Supreme Court No. 101735-9
Court of Appeals, Division III No. 384675
Walla Walla Co. Superior Court Cause No. 15-2-00417-5

THE SUPREME COURT OF WASHINGTON

ELISSA AGUILAR, individually,

Plaintiff-Petitioner,

vs.

DR. BRENT A. CLARK, DPM, and JANE DOE CLARK, individually and as a marital community, and WALLA WALLA CLINIC, P.S.,

Defendants-Respondents.

PETITION FOR REVIEW

George M. Ahrend
WSBA #25160
Ahrend Law Firm PLLC
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201
(206) 467-6090
george@luveralawfirm.com

Attorney for Petitioner

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IDENTITY OF PETITIONER

This Petition for Review is filed on behalf of Plaintiff-Petitioner Elissa Aguilar.

COURT OF APPEALS DECISION

From March 4, 2020, through August 18, 2021, this Court issued no less than 37 orders suspending proceedings, extending deadlines, and otherwise addressing the disruptions to the legal system resulting from the Covid-19 pandemic. During that time, the Walla Walla County Superior Court also issued no less than seven additional orders of its own dealing with the pandemic. In the midst of the pandemic that required such measures, this action was dismissed by the superior court for want of prosecution on August 28, 2020.

Before the proceedings in this case were interrupted by the pandemic, the parties participated in extensive discovery and motion practice, including an attempt to seek discretionary review. Two trial dates were set and continued, and a third trial date was anticipated, but had not been set.

Plaintiff-Petitioner Elissa Aguilar did not receive notice of the Clerk's Notice for Dismissal for Want of Prosecution. A copy of the notice was apparently sent to, but was not received by, one of Aguilar's two lawyers. A copy of the notice was received by the second lawyer, but was overlooked by the lawyer and not forwarded to her due to disruptions caused by the pandemic. Although Aguilar moved to vacate the dismissal under CR 41(b)(2)(B) and CR 60(b)(1) and (11) as soon as it was discovered, the superior court denied the motion without explanation and without any claim of prejudice by Defendants-Respondents Brent Clark, DPM, and Walla Walla Clinic, P.S. ("Clark").

The Court of Appeals affirmed dismissal of Aguilar's lawsuit. *Aguilar v. Clark*, 2022 WL 17850350 (Wn. App. Div. 3, Dec. 22, 2022). A copy of the decision is reproduced in the Appendix. Aguilar filed a timely motion to publish that was denied on January 23, 2023. A copy of the order denying publication is also reproduced in the Appendix.

The decision below conflicts with decisions of this Court and other decisions of the Court of Appeals that liberally require vacation of dismissals for want of prosecution to resolve cases on the merits, especially in the absence of a showing of prejudice by the opposing parties. RAP 13.4(b)(1) & (2). It also presents substantial issues of public concern that should be resolved by this Court. RAP 13.4(b)(3).

ISSUES PRESENTED

1. Did the Court of Appeals err by affirming denial of Aguilar's motion to reinstate her lawsuit under CR 41(b)(2)(B), which provides that "[a] party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal?"

2. Did the Court of Appeals err by affirming denial of Aguilar's motion to vacate the Order of Dismissal for Want of Prosecution under CR 60(b)(1), which provides for vacation based on "[m]istakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order," and/or CR 60(b)(11), which provides for vacation based on "[a]ny other reason justifying relief from the operation of the judgment," in the absence of any claim of prejudice by the opposing parties?

STATEMENT OF THE CASE

This matter had originally been set for trial on March 20, 2019. CP 34. On January 10, 2019, Aguilar received a Notice of Trial Conflict from counsel for Clark. *Id.* A stipulated motion to continue the trial was filed and granted. *Id.*; CP 74-81.

In June 2019, one of Aguilar's key expert witnesses (who was also an expert for Clark's counsel in a separate case in Spokane County) had a medical emergency. CP 34. The expert's unavailability prompted a second continuance of the trial date in the Spokane County case from June 2019 to January 2020. CP 34-35.

In late December 2019, counsel for Aguilar and Clark learned that the expert had another medical emergency requiring heart surgery. CP 35. The parties and the Court in Spokane County discussed having a case status conference on April 14, 2020 to determine the third continued trial date based on the availability of the expert following his recovery. The lawyers knew that the witness was unavailable in the Spokane case, so

they did not push to rest the trial in this case because they knew he would also be unavailable here. *Id.*

In the meantime, beginning on March 4, 2020, this Court issued emergency orders related to the Covid-19 pandemic. Walla Walla County Superior Court issued additional orders of its own to deal with the pandemic. Among other things, the strict deadlines for filing notices of appeal or discretionary review, petitions for review, and motions for reconsideration and the time limits for modifying an appellate court decision were suspended from March 27, 2020, through October 14, 2020. Wash. S. Ct. Order No. 25700-B-611, Apr. 2, 2020; Wash. S. Ct. Order No. 25700-B-648, Oct. 13, 2020. Civil jury trials were suspended through July 6, 2020. Wash. S. Ct. Order No. 25700-B-631, June 18, 2020. Non-emergency civil matters were suspended through June 1, 2020. Wash. S. Ct. Order No. 25700-B-625, May 28, 2020. Thereafter, trials and other proceedings could only be

conducted remotely or in compliance with applicable Covid-19 safety guidelines.[1]

On July 14, 2020, the receptionist for one of Aguilar's lawyers (Brandon Casey) quit due to the pandemic. CP 35-36. She was the person who processed mail coming into the office. *Id.* During the re-opening of Mr. Casey's office, which occurred progressively over May and June 2020, office procedures had to change significantly to accommodate the loss of the receptionist as well as people within and outside of the office who were now working remotely due to the pandemic. *Id.* The disruption was exacerbated by updates to the office computer system, which were in process when the pandemic hit, as well as difficulty finding replacement staff. CP 36.

