

FILED

JUN 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 303543

IN THE COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

EDGAR V. WATERS

Appellant,

v.

PAMELLA A. WATERS

Respondent.

BRIEF OF APPELLANT

ERIC R. SHUMAKER
Attorney for Appellant

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ASSIGNMENT OF ERROR

1. The trial court erred in entering the order of September 22, 2011, granting Respondent's Motion for Modification of the June 18, 2008 Order Granting Revision.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err in concluding that a clerical mistake was made, which triggered the application of CR 60(a)?
(Assignment of Error #1)
2. Did the Trial Court err in finding that the June 18, 2008 Order was inconsistent with the verbal ruling from which the order was based?
(Assignment of Error #1)
3. Did the trial court err in modifying a court order more than three years after its entry?
(Assignment of Error #1)

A. STATEMENT OF FACTS

On May 8, 2008, Commissioner Valerie Jolicoeur entered an Order on Contempt. CP 81.

On May 29, 2008, a revision hearing was conducted before Judge Salvatore F. Cozza. CP 89. On June 18, 2008, and after reviewing all relevant documents and pleadings, Judge Salvatore F. Cozza entered an Order Granting Revision, and vacated the May 8, 2008 Order. CP 93. The June 18, 2008 Order Granting Revision was simple and concise, and read as follows:

"Pursuant to RCW 2.24.050, the Commissioner's Order of May 8, 2008 shall not be the order of this Court and is, accordingly, vacated."

CP 93.

On July 29, 2011, more than three (3) years after the June 18, 2008 Order was entered, the Respondent filed a pleading entitled "Motion for Clarification of Order Entered June 18, 2008." CP 116.

Respondent's Motion was purportedly based on CR 60(b)(4). CP 116.

On September 22, 2011, Judge Salvatore F. Cozza entered an order granting revision of the June 18, 2008 Order. CP 124. Judge Cozza found that the June 18, 2008 written order was inconsistent with his verbal ruling, and that a clerical mistake had occurred. CP 124. Judge Cozza didn't base his decision on CR 60(b)(4). He based the decision on CR 60(a). CP 124.

Appellants filed this appeal of Judge Cozza's September 22, 2011 Order on the basis that:

1. no clerical mistake was made,
2. there is no inconsistency between the oral and written rulings, and
3. the time for appeal, modification or clarification of the June 18, 2008 Order has expired.

B. ARGUMENT

1. No Clerical Mistake.

CR 60(a) allows a trial court to grant relief from judgments only for clerical mistakes. CR 60(a). It does not permit correction of judicial errors. In Re Marriage of Stern, 68 Wn. App 922, 927, 846 P.2d 1387

(1993); In re Marriage of Getz, 57 Wn. App 602, 604, 789 P.2d 331 (1990).

In deciding whether an error is "judicial" or "clerical", a reviewing court must ask itself whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial. Marchal v. Bunger, 13 Wn. App. 81, 84, 533 P.2d 406, review denied, 85 Wn2d 1012 (1975).

In Presidential Estates v. Barrett, 129 Wn.2d 320, 917 P.2d 100 (1996), the court addressed the above question using the following reasoning:

"If the answer to that question is yes, it logically follows that the error is clerical in that the amended judgment merely corrects language that did not correctly convey the intention of the court, or supplies language that was inadvertently omitted from the original judgment. If the answer to that question is no, however, the error is not clerical, and, therefore, must be judicial. Thus, even though a Trial Court has the power to enter a judgment that differs from its oral ruling, once it enters a written judgment, it cannot, under CR 60(a), go back, rethink the case, and enter an amended judgment that does not find support in the trial court record."

Presidential Estates v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996).

Here, there is nothing in the May 29, 2008 Oral Decision to support the contention that the trial court intended to uphold any portion of Commissioner Jolicoeur's decision. CP 98. Further, there is nothing in the May 29, 2008 Oral Decision to suggest that Judge Cozza's decision to vacate commissioner Jolicoeur's Order was only partial or limited in scope. CP 98.

2. There is no inconsistency between the oral and written rulings of Judge Cozza.

Judge Cozza's verbal ruling from the bench doesn't differ from the written order. Judge Cozza contemplated a simple order that reflected his ruling.

