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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

MICHAEL CROSSAN and ROWENA CROSSAN, dba LAKE
WASHINGTON BOAT CENTER,

Appellant,

v.

DANIEL LUCHTERHAND,

Respondent.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
II.	STATEMENT OF THE CASE	2
III.	LEGAL ARGUMENT	5
IV.	CONCLUSION	11

TABLE OF AUTHORITIES

WASHINGTON CASES

Adams v. Adams
181 Wash. 192, 42 P.2d 787 (1935)9

Stanley v. Cole
157 Wash.App. 873, 239 P.3d 611 (2010) 7, 8, 9

Swasey v. Mikkelsen
65 Wash.411, 118 P. 308 (1911)8

STATUTES

RCW 19.86, et seq 10

WASHINGTON STATE COURT RULES

CR606

CR60(b)7

CR 60(b)(9) 2, 10

CR 60(e)(1) 10

MAR 5.4.....5

MAR 6.3.....6

I. INTRODUCTION

On September 12, 2013, the Superior Court entered a judgment against the Appellants (Defendants) upon the motion of Respondent (Plaintiff) for entry of judgment upon an arbitration award. (CP 76-78) On the same date, the court granted plaintiff's Motion to Strike a Trial de Novo request by the defendants. (CP 72, 73) The primary reason for entry of these court orders was the certification of the arbitrator the Appellants did not participate in the arbitration hearing. (CP 46) In response to plaintiff's motion, Mr. Crossan, appearing Pro Sé, asserted judgment should not be entered because of his illness on the date of the arbitration hearing which prevented his participation. (CP 65) In plaintiff's Motion to Strike Request for Trial De Novo his counsel asserted this argument should be raised in a CR 60 motion. (CP 56-63)

A CR 60 motion was filed (CP 77-83) and argued on November 1, 2013. The court had three options presented: first, to grant the defendant's motion based on the material presented; second, to hold a fact finding hearing; or third, deny the motion. The court chose to deny the motion stating the Crossans had not provided a prima facie case of a medical condition that prevented his appearance at the arbitration hearing. (RP 15; CP 192-194). The court entered an amended judgment on the arbitration award on November 14, 2013,

essentially awarding plaintiff additional attorneys fees for responding to the CR 60 motion. (CP 209-211) This appeal followed. (CP 87)

II. ASSIGNMENT OF ERROR

The court erred in denying Appellants' motion for relief pursuant to CR 60(b)(9).

III. STATEMENT OF THE CASE

The defendants did not participate at the arbitration hearing because of an unforeseen illness to Mr. Crossan and Mrs. Crossan's need to be with him during this illness. Mr. Crossan has a colostomy bag as a result of colon cancer. At times he gets severe abdominal pain and cramping which incapacitates him. On the evening before, and on the morning of, the arbitration he had such an attack. (CP 90-100) His wife, Rowena, called his physician and was advised by the physician that Mr. Crossan should remain in bed. (CP 86, 87). (See Declaration of Dr. Chet Jangela) (CP 84, 85)

The fact of the illness and Mr. Crossan's incapacity was communicated to the arbitrator on the day of the hearing. (CP 65) The arbitrator refused to continue the matter, stating the matter had previously been continued. (CP 95-96) In fact, the case had been continued three times - twice at the request of Mr. Crossan and once at the request of plaintiff. (CP 97-99) The plaintiff's request, which

resulted in the most recent continuance, was based on his attorney's conflict with a family vacation. (CP 97-99) The hearing proceeded without the presence of Michael or Rowena Crossan and an award was entered based on the plaintiff's presentation of the case. Both Mr. and Mrs. Crossan had valid defenses to the plaintiff's claims.

Plaintiff asserted two claims in his complaint. (CP 1-8) One claim was based on alleged violations of the Consumer Protection Act. The factual basis for this claim was plaintiff's assertion he was sold a marine engine represented to him to be a 300-horsepower Mercruiser marine engine which was neither a Mercruiser engine nor had 300-horsepower. The declarations of Michael Crossan (CP 90-100) and Michael Anderson (CP 88, 89) specifically state plaintiff was not told he was being offered a Mercruiser engine. All of the representations made to plaintiff were included on the invoice. The invoice attached to the declaration of Michael Crossan clearly makes no representation that the engine was a Mercruiser brand engine. The declaration of Michael Crossan specifically states he tested the engine sold to plaintiff and it demonstrated horsepower in excess of 300 rpm.