On July 20, 2020, the Clerk of the Walla Walla County Superior Court mailed a Clerk's Notice of Dismissal for Want of Prosecution to counsel for the parties. CP 20. Although it was

[1] The Covid-19 orders are reproduced in the Appendix to Aguilar's opening brief in the Court of Appeals.

received by Mr. Casey's office, it was improperly filed by a temporary receptionist without notice to Mr. Casey or his staff. CP 36. It was not received at all by Aguilar's associated counsel (William Gilbert). CP 31-32 & 37. Based on the clerk's notice, an order of dismissal was entered by the superior court on August 28, 2022. CP 22.

Around August 31, 2020, Mr. Casey had a conversation with counsel for Clark (Mark Louvier). CP 36-37. During that conversation, Mr. Casey mentioned that he had not yet received a trial date from the superior court and asked whether Mr. Louvier had heard anything. CP 37. Mr. Louvier confirmed that he had not heard anything. *Id.* Counsel also discussed the possibility of resolving the case by means of a private trial due to the pandemic, but those discussions did not culminate in an agreement. *Id.* Mr. Louvier denies the conversation occurred. CP 58 (¶¶ 8-9).

Mr. Casey did not discover the Clerk's Notice of Dismissal for Want of Prosecution until July 26, 2021. CP 36. It

was located in a part of Aguilar's file where it was not supposed to be and would not readily be found. *Id.* Neither Mr. Casey nor anyone else working in his office was aware the notice had been received (presumably other than the temporary receptionist who misfiled it). *Id.* Of course, Aguilar's associated counsel, Mr. Gilbert, was not aware of it either because he had not received it. CP 31-32.

Aguilar moved to vacate the dismissal of her lawsuit pursuant to CR 41(b)(2)(B) and CR 60(b) on August 11, 2021. CP 23-28. Clark resisted the motion, but did not identify any prejudice. CP 42-54. The superior court denied the motion without explanation or comment. RP 11:11-12; CP 62-63. The Court of Appeals affirmed without considering the lack of prejudice to Clark and Aguilar timely seeks review.

ARGUMENT

A. The decision below conflicts with decisions of this Court and the Court of Appeals requiring liberal vacation of dismissals for want of prosecution to resolve cases on the merits, especially in the absence of prejudice to the opposing parties.

The *Civil Rules* embody "a preference for deciding cases on their merits rather than on procedural technicalities." *Vaughn v. Chung*, 119 Wn.2d 273, 280, 830 P.2d 668, 671 (1992). This applies to involuntary dismissal for want of prosecution under CR 41(b)(2) to the same extent as any other rule. *Id.*, 119 Wn.2d at 280. In considering whether to vacate such a dismissal, the superior court "should exercise its authority 'liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.'" *Id.* at 278-79 (quoting *Griggs v. Averbeck Realty*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979), and *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968)). The overriding concern is to see that justice is done. *Griggs*, 92 Wn.2d at 581-82.

The importance of resolving cases on the merits has, in recent years, been highlighted in the *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), *Jones v. Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013), and *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), line of cases from this Court, which hold that court rules, scheduling orders, and even discovery obligations are not ends in themselves, but rather must be interpreted and applied to promote resolution of cases on the merits.

With respect to involuntary dismissal for want of prosecution in particular, the "primary function" of such dismissal by a clerk's motion "is to clear the clerk's record of inactive cases." *Vaughn*, 119 Wn.2d at 277 (brackets added). "It is an administrative provision that creates a 'relatively simple means by which the court system itself, on its own volition, may purge its files of dormant cases.'" *Id.* (quot. omitted). Protecting opposing parties is, at best, a secondary purpose of CR 41(b)(2). *Id.* The rule "benefits the court's docket management" and "is

not intended to confer any tactical or substantive advantage to either party." *Kirsch v. Cranberry Fin., LLC*, *noted at* 178 Wn. App. 1031, 2013 WL 6835195, at *6 n.14 (Div. 1, Dec. 23, 2013).

As a practical matter, "because discovery materials are no longer routinely filed with the court (see CR 5(i)), a case may (inaccurately) appear to be inactive." Drafter's Comment, 1997 Amendment, *reprinted in* 4 Wash. Prac., Rules Practice CR 41 (7th ed.) (parens. in orig.). In this case, the lack of activity explained by the fact that the parties were ready for trial, but trial was continued due to an expert witness's medical condition and not rescheduled due to interruptions resulting from the pandemic.

In denying Aguilar's motion to vacate the order dismissing this action for want of prosecution, the decision below conflicts with decisions regarding the preference for resolving cases on the merits, especially in the absence of any claim of prejudice. *Keck*, 184 Wn.2d at 369 (requiring proof of prejudice to exclude untimely evidence in opposition to summary judgment, citing

Jones); *Jones*, 179 Wn.2d at 338 (requiring proof of prejudice to exclude untimely disclosed witnesses, citing *Burnet*); *Burnet*, 131 Wn.2d at 494 (requiring proof of prejudice to justify exclusion or limitation on expert testimony disclosed in violation of scheduling order).

