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CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

**COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION ONE**

RICHARD AZPITARTE, *appellant*

v.

KING COUNTY, *appellee*

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON**

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
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Richard Azpitarte
153 S. 120th St.
Seattle, Wash., 98168

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**ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR
REVIEW**

A. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that an extension of judgment could be obtained without giving notice to the other party.

2. The trial court erred in allowing King County multiple continuances in responding to a motion to set aside an improperly obtained judgment.

3. The trial court erred in ruling that the appellant-defendant took too long in bringing his motion to set aside the judgment.

4. The trial court erred in not entering a satisfaction of judgment for the appellant-defendant.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do the civil rules require the plaintiff to serve notice of a motion on the defendant when it petitions the court for an extension of judgment?

2. What is the effect of bringing a motion to extend the judgment without giving notice to a defendant who has appeared?

3. Did the trial court abuse its discretion in awarding multiple extensions of time to respond and serve a motion, when the continuances

resulted in a hardship for the appellant defendant who is ADA certified as handicapped?

4. Did the court err in refusing to issue a satisfaction of judgment when the appellant raised the issue in his argument?

5. Did the court improperly consider the response of the plaintiff to the motion to set aside the extended judgment when it had not been served on the appellant-defendant?

STATEMENT OF THE CASE

A. PROCEDURAL FACTS

According to the docket in this case, the plaintiff obtained a judgment on June 16, 1997 for \$3,870.92. (CP 11-13).¹ Soon after the appellant appeared through counsel and obtained a Stipulated Order of Continuance of the Examination of the debtor. (CP 14-15). On May 10, 2007, without notifying the defendant, the plaintiff obtained an order which extended the judgment another 10 years. (CP 16-18). On November 12, 2009 the plaintiff brought a motion to set aside the judgment and obtained a show cause ordering the county to appear as to why the judgment should not be set aside. (CP 52-77). However, this motion was later stricken (CP

78). The motion was brought again on November 5, 2010, when the appellant-defendant obtained another show cause order. (CP 79-80).

The plaintiff-appellee then brought a motion to continue the hearing. (CP 100-102). An order was issued continuing the hearing until December 3, 2010 with the county ordered to respond by November 30th, 2010 (CP 105-106). The court denied appellant defendant's motion to set aside on December 3, 2010. (CP 174-176). The appellant/defendant filed for reconsideration on December 13, 2010. The court denied the motion for reconsideration on December 16, 2010. CP(189-190). The appellant filed a motion for a stay of the judgment on December 23, 2010. (CP 193-197). He filed a timely Notice of Appeal on January 11, 2011. The court denied the stay on February 10, 2011.

B SUBSTATIVE FACTS

The County obtained a default judgment on June 16th, 1997. (CP 11-13) However, shortly after that, the County made an offer of having Mr. Azpitarte move his automobiles in return for forgiving the judgment, which Azpitarte accepted by moving his cars, according to the

¹ CP Refers to Clerk's Papers, NRP refers to Narrative of Report of Proceedings.

uncontroverted declaration of Richard Azpitarte of November 5th, 2010.
(CP 85).

After that, the county never sent Mr. Azpitarte any bills nor did it notify him that it was going to seek a judgment, or that it had done so until over 12 1/2 years later in November of 2009. (CP 46).

At that time Mr. Azpitarte brought a motion to set aside the judgment. (CP 52-57). He raised several issues, including the fact that he had not been notified of the judgment and the fact that he had already paid \$57,000.00 toward this judgment. (CP 45-51). He claimed that \$25,000 was paid on September 24, 2004 to the County's agent, Joni McCall who was the tow truck operator and \$32,363.71 to the County for the same towing costs. (CP 45-46). However, shortly after the motion was brought, Mr. Azpitarte's counsel was issued an interim suspension by the Washington State Supreme Court before a hearing could be held. (CP 184). Mr. Azpitarte, rather than proceeding pro se, struck the motion so that he could see if the matter with his attorney in the Supreme Court could be resolved or whether he could get another attorney. (CP 184).

Following that time, Mr. Azpitarte, like many other of John Scannell's clients, attempted to get another attorney. (CP 187). Also, Mr. Scannell brought several motions to end the suspension which he showed to Mr. Azpitarte. (CP 187-188). Both of them thought the chances of winning one of these motions was excellent, given the fact that the Supreme Court had not allowed him to argue the merits of the suspension when it issued the temporary suspension. (CP 184, 188). However, after filing these motions with the Supreme Court Clerk, he could not get the clerk to forward the motions to the Supreme Court, a matter that is of continuing dispute with Mr. Scannell. (CP 188).