Mr. Luchterhand's second claim was based on allegations of breach of warranty. He alleged the engine leaked oil and, despite bringing the engine in for repairs five times, it could not be fixed. He

also contends the crankshaft was bent. The declarations of Michael Crossan and Michael Anderson indicate the engine was fixed on a number of occasions. On the last occasion that Michael Anderson saw the engine he ran it in a boat for an hour and no oil leak was present. On the last occasion the engine was brought to the Lake Washington Boat Center, it was tested extensively before it was released back to Mr. Luchterhand and it ran without leaking. After litigation started the engine ran for an hour in the presence of a court reporter. At no time did the engine leak or indicate the crankshaft was bent.

Mr. Crossan states in his declaration that he offered to replace the engine with a better engine, giving full credit plus having Mr. Luchterhand pay the difference in value. Mr. Luchterhand refused, stating he could buy the engine for a cheaper price. The engine subsequently purchased by Mr. Luchterhand from a different source was not the engine offered by Mr. Crossan but a cheaper model.

In summary, the engine sold by defendants to plaintiff was neither defective nor improperly installed.

There are no allegations by Respondent that Rowena Crossan participated in any of the events giving rise to his claim. Her liability is based on her alleged ownership of the entities making the sale and

performing the repairs. (CP 3) If there is no liability of these entities she cannot be vicariously liable.

All of the facts asserted above were supported by the declarations of Michael Crossan, Michael Anderson, Rowena Crossan (CP 86, 87), Dr. Chet Jangela and Ronald J. Meltzer (CP 101-125) attached to the CR60 motion. (CP 77-83)

IV. LEGAL ARGUMENT

The CR 60 motion contained essentially uncontroverted evidence Mr. Crossan was ill and unable to attend the arbitration. No facts were presented why a short continuance to accommodate this illness could in any way have prejudiced the plaintiff. The arbitrator simply determined to proceed with the hearing only permitting Mr. Luchterhand to present evidence. (CP 95, 96)

MAR 5.4 reads as follows:

The arbitration hearing may proceed, and an award may be made, in the absence of any party who after due notice fails to participate or to obtain a continuance. If a defendant is absent, the arbitrator shall require the plaintiff to submit the evidence required for the making of an award. In a case involving more than one defendant, the absence of a defendant does not preclude the arbitrator from assessing as part of the award damages against the defendant or defendants who are absent. The arbitrator, for good cause shown, may allow an absent party an opportunity to appear at a subsequent hearing before making an award. A party

who fails to participate without good cause waives the right to a trial de novo.

In this matter, the arbitrator had the option to continue the hearing to a later date or allow the defendants come in at a later date to present their case before making his award. Instead, the arbitrator chose to conduct the hearing in the absence of the defendants and enter an award based only on the plaintiff's presentation. By signing a certification, the defendants did not participate. The arbitrator prevented Appellants from exercising their right to a trial de novo (see MAR 5.4 above). A judgment entered on an arbitration award can only be challenged or set aside by a CR 60 motion.

MAR 6.3 reads as follows:

If within the 20-day period specified in rule 7.1(a) no party has properly sought a trial de novo, the prevailing party on notice as required by CR 54(f) shall present to the court a judgment on the award of arbitration for entry as the final judgment. A judgment so entered is subject to all provisions of law relating to judgments in civil actions, but it is not subject to appellate review and it may not be attacked or set aside except by a motion to vacate under CR 60.

CR60 reads as follows in relevant part:

(b) . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment order or proceeding for the following reasons:

. . . (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending..

This Court reviews the denial of a motion for relief under CR60(b) on an abuse of discretion standard.

In Stanley v. Cole, 157 Wash.App. 873, 239 P.3d 611 (2010), the court reviewed the legislative and case law history leading to the adoption of CR 60(b) (9) stating at pages 881, 882:

We next address whether the trial court abused its discretion because Stanley was entitled to relief under CR 60(b)(9). Under this rule, a court may relieve a party or the party's legal representative from a final judgment, order, or proceeding if the court finds '[u]navoidable casualty or misfortune preventing[ed] the party from prosecuting or defending.' CR 60(b)(9). Stanley cites no case authority addressing what circumstances qualify as an 'unavoidable casualty or misfortune' under this rule. And our search reveals sparse Washington authority on this question.

