a party’s control—such as a serious illness, accident, natural disaster, or similar event—prevents the party from taking actions to pursue or defend the case. Stanley v. Cole, 157 Wn. App. 873, 882, 239 P.3d 611, 616 (2010). Cases of excusable neglect “must rest on its own facts.” Pybas v. Paolino, 73 Wn. App. 393, 402, 869 P.2d 427, 432 (1994) (citations and quotations omitted). Judgments may be set aside for “any other reasons justifying relief,” when there are “irregularities which are extraneous to the action of the court or go to the question of the regularity of the proceedings.” Barr v. MacGugan, 119 Wn. App. 43, 48, 78 P.3d 660, 663 (2003) (providing relief when attorney had neglected a matter due to severe depression, rather than to incompetence or deliberate inattention).

As described above, on the same date that Parc Enchanted Parks submitted a reply memorandum introducing new facts and arguments in

support of their position, Acosta's counsel was involved in a tragic car accident resulting in a fatality to a pedestrian and physical injuries and emotional distress to Acosta's counsel. Unfortunately, at a critical time, he was unable to effectively advocate on behalf of Acosta to controvert the evidence and arguments presented in Parc Enchanted Parks' reply brief and to make sure that a hearing was held. This was clearly related to an unforeseen and unavoidable accident casualty or misfortune. Likewise, any "neglect" of Acosta's counsel in failing to continue to advocate for Acosta at such a crucial time, was excusable considering the the tragic circumstances and serious effects of the fatal accident. Similarly, the accident and its effects should be considered an irregularity which would justify providing relief from judgment.

There is no real question that the Acosta demonstrated compelling reasons for vacating the judgment. But, the trial court ended up deciding the case by analyzing the issues based on incorrect legal standards. Accordingly, the court's denial of Acosta's motion was an abuse of discretion.

E. CONCLUSION

For the reasons stated in this supplemental brief, the trial court abused its discretion in denying Acosta's motion for relief from judgment.

Accordingly, the trial court's judgment dismissing Acosta's action should be reversed.

Respectfully submitted, this 20th day of March, 2015.

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DECLARATION OF FILING AND SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I arranged for filing and service of the foregoing Appellant's Supplemental Brief to the court (one original and one copy) and to respondent's counsel (one copy) as follows:

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By depositing the foregoing Appellant's Supplemental Brief, postage prepaid, for mailing with the U.S. Post Office on this 20th day of March, 2015.

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