After failing to get another attorney and after the failure of his attorney to end the temporary suspension, the Supreme Court issued a disbarment order of Mr. Scannell on September 9, 2009. (CP 189). Mr. Azpitarte then refiled his motion to set aside the judgement on November 5th, 2010 which was within one year of learning of the judgment. (CP 81-99).

Although, Mr. Azpitarte gave the county six days notice of the motion as required by the rules, (CP 79-80), the County received a continuance with an ex parte motion without notifying the defendant even

though it had both his address and his cell phone. (CP 100-106). The continuance was granted until December 3, 2010, with the court specifically giving the county a deadline of November 30th, 2010 at 5:00 p.m. to file a response. (CP 105-106).

The county did not file a response on November 30, 2010 even though Mr. Azpitarte was present at the service address during business hours for the entire week before November 30 and was also available by cell phone. (CP 185). Instead, it filed and attempted to serve him on December 1, 2010. (CP 167-172, 185). The county has provided no explanation as to why this motion could not have been served on time or why they did not notify Mr. Azpitarte it would be filed late, even though they had his phone number and address. (CP 167-172, NRP p. 1-3).

In support of their response, the county submitted a declaration from legal assistant Michael Hepburn, who claimed he found out Mr. Azpitarte's address on November 17, 2010 on Pacer. (CP 229-231). However, he should have known the address at the time the motion was filed because it was listed on Mr. Azpitarte's Motion to Set Aside Order Extending Judgment. (CP 81-89). Also, according to Mr. Azpitarte, he

has known Mr. Hepburn for at least eight years and has continually received mailings there. (CP 185-186)

In their response, the county raised issues of timeliness that it had never raised before. At the time of the hearing, Mr. Azpitarte would not stipulate to a continuance, choosing to preserve this issue for appeal. (NRP 2). At the time of the hearing, Mr. Azpitarte still had not read the response because he still had not received a copy of the response. (NRP 1).

Both at the hearing and in his motion for reconsideration, Mr. Azpitarte raised various concerns about his status as a handicapped person, yet the court kept making concessions to the plaintiff King County instead of the disabled person. (CP 179-186) (NRP 1-3). For example, he stated it was a hardship for him to make this trip. He has to reduce his medication so he can think clearly in court, but that increases the pain. He stated that he is ADA certified and uses a cane. He complained about the necessity of climbing steps to get into the building. He argued that the parking situation is not in compliance with the ADA. He stated that the parking garage is typically full, with court employees who arrive earlier

taking the best spots including all the disabled stalls. Then he has to climb stairs. He stated that if he does park in the garage, its a long walk. He also stated its also a long walk even if you don't park within the garage.

Parking is a problem even with a disabled pass because you can't park close enough. Then when you do find a place to park, its a long distance to walk. (NRP 1).

Azpitarte compared the treatment of the prosecutor with his own past experience. He mentioned a suit involving Jony McCall in Judge Christie's in 2005. His own attorney asked for a continuance. Judge Christie stated, "You are all here right now, why would anyone want to come back?" Azpitarte stated that he has had his own responses thrown out because they were late once. He claimed that he had been advised by counsel that was usually the case. Here, the County was late twice and was coming back getting another continuance.

The county failed to communicate with Azpitarte about any problems with the response even though they had both his address and cell phone, which he always carries. He argued they could have saved him a trip, saved the trouble of parking, and saved the courts time if they had just called him and made alternative arrangements with a joint call to the bailiff.

Instead, the prosecutors wasted everyone's time and caused him the expense and trauma of an unnecessary trip to the courthouse. (NRP 1, 2).