Our Supreme Court adopted this rule In 1967 as part of its complete reorganization of Washington civil procedure rules. *Curtis Lumber Co. v. Sortor*, 83 Wash.2d 764, 766-67, 522 P.2d 822 (1974); Order Adopting Civil Rules for Superior Court, 71 Wn.2d at xvii, cxxiv (1967). While CR 60(b) largely follows its federal counterpart, several subsections, including CR 60(b)(9), were instead taken from RCW 4.72.010. That statute allowed a superior court to vacate a judgment '[f]or unavoidable casualty, or misfortune preventing the party from prosecuting or defending.' RCW 4.72.010(7). Because this statutory language was incorporated wholesale in CR 60(b)(9), we find three Washington cases addressing this

provision persuasive to determine CR 60(b)(9)'s scope. *Compare Spring Spectrum, LP v. Dep't of Revenue*, 156 Wash.App. 949, 235 P.3d 849 (2010) (case interpreting prior version of Administrative Procedure Act, chapter 34.05 RCW, was persuasive as to meaning of subsequent version where the two versions' language was not materially different).

These cases support relief under the rule 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. For example, in *Adams v. Adams*, 181 Wash. 192, 42 P.2d 787 (1935), the defendant claimed a severe case of influenza left him delirious and mentally incapacitated until after the default order was entered. *Adams*, 181 Wash. at 193, 42 P.2d 787. The court held that RCW 4.72.010(7) justified relief from the default order under these circumstances. *Adams*, 181 Wash. at 195, 42 P.2d 787. And in *State v. Scott*, 20 Wash.App. 382, 385-86, 580 P.2d 1099 (1978), a criminal defendant argued that RCW 4.72.010(7) allowed the court to modify a probation revocation order entered based on 'erroneous and incomplete' information. We rejected this argument, explaining, 'It strains the language of [RCW 4.72.010]'s 7 to apply it for something other than an accident or disease or natural catastrophe preventing the appearance of a party or his witness.' *Scott*, 20 Wash.App. at 386 n. 1, 580 P.2d 1099.

The court in *Stanley v. Cole*, *supra*, also cited *Swasey v. Mikkelsen*, 65 Wash.411, 118 P. 308 (1911) as an example of where the unavoidable casualty or misfortune doctrine was not applied. In that case the moving party claimed he was attending his sick wife for a

period of some months. The court pointed out he still had ample time to take care of legal matters in this time period.

This case clearly indicates an unexpected illness or misfortune is a basis for the application of this rule. The court denied relief because the misfortune alleged was the attorney abandoning her practice for several months to take care of health needs of her elderly parents. The court pointed out while this was unavoidable misfortune, it did not prevent the defense of the lawsuit. The attorney had ample time to arrange continuances or substitute new counsel.

In the present case the illness came on without warning, preventing Mr. Crossan from leaving his home and defending the lawsuit. It is similar to the circumstances in Adams v. Adams, 181 Wash. 192, 42 P.2d 787 (1935) cited with approval in Stanley v Cole, supra.

In Adams supra, the defendant claimed he was unavailable because of a serious influenza attack. The court held this represented a prima facie case for vacating a default under the authority of the predecessor statute to RCW 4.72.010 from which CR 60(b)(9) is derived.

While Appellants recognize the strong public policy in relieving court congestion and resolving disputes by use of mandatory

arbitration such policy is not frustrated by this case. Appellants timely filed a request for trial de novo. It was stricken by reason of the arbitrator's certification the defendants did not participate in the arbitration hearing. A CR 60(b)(9) motion is the only method available to address this issue.

As part of the requirement for CR 60 relief, the moving party must show facts constituting a defense to the action. See CR 60(e)(1). The declarations of Michael Anderson and Michael Crossan establish no misrepresentations were made to plaintiff and that the engine functioned properly after each warranty repair. If this testimony was accepted by a trier of fact it constitutes a complete defense to plaintiff's claims.

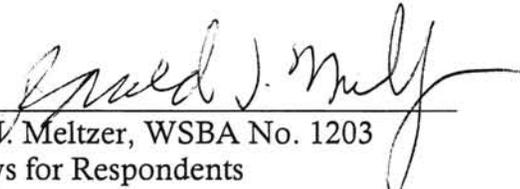
In order to establish a consumer protection act claim (RCW 19.86, et seq) the plaintiff must prove an unfair or deceptive act or practice. The declaration of Michael Crossan also established any oil leaks after the warranty repair could only have been due to plaintiff overfilling the engine with oil. The fact the engine ran for an hour without leaking when tested during the course of the litigation is compelling evidence of the lack of merit of plaintiff's claim. These facts constituted a complete defense to a CPA claim.

V. CONCLUSION

Due to Mr. Crossan's unavoidable medical condition at the time of the hearing which prevented his participation and his wife participation at the arbitration hearing the decision of the trial court denying the Appellants request for relief under CR 60 should be reversed. The judgment entered against Appellants should be vacated.

RESPECTFULLY SUBMITTED this 21st day of March 2014.

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