Dismissals for want of prosecution as analogous to default judgments. *Vaughn*, 119 Wn.2d at 278-80 (relying on default judgment cases, *Griggs,* 92 Wn.2d 576, and *White*, 73 Wn.2d 348); *id.* at 281 (noting the analogy). This Court and the Court of Appeals have repeatedly upheld vacation of default judgments in the absence of unfair prejudice and held that mere delay in resolving a claim does not constitute such prejudice. *Little v. King*, 160 Wn.2d 696, 720, 161 P.3d 345 (2007); *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 455, 332 P.3d 991 (2014), *rev. denied*, 182 Wn.2d 1006 (2015); *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099, 1104, *rev. denied*, 150 Wn.2d 1020 (2003); *Hous. Auth. of Grant Cnty. v. Newbigging*, 105 Wn. App. 178, 191, 19 P.3d 1081 (2001); *Pybas v. Paolino*, 73 Wn. App.

393, 398, 869 P.2d 427 (1994); *Calhoun v. Merritt*, 46 Wn. App. 616, 622, 731 P.2d 1094 (1986). Aguilar highlighted the lack of any claim of prejudice by Clark, but the issue was ignored by the Court of Appeals. Reply Br. at 1-3. The Court should accept review to address and resolve these conflicts.

B. Dismissal of a lawsuit for want of prosecution during the pandemic, in the absence of intent to abandon the lawsuit or prejudice to the opposing parties, presents a substantial issue of public interest that should be reviewed by this Court.

CR 60(b) delineates the circumstances warranting vacation of a judgment and provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> …
>
> (11) Any other reason justifying relief from the operation of the judgment.

(Ellipses added.)[2] The rule "gives trial courts a broad measure of equitable power to grant parties relief from judgments or orders," including dismissals for want of prosecution. *Vaughn*, 119 Wn.2d at 280.

Dismissal for want of prosecution that is entered through "inadvertence"—i.e., unintentionally—justifies relief from judgment under CR 60(b)(1). This is in accordance with the ordinary meaning of the word "inadvertent." *Merriam-Webster Online*, *s.v.* "inadvertent." (viewed Feb. 22, 2023; available at m-w.com). In addition, it is in accordance with the rule applied to vacation of default judgments, which, as already noted, are analogous to dismissals for want of prosecution. *Vaughn*, 119 Wn.2d at 278-80 & 281.

Applying this Court's standard for vacating default judgment, Division 3 has previously held that the CR 60(b)(1) criteria are satisfied when the party against whom judgment is

[2] The full text of CR 60 is reproduced in the Appendix.

entered "did not intentionally ignore its obligation to respond." *DeCaro v. Spokane County*, 198 Wn. App. 638, 645, 394 P.3d 1042, *rev. denied*, 189 Wn.2d 1024 (2017) (applying the standard from *White*, 73 Wn.2d 348). The lack of intent to abandon the lawsuit goes to the "heart" of the *White* standard. *DeCaro*, 198 Wn. App. at 645. Yet the Court of Appeals failed to follow this standard and vacate the dismissal of Aguilar's lawsuit. Aguilar and her lawyers did not intentionally fail to respond to the Clerk's Notice of Dismissal for Want of Prosecution because none of them knew about it. CP 31-32 & 34-37.

Additionally, the catch-all provision of CR 60(b)(11) justifies relief from judgment based on extraordinary or unusual circumstances not within the control of the party. *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2010). If ever such circumstances have existed in recent history, they existed during the Covid-19 pandemic. Dismissal for want of prosecution under these circumstances presents a substantial issue of public concern that should be addressed by this Court. RAP 13.4(b)(4).

C. The notice required for reinstating a lawsuit dismissed for want of prosecution also presents a substantial issue of public interest that should be reviewed by this Court.

CR 41(b)(2)(B) provides for reinstatement of a case that is dismissed for want of prosecution without actual notice to the party whose case is dismissed. The text of the rule provides in pertinent part:

> *Dismissal on Clerk's Motion.*
>
> (A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, ***the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution*** unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.
>
> (B) Mailing Notice; Reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. ***A party who does not receive the clerk's notice shall be entitled to reinstatement of the case***, without cost, upon motion brought within a reasonable time after learning of the dismissal.

(Emphasis added.)[3] The notice provision in subsection (A) and the reinstatement provision in subsection (B) are mandatory, both using the directory term "shall." *Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011) ("'shall' when used in a statute, is presumptively imperative and creates a mandatory duty unless a contrary legislative intent is shown").

The clerk's notice described in subsection (A) shall be given to "the attorneys of record" and it is deemed to be sufficient if it is "by mail." However, the reinstatement provision in subsection (B) provides that a "party" who does not "receive" such notice shall be entitled to reinstatement. The difference in the language of these subsections—"dismissal" versus "reinstatement," "attorney" versus "party," and "mail" versus "receive"—is presumed to be intentional and meaningful. "Court rules are interpreted as though they were statutes, applying the accepted canons of statutory construction." *Spokane Cty. v.*

[3] CR 41 is reproduced in the Appendix.

Specialty Auto & Truck Painting, Inc., 153 Wn.2d 238, 249, 103 P.3d 792 (2004). "Where different language is used in the same connection in different parts of a statute, it is presumed that a different meaning was intended." *State v. Roth*, 78 Wn.2d 711, 715, 479 P.2d 55 (1971); *accord Guardado v. Taylor*, 17 Wn. App. 2d 676, 694, 490 P.3d 274 (2021) ("Where the legislature uses different language, particularly within the same statute, we recognize that it intends a different meaning").

The difference between "attorney" in subsection (A) of CR 41(b)(2) and "party" in subsection (B) of the rule is readily apparent. The attorney is an agent of the party who is their client, and the party is the principal of the attorney. *West v. Thurston Cty.*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012). Normally, knowledge of the attorney is imputed to the party, as with other agency relationships, so that notice to the attorney would be deemed to be constructive notice to the party. *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978). This is subject to limitations, however, including circumstances when

the attorney-agent lacks knowledge due to negligence or misconduct. Restatement (Second) of Agency § 277 (1958) ("The principal is not affected by the knowledge which an agent should have acquired in the performance of the agent's duties to the principal or to others, except where the principal or master has a duty to others that care shall be exercised in obtaining information"). CR 41(b)(2) avoids issues arising from imputation of notice from attorney to party by permitting notice to be given to the ***attorney*** by mail, yet also permitting reinstatement of the case if the ***party*** does not receive such notice.