"But I am going to go ahead and grant the revision here, so we will need a simple order to reflect that."

Verbatim Report of Proceedings, CP 98, P.5, Lines 10-11.

Judge Cozza didn't say that he was going to revise only a portion of Commissioner Jolicoeur's decision, or that any part of her ruling would remain.

The June 18, 2008 Order Granting Revision was simple and concise, and read as follows:

"Pursuant to RCW 2.24.050, the Commissioner's Order of May 8, 2008 shall not be the order of this Court and is, accordingly, vacated."

CP 93.

The verbal ruling of Judge Cozza was handed down on May 29, 2008, after oral argument of counsel. The written order was signed and entered on June 18, 2008, at a presentment hearing. CP 93. The time for reconciliation of any inconsistency between the oral ruling and the written order was at the presentment hearing.

3. The time for appeal, modification or clarification of the June 18, 2008 Order has expired.

It is acknowledged that CR 60(a) allows the court to correct clerical mistakes at any time of its own initiative or on the motion of any party. CR 60(a).

By contrast, CR 60(b) motions must be made within a reasonable time, and in some cases not more than one 1) year after the judgment, order or proceeding was entered or taken. CR 60(b).

RCW 4.72.020 states that proceedings to vacate or modify a judgment or order for mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion served on the adverse party or on his attorney in the action, **and within one year.** RCW 4.72.020. (emphasis added).

Here, the Respondent's "motion to clarify" was filed on July 29, 2011, over 3 years after entry of the Order Granting Revision on June 18, 2008. In short, it's simply too late to vacate, modify or "clarify" the court's clear and unambiguous decision. A reasonable time for making such a motion would have been one year, not three.

Judge Cozza acknowledged that the passage of time may have had an impact on this case, and his ability to make an informed decision. Specifically, Judge Cozza opined:

"Let me go ahead and hear your comments. This was awhile ago, so don't always assume that my memory is perfect."

Verbatim Report of Proceedings, September 2, 2011, Volume 1, Page 3, Lines 14-16.

Later, Judge Cozza's comment confirmed that he had a somewhat limited recollection of the case:

"Remind me. Who was her attorney at the time?"
Verbatim Report of Proceedings, September 2, 2011, Volume 1, Page 5, Lines 24-25.

CR 60(a) does not set forth a rigid time requirement for the correction of clerical mistakes. CR 60(a). At some point, however, the court must consider what period of time is reasonable under the circumstances. Three years is not reasonable, especially in light of Judge Cozza's own comments about his memory of the case.

C. CONCLUSION

The trial court erred in entering the September 22, 2011 Order Granting Motion for Modification of Order Revising Commissioner's Ruling. The oral ruling of the court and the written order vacating the June 18, 2008 order are not inconsistent. No clerical mistake was made by the court.

Judge Cozza decided to make a change to his original ruling. His change was judicial in nature,

not clerical. There is simply no basis upon which to possibly fit the change within the scope of CR 60(a). The order should be reversed, and the case remanded to the trial court with instructions to enter an order denying Respondent's Motion to Clarify or Modify the June 18, 2008 Order.

June 26, 2012

Respectfully submitted,



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Attorney for Appellant

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By _____

DECLARATION OF SERVICE

I, Eric R. Shumaker, declare as follows:

I am a resident of the City and County of Spokane, Washington. I am over the age of eighteen years and not a party to the within cause; my business address is 113 E. Baldwin Avenue, Spokane, Washington, 99207. On June 27, 2012, I personally delivered the following:

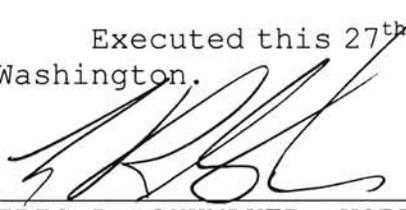
BRIEF OF ~~RESPONDENT~~ APPELLANT (28)

to the interested parties in this action as follows:

Timothy W. Durkop
Attorney at Law
2906 N. Argonne Rd.
Spokane Valley, WA

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 27th day of June, 2012, at Spokane, Washington.


ERIC R. SHUMAKER WSBA #22231