CR 41(b)(2) also avoids related issues arising from constructive versus actual notice by permitting reinstatement of a case if the party does not ***receive*** notice of the dismissal for want of prosecution. The word "receive" is not specially defined and is therefore given its ordinary meaning as discerned from common dictionaries. *Filmore LLLP v. Unit Owners Ass'n of Ctr. Pointe Condo.*, 184 Wn.2d 170, 174, 355 P.3d 1128 (2015). "Receive" is defined as "to come into possession of." *Merriam-*

Webster Online s.v. "receive" (viewed Feb. 22, 2023; available at m-w.com); *accord Black's Law Dictionary s.v.* "receive" (11th ed. 2019) (defining as "to come into possession of or get from some outside source"). The definition of "receive" denotes that actual rather than constructive notice is required.

The ordinary definition of "receive" as requiring actual notice is further supported by the specification of the party, rather than the attorney, as the one who must receive notice. If constructive notice were sufficient, it would be unnecessary to separately identify the party represented by the attorney in the text of the rule. In this way, the context in which the word "receive" appears confirms the definition requiring actual rather than constructive notice. *Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 437, 359 P.3d 753 (2015) (stating "words 'must be read in the context of the statute in which they appear, not in isolation or subject to all possible meanings found in a dictionary'"; quot. omitted).

Lastly, the definition of "receive" as requiring actual notice is consistent with and supported by the legislative purpose and history of CR 41(b)(2). Under a prior version of the rule, the Supreme Court recognized that it "would clearly be unjust" and contrary to purpose of the *Civil Rules* if a court could not grant relief from an order dismissing a case for want of prosecution when the notice was "misplaced by the post office." *Vaughn*, 119 Wn.2d at 280-81. The rule was subsequently amended due to the "concern[] that cases could be dismissed because of clerical error in mailing the notice or failure of the post office to forward the mail." Drafter's Comment, 1997 Amendment, *reprinted in* 4 Wash. Prac., Rules Practice CR 41 (7th ed.) (brackets added). The amendment added the provision stating "[a] party who does not receive the clerk's notice shall be entitled to reinstatement of the case[.]" The history and purpose of CR 41(b)(2) also confirm the definition of "receive" as requiring actual notice.

In the decision below, the Court of Appeals declined to follow the plain language of CR 41(b)(2)(B) and held that notice

unwittingly received by one of Aguilar's lawyers and not shared with Aguilar was sufficient. *Aguilar*, 2022 WL 17850350, at *3-4. The proper interpretation and application of the rule presents an issue of substantial public interest that should be resolved by this Court. RAP 13.4(b)(4).[4]

CONCLUSION

This Court should accept review, reverse the Court of Appeals, and remand this case for trial on the merits.

RAP 18.17 CERTIFICATE

This document contains 3,939 words, excluding the parts of the document exempted from the word count by RAP 18.17.

[4] Although the Court of Appeals addressed this issue, it wrongly described it as a "new contention" on appeal. *Aguilar*, 2022 WL 17850350, at *2. Aguilar's motion to vacate was expressly "made pursuant to CR 41(b), ***CR 41(b)(2)(B)***, [and] CR 60(b)[.]" CP 23 (line 21, emphasis & brackets added). Aguilar argued in the superior court that the order should be vacated based on the same 1997 amendment to CR 41(b)(2)(B) on which Aguilar relies on appeal. CP 25-26 (internal 3:17-4:4). Clark addressed Aguilar's reliance on CR 41(b)(2)(B) in his superior court briefing as well. CP 46 (line 21).

Respectfully submitted this 22nd day of February, 2023.

s/George M. Ahrend
George M. Ahrend, WSBA #25160
Ahrend Law Firm PLLC
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201
(206) 467-6090
(206) 467-6961 Fax
Email george@luveralawfirm.com

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I electronically filed the foregoing with the Washington State Appellate Court's Secure Portal system, which will send notification and a copy of this document to all counsel of record:

Markus W. Louvier
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave., Ste. 250
Spokane, WA 99201-0910
mlouvier@ecl-law.com

Brandon R. Casey
Casey Law Offices, PS
421 W. Riverside, Ste. 308
Spokane, WA 99201
brandonspokanelawcenter.com

William A. Gilbert
Gilbert Law Firm
421 W. Riverside, Ste. 353
Spokane, WA 99201
bill@wagilbert.com

Signed at Spokane, Washington on February 22, 2023.

s/George M. Ahrend
George M. Ahrend, WSBA #25160

APPENDIX

2022 WL 17850350
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 3.

Elissa AGUILAR, individually, Kerri Feeney, as Guardian ad Litem for the minor children of Elissa Aguilar, J. Ramirez, a minor child, I. Ramirez, a minor child, and M. Ramirez, a minor child, Appellants,

v.

Dr. Brent A. CLARK, DPM, and Jane Doe Clark, individually and as a marital community, Dr. Ryan Cornia, DPM, and Jane Doe Cornia, individually and as a marital community, Walla Walla Clinic, Inc., P.S., Respondents.

No. 38467-5-III
|
Filed December 22, 2022

Appeal from Walla Walla Superior Court, Docket No: 15-2-00417-5, Honorable M. Scott Wolfram, Judge.

Attorneys and Law Firms

George M. Ahrend, Luvera Law Firm, 421 W Riverside Ave., Ste. 1060, Spokane, WA, 99201-0406, Brandon R. Casey, Casey Law Offices PS, 421 W Riverside Ave., Ste. 308, William A. Gilbert, Gilbert Law Firm, 421 W Riverside Ave., Ste. 353, Spokane, WA, 99201-0402, for Appellants.

Markus William Louvier, Samuel Charles Thilo, Evans Craven & Lackie PS, 818 W Riverside Ave., Ste. 250, Spokane, WA, 99201-0994, for Respondents.

UNPUBLISHED OPINION

Fearing, J.

***1** When no action occurred in the case for over a year, the superior court clerk dismissed Elissa Aguilar's suit for want of prosecution. One year later, Aguilar moved to reinstate the case. The trial court declined reinstatement. Aguilar now asks that this court reinstate the suit because of a defective notice of dismissal or because equitable principles compel reinstatement. Because the superior court did not incorrectly apply the law and did not abuse its discretion in declining reinstatement, we affirm.

FACTS

The important facts on appeal arise from proceedings in the superior court rather than the facts underlying plaintiff Elissa Aguilar's suit. On July 28, 2015, Aguilar filed a complaint against Brent Clark, Ryan Cornia, and Walla Walla Clinic. On February 1, 2019, the parties filed a stipulated motion to continue the trial date.

From the trial court's perspective, the case lay dormant after the February 2019 filing. According to one of Elissa Aguilar's attorneys, a key expert witness' involvement in another lawsuit and a later medical emergency prevented the parties from determining an appropriate trial date.

On July 20, 2020, the superior court clerk mailed a notice of dismissal for want of prosecution to both of Elissa Aguilar's attorneys: William Gilbert and Brandon Casey. The clerk did not send a notice directly to Aguilar. The notice informed the recipients that the clerk would dismiss the case without prejudice within thirty days of the mailing unless a party took action of record or filed a status report.

William Gilbert avers that he never received the clerk's notice. Brandon Casey agrees his office received the notice. Casey's office receptionist had recently quit due to stress related to the Covid-19 pandemic. Casey's temporary receptionist misfiled the clerk's notice without informing Casey. Without suggesting that Gilbert received the notice, we applaud Casey for his honesty.

On August 28, 2020, the superior court entered an order of dismissal. The order read:

> [1] CLERK'S NOTICE OF DISMISSAL FOR WANT OF PROSECUTION WAS MAILED TO THE ATTORNEYS OR PARTIES OF RECORD AT THEIR LAST KNOWN ADDRESS NOT LESS THAN 30 DAYS PRIOR TO THE DATE OF THIS ORDER, AND
>
> [2] NO PARTY HAS TAKEN ACTION OF RECORD IN THIS CASE OR FILED A STATUS REPORT

PURSUANT TO THE CLERK'S NOTICE OF DISMISSAL FOR WANT OF PROSECUTION.

Clerk's Papers (CP) at 22. On July 26, 2021, attorney Brandon Casey discovered the clerk's notice in his files.

PROCEDURE

On August 11, 2021, Elissa Aguilar brought motion to vacate the order of dismissal. Aguilar argued that, under CR 41(b)(2)(B), the clerk's notice was defective because attorney William Gilbert never received it. Alternatively, Aguilar argued for discretionary reinstatement under CR 60(b).

The superior court denied the motion to vacate. The order of denial reads:

1. This Court's clerk mailed the required Notice for Dismissal for Want of Prosecution to the parties on July 20, 2020.

2. No action of record took place by any party in the twelve months preceding the filing of the clerk's Notice.

***2** 3. Counsel for Plaintiff and Counsel for Defendants received the clerk's Notice.

4. Within 30 days following the Notice, there was no action of record and no showing of good cause for continuing the case.

5. This Court issued a signed Order of Dismissal for Want of Prosecution on August 28, 2020.

6. Plaintiff has failed to meet her burden for relief from a final order under CR 60(b).

CP at 63.

LAW AND ANALYSIS

On appeal, Elissa Aguilar again cites CR 41(b)(2) and CR 60(b) as grounds for reversing the superior court's denial of her motion to vacate the dismissal. We address CR 41(b)(2) first. CR 41(b)(2) governs a trial court clerk's dismissal of a civil case for want of prosecution:

Dismissal on Clerk's Motion.

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court *shall notify the attorneys of record by mail* that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, *a party takes action* of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing Notice; Reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. *A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.*

(C) Discovery in Process. The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

(Some emphases added.)

An involuntary dismissal by a clerk's motion clears the clerk's record of inactive cases. *Vaughn v. Chung*, 119 Wn.2d 273, 277, 830 P.2d 668 (1992). CR 41(b)(2) provides a simple means by which the court system may purge its files of dormant cases. *Miller v. Patterson*, 45 Wn. App. 450, 455, 725 P.2d 1016 (1986).

Elissa Aguilar argued, before the superior court, that under CR 41(b)(2) the clerk's notice was defective because attorney William Gilbert did not receive the notice. On appeal, Aguilar abandons this argument and advances three new contentions. First, CR 41(b)(2) distinguishes between a party and an attorney, and the court clerk must mail notice of dismissal to the party. Second, either the attorney or party must gain actual knowledge of the notice. Third, the superior court should vacate the order of dismissal if the parties engaged in activity unnoticed by court filings.

Under RAP 2.5(a), an appellate court may refuse to hear a claim not preserved by objection below. *State v. Mercado*, 181 Wn. App. 624, 632, 326 P.3d 154 (2014). Thus, in general, a party may not raise an issue for the first time on appeal that it did not raise below. *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). We address Elissa Aguilar's new contentions anyway.

Attorney/Party Distinction

***3** Elissa Aguilar first argues that she should have personally received the clerk's notice and that notice to her attorneys was insufficient. She points to the use of different words within the text of the CR 41(b)(2) rule to support her argument. The rule requires notice to "the *attorneys* of record by mail" prior to dismissal unless "a *party* takes action of record or files a status report." (Emphases added.) Subsection (B) provides for reinstatement of a case when a "*party* ... does not receive the clerk's notice." (Emphasis added.)

We apply canons of statutory construction to court rules. *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). One principle of construction directs us to accord disparate meaning to different words used within the same court rule. *Guardado v. Taylor*, 17 Wn. App. 2d 676, 694, 490 P.3d 274 (2021). This principle supports Elissa Aguilar's contention that Subsection (B)'s employment of the word "party" demands that she personally, not her counsel, receive the clerk's notice. Under this principle, the clerk must mail the notice to her.

In contrast to the principle of statutory construction and Elissa Aguilar's contention, the law imputes knowledge by an attorney to his or her client. *Hill v. Department of Labor & Industries*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978). The civil rules provide that service upon an attorney satisfies any rule requiring service to a party "unless service directly upon the party is ordered by the court." CR 5(b)(1). Subsection A of CR 41(b)(2) only requires mailing to counsel. Subsection A also references that a "party" must take action to avoid dismissal. The party would take such action through her attorney, illustrating that the drafters of CR 41(b)(2) intended the words "party" and "attorney" to be used interchangeably. Based on a natural reading of the rule, we conclude that the clerk need only mail the notice to the party's attorney.

Actual Notice Requirement

Elissa Aguilar next argues that CR 41(b)(2) imposes an actual notice requirement. Aguilar extends beyond the previous argument to contend that either she or her lawyer must gain actual knowledge of the notice of dismissal. According to Aguilar, her one attorney never received the notice, and the assistant of her second attorney never brought the notice to the attorney's attention.

Review of a court rule begins with the rule's plain meaning, discerned from its language's ordinary meaning, the context of the rule in which the provision lies, related provisions, and the civil rules as a whole. *Lake v. Woodcreek Homeowners Association*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). CR 41(b)(2)(A) plainly provides that the clerk's notice shall be mailed to the attorneys of record. Thus, a plain reading of the rule establishes that notice is effective upon mailing.

Elissa Aguilar's own argument punctures her suggestion that CR 41(b)(2)(A) requires actual notice. She quotes the dictionary definitions from *Merriam-Webster* and *Black's Law Dictionary* to argue that the verb "receive" can mean "to come into possession of." Appellant's Opening Br. at 15-16. Aguilar does not dispute that attorney Brandon Casey possessed the clerk's notice. In another context, the Supreme Court has recognized that possession does not require awareness. *See State v. Blake*, 197 Wn.2d 170, 183-86, 481 P.3d 521 (2021).

Elissa Aguilar also points to a 1997 drafters' comment addressing the purpose behind CR 41(b)(2)(B):

> The Committee had also been concerned that cases could be dismissed because of clerical error in mailing the notice or failure of the post office to forward mail. The last sentence of proposed section (b)(2)(B) addresses this issue.

***4** *Reprinted in* Elizabeth A. Turner, 4 Wash. Practice: Rules Practice CR 41 at 79 (7th ed. 2021). But attorney Brandon Casey acknowledged his office's receipt of the notice. He suffered no clerical error from the superior court clerk's office nor a post office malfunction.

While CR 41(b)(2)(B) implicates an attorney's or party's actual awareness of a clerk's notice, Elissa Aguilar does not benefit from this implication. The subsection provides that, when a notice is not received, a party must move within a reasonable time after obtaining knowledge of the dismissal to obtain reinstatement of the case. To repeat, Brandon Casey's office received notice in July 2020.

Ongoing Activity

Elissa Aguilar suggests that ongoing activity occurred outside of the trial court's docket. She characterizes this activity as a "holding pattern," wherein the parties awaited the availability

of an expert witness. She thus argues the trial court should have bestowed leniency from CR 41(b)(2)'s requirements.

Elissa Aguilar again cites to a 1997 drafters' comment for support:

> the Committee noted that because discovery materials are no longer routinely filed with the court (see CR 5(i)), a case may (inaccurately) appear to be inactive.... The Committee agreed that filing a simple "status report" once a year to keep a case "active" was not an undue burden.

Reprinted in Elizabeth A. Turner, 4 Wash. Practice: Rules Practice CR 41 at 79 (7th ed. 2021). The adoption of CR 41(b)(2)(C) afforded a process for a party to toll dismissal when activity occurs outside the clerk's file or the parties fly in a holding pattern. The party may file a status report. Elissa Aguilar filed no report.

Excusable Neglect

We move to Elissa Aguilar's contentions under CR 60(b). CR 60(b) grants the superior court discretionary authority to grant relief from a judgment or order. Relevant to Elissa Aguilar's arguments, the rule states:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> ....
>
> (11) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

CR 60(b) allows subsequent relief from a dismissal for failure to prosecute under CR 41(b)(2). *Vaughn v. Chung*, 119 Wn.2d 273, 283 (1992).

Courts consider equitable principles when deciding a motion to vacate a dismissal for want of prosecution. *See Vaughn v. Chung*, 119 Wn.2d 273, 278-79 (1992). A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). This court reviews a CR 60(b) ruling for abuse of discretion. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985).

Elissa Aguilar advances two arguments under CR 60(b). First, her attorney office's filing mistake qualifies as excusable neglect under CR 60(b)(1). Second, the extraordinary circumstances surrounding the Covid-19 pandemic justify relief from the dismissal.

***5** Whether neglect is excusable turns on the individual facts of the case. *City of Goldendale v. Graves*, 88 Wn.2d 417, 423, 562 P.2d 1272 (1977). The civil rules embody a preference for deciding cases on their merits rather than on procedural technicalities. *Vaughn v. Chung*, 119 Wn.2d 273, 280 (1992).

Elissa Aguilar underscores the fact that the failure to respond to the clerk's notice was unintentional. A party's unintentional failure to act may predicate vacation of default against the party. *DeCaro v. Spokane County*, 198 Wn. App. 638, 645, 394 P.3d 1042 (2017).

We might agree with Elissa Aguilar if we decided the motion to vacate anew. But on abuse of discretion review, we do not reverse when the trial court could have reached a different outcome. Valid reasons support the court's refusal to vacate. This court has found inexcusable the internal failures of organizations to properly forward process to the appropriate personnel. *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 212-13, 165 P.3d 1271 (2007); *Johnson v. Cash Store*, 116 Wn. App. 833, 848-49, 68 P.3d 1099 (2003); *Prest v. American Bankers Life Assurance Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995). The mistake occurring in this appeal parallels the failures in the reported decisions.

Extraordinary Circumstances

Finally, Elissa Aguilar argues that the outbreak of the Covid-19 pandemic constituted an extraordinary and unusual circumstance to justify relief from dismissal. CR 60(b)(11) provides a catch-all provision for relief based on extraordinary or unusual circumstances not within the control of the party. *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2010). The circumstances must involve reasons extraneous to the action of the court or go to the regularity of its proceedings. *State v. Dallas*, 126 Wn.2d 324, 333, 892 P.2d

1082 (1995). The provision allows courts to provide relief when such an action is appropriate to accomplish justice. *State v. Carter*, 56 Wn. App. 217, 223, 783 P.2d 589 (1989).

We reject reliance on the pandemic. The pandemic was not so disruptive to the judicial system to prevent the trial court from issuing the clerk's notice. Aguilar could have responded to the notice and filed a status report to toll dismissal of her case. We recognize that Brandon Casey's office receptionist had quit employment due to stress related to the Covid-19 pandemic. Nevertheless, Elissa Aguilar does not contend that the pandemic prevented Casey from hiring a capable replacement.

Elissa Aguilar appends 279 pages of State and county level orders pertaining to courtroom rule modifications during the outbreak of Covid-19. Presumably, she intends to convey the disrupting effect Covid-19 had on the court system. Nevertheless, she provides no citation to any provision that would have prohibited her from taking an action of record or that precluded the superior court clerk from dismissal of stale cases.

CONCLUSION

We affirm the superior court's order denying vacation of the involuntary dismissal of the complaint.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Siddoway, C.J.

Staab, J.

All Citations

Not Reported in Pac. Rptr., 2022 WL 17850350

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

Elissa Aguilar, individually, Kerri Feeney, as Guardian ad Litem for the minor children of Elissa Aguilar, J. Ramirez, a minor child, I. Ramirez, a minor child, and M. Ramirez, a minor child,	)	No. 38467-5-III
Appellants,	)	ORDER DENYING MOTION TO PUBLISH
v.	)	
Dr. Brent A. Clark, DPM, and Jane Doe Clark, individually and as a marital community, Dr. Ryan Cornia, DPM, and Jane Doe Cornia, individually and as a marital community, Walla Walla Clinic, Inc., P.S.,	)	
Respondents.	)	

THE COURT has considered the appellant's motion to publish the court's opinion of December 22, 2022, and the record and file herein, and is of the opinion the motion to publish should be denied. Therefore,

IT IS ORDERED, the motion to publish is denied.

PANEL: Judges Fearing, Siddoway, Staab

FOR THE COURT:

Siddoway, C.J.

LAUREL H. SIDDOWAY
Chief Judge

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 60

Rule 60. Relief From a Judgment or Order [Rule Text & Notes of Decisions subdivisions I to III]

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 60 are displayed in multiple documents.>

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

CREDIT(S)
(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES
1937 Adoption

Note to Subdivision (a). See [former] Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich.Court Rules Ann. (Searl, 1933) Rule 48, § 3; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 464(3); Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-2301(3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see VA.Code Ann. (Michie, 1936) §§ 6329, 6333.

Note to Subdivision (b). Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif.Code Civ.Proc. (Deering, 1937) § 473. See also N.Y.C.P.A. (1937) § 108; 2 Minn.Stat. (Mason, 1927) § 9283.

For the independent action to relieve against mistake, etc., see Dobie, *Federal Procedure,* pages 760 to 765, compare 639; and Simkins, *Federal Practice,* ch. CXXI (pp. 820 to 830) and ch. CXXII (pp. 831 to 834), compare § 214.

1946 Amendment

Note. Subdivision (a). The amendment incorporates the view expressed in *Perlman v. 322 West Seventy-Second Street, Co., Inc.,* C.C.A.2d, 1942, 127 F.2d 716; 3 *Moore's Federal Practice,* 1938, 3276, and further permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost its power to act. See *Schram v. Safety Investment Co.,* E.D.Mich.1942, 45 F.Supp. 636; also *Miller v. United States,* C.C.A.7th, 1940, 114 F.2d 267.

Subdivision (b). When promulgated, the rules contained a number of provisions, including those found in Rule 60(b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60(b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, coram nobis, or audita querela, to obtain relief from

final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, *Federal Relief from Civil Judgments,* 1946, 55 Yale L.J. 623. See also 3 *Moore's Federal Practice,* 1938, 3254 et seq.; Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment,* 1941, 4 Fed.Rules Serv. 942, 945; *Wallace v. United States,* C.C.A.2d, 1944, 142 F.2d 240, certiorari denied 65 S.Ct. 37, 323 U.S. 712, 89 L.Ed. 573.

The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6(b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by coram nobis, coram vobis, audita querela, bill of review, or bill in the nature of a bill of review. See Moore and Rogers, *Federal Relief from Civil Judgments,* 1946, 55 Yale L.J. 623, 659 to 682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action.

To illustrate the operation of the amendment, it will be noted that under Rule 59(b) as it now stands, without amendment, a motion for new trial on the ground of newly discovered evidence is permitted within ten days after the entry of the judgment, or after that time upon leave of the court. It is proposed to amend Rule 59(b) by providing that under that rule a motion for new trial shall be served not later than ten days after the entry of the judgment, whatever the ground be for the motion, whether error by the court or newly discovered evidence. On the other hand, one of the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review, Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment. Such a motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal.

If these various amendments, including principally those to Rule 60(b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice. With reference to the question whether, as the rules now exist, relief by coram nobis, bills of review, and so forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery. See *Wallace v. United States,* C.C.A.2d, 1944, 142 F.2d 240, certiorari denied 65 S.Ct. 37, 323 U.S. 712, 89 L.Ed. 573; *Fraser v. Doing,* App.D.C.1942, 130 F.2d 617; *Jones v. Watts,* C.C.A.5th, 1944, 142 F.2d 575; *Preveden v. Hahn,* S.D.N.Y.1941, 36 F.Supp. 952; *Cavallo v. Agwilines, Inc.,* S.D.N.Y.1942, 6 Fed.Rules Serv. 60b.31, Case 2, 2 F.R.D. 526; *McGinn v. United States,* D.C.Mass.1942, 6 Fed.Rules Serv. 60b.51, Case 3, 2 F.R.D. 562; *City of Shattuck, Oklahoma ex rel. Versluis v. Oliver,* W.D.Okl.1945, 8 Fed.Rules Serv. 60b.31, Case 3; Moore and Rogers, *Federal Relief from Civil Judgments,* 1946, 55 Yale L.J. 623, 631 to 653; 3 *Moore's Federal Practice,* 1938, 3254 et seq.; Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment,* op. cit. supra.

Cf. *Norris v. Camp,* C.C.A.10th, 1944, 144 F.2d 1; *Reed v. South Atlantic Steamship Co. of Delaware,* D.Del.1942, 2 F.R.D. 475, 6 Fed.Rules Serv. 60b.31, Case 1; *Laughlin v. Berens,* D.D.C.1945, 8 Fed.Rules Serv. 60b.51, Case 1, 73 W.L.R. 209.

The transposition of the words "the court" and the addition of the word "and" at the beginning of the first sentence are merely verbal changes. The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The qualifying pronoun "his" has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through *his* mistake, inadvertence, etc.

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a "reasonable time," which might be after the time stated in the rule had run. *Fiske v. Buder,* C.C.A.8th, 1942, 125 F.2d 841; see also inferentially *Bucy v. Nevada Construction Co.,* C.C.A.9th, 1942, 125 F.2d 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, an independent action was the only proper remedy. Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment,* 1941, 4 Fed.Rules Serv. 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, *Federal Relief from Civil Judgments,* 1946, 55 Yale L.J. 623, 653 to 659; 3 Moore's Federal Practice, 1938, 3267 et seq. And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 1944, 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250.

The time limit for relief by motion in the court and in the action in which the judgment was rendered has been enlarged from six months to one year.

It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief. It should also be noted that under § 200(4) of the Soldiers' and Sailors' Civil Relief Act of 1940, § 501 et seq. [§ 520(4)] of the Appendix to Title 50, a judgment rendered in any action or proceeding governed by the section may be vacated under certain specified circumstances upon proper application to the court.

1948 Amendment

The amendment substitutes the present statutory reference.

1987 Amendment

The amendment is technical. No substantive change is intended.

2007 Amendment

The language of Rule 60 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 60(b) said that the procedure for obtaining any relief from a judgment was by motion as prescribed in the Civil Rules or by an independent action. That provision is deleted as unnecessary. Relief continues to be available only as provided in the Civil Rules or by independent action.

Notes of Decisions (1409)

Fed. Rules Civ. Proc. Rule 60, 28 U.S.C.A., FRCP Rule 60
Including Amendments Received Through 2-1-23

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West's Revised Code of Washington Annotated
Part IV. Rules for Superior Court
Superior Court Civil Rules (CR) (Refs & Annos)
6. Trials (Rules 38-53.4)

Superior Court Civil Rules, CR 41

RULE 41. DISMISSAL OF ACTIONS

Currentness

(a) Voluntary Dismissal.

(1) *Mandatory.* Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By Stipulation. When all parties who have appeared so stipulate in writing; or

(B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case.

(2) *Permissive.* After plaintiff rests after plaintiff's opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) *Counterclaim.* If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff s motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) *Effect.* Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) *Want of Prosecution on Motion of Party.* Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

(2) *Dismissal on Clerk's Motion.*

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing Notice; Reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

(C) Discovery in Process. The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

(D) Other Grounds for Dismissal and Reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) *Defendant's Motion After Plaintiff Rests.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Notice of Settlements. If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court *promptly* of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

Credits

[Amended effective September 1, 1997; April 28, 2015.]

Notes of Decisions (260)

CR 41, WA R SUPER CT CIV CR 41

State court rules are current with amendments received through January 1, 2023. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Some rules may be more current, see credits for details.

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Appellate Court Case Title:	Elissa Aguilar v. Dr. Brent Clark, et ux, et al
Superior Court Case Number:	15-2-00417-5

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