ARGUMENT

1. THE COURT SHOULD NOT HAVE GRANTED AN EXTENSION OF JUDGMENT WITHOUT NOTICE TO ALL PARTIES.

The right of the party to extend the judgment is defined by RCW 6.17.020(3):

After June 9, 1994, a party in whose favor a judgment has been filed as a foreign judgment or rendered pursuant to subsection (1) or (4) of this section, or the assignee or the current holder thereof, may, within ninety days before the expiration of the original ten-year period, apply to the court that rendered the judgment or to the court where the judgment was filed as a foreign judgment for an order granting an additional ten years during which an execution, garnishment, or other legal process may be issued. If a district court judgment of this state is transcribed to a superior court of this state, the original district court judgment shall not be extended and any petition under this section to extend the judgment that has been transcribed to superior court shall be filed in the superior court within ninety days before the expiration of the ten-year period of the date the transcript of the district court judgment was filed in the superior court of this state. The petitioner shall pay to the court a filing fee equal to the filing fee for filing the first or initial paper in a civil action in the court, except in the case of district court judgments transcribed to superior court, where the filing fee shall be the fee for filing the first or initial paper in a civil action in the superior court where the judgment was transcribed. The order granting the application shall contain an updated judgment summary as

provided in RCW 4.64.030. The filing fee required under this subsection shall be included in the judgment summary and shall be a recoverable cost. The application shall be granted as a matter of right, subject to review only for timeliness, factual issues of full or partial satisfaction, or errors in calculating the judgment summary amounts.

CR 5(a) requires service as follows:

Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in rule 4.

'Irregularities' within the reach of Civil Rule 60(b)(1) concern departures from prescribed rules or regulations. Merritt v. Graves, 52 Wash. 57, 100 P. 164 (1909). Most of the cases relying on this ground have involved procedural defects unrelated to the merits. 4 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Rules Practice* 717 (4th ed. 1992) (citing Muscek v. Equitable Sav. & Loan Ass'n, 25 Wn.2d 546, 171 P.2d 856 (1946)). In this case, Mr. Azpitarte had previously

appeared in this action through a stipulated order by another attorney and therefore should have been given notice. According to the declaration of Richard Azpitarte and files of this case, Mr. Azpitarte was not served nor is there any proof of service in the file.

Furthermore, the county was seeking additional claims in at least two ways. It sought a filing fee of \$200.00 that it did not seek before. In 1997, the filing fee was \$110.00. In addition, it was seeking a judgment that lasted ten years longer than the judgment it obtained in 1997. Therefore under civil rule 5 he should have been served in the same manner as a summons.

2. THE JUDGMENT EXTENSION SHOULD BE SET ASIDE UNDER CR 60(B)(4), CR 60(B)(5), CR 60(B)(6), AND CR 60(B)(11).

CR 60(b)(4) provides that the court may relieve a party from an order for fraud, misrepresentation, or other misconduct. The party requesting the relief must show misconduct that prevented a full and fair presentation of its case. And, proof of misconduct must be clear, cogent, and convincing. **Peoples State Bank v. Hickey**, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989); see also **Lindgren v. Lindgren**, 58 Wn. App. 588,

596, 794 P.2d 526 (1990); Goodman v. Bowdoin College, 380 F.3d 33, 48 (1st Cir. 2004), cert. denied, 125 S.Ct. 919 (2005).

Here the county committed misconduct first by representing to the defendant that the judgment would be forgiven if he moved the cars in question. The defendant agreed to the offer, then moved his cars, with the result that that supplemental by not notifying the defendant of the motion. As a result, Mr. Azpitarte lost his right to have the judgment reviewed for factual issues regarding full or partial satisfaction of judgment.

CR 60(b)(5) allows for a judgment to be set aside if it is void. A judgment is void if entered without personal jurisdiction, subject matter jurisdiction, or if entered by a court which lacks the inherent power to enter the particular order involved. In re Marriage of Ortiz, 108 Wn.2d 643, 649, 740 P.2d 843 (1987) (citing Dike v. Dike, 75 Wn.2d 1, 7, 448 P.2d 490 (1968) (quoting with approval from Robertson v. Commonwealth, 181 Va. 520, 536, 25 S.E.2d 352 (1943))). See also Bour v. Johnson, 80 Wn. App. 643, 910 P.2d 548 (1996); State ex rel. Turner v. Briggs, 94 Wn. App. 299, 971 P.2d 581 (1999); Summers v. Dep't of Revenue, 104 Wn. App. 87, 14 P.3d 902, review denied, 144 Wn.2d 1004 (2001).

The defendant contends that this motion required personal service as in a summons for the aforementioned reasons. Therefore the court lacked personal jurisdiction over the defendant to issue the judgment extension.

Although the rule suggests that the court has a measure of discretion when ruling on a motion to vacate (“the court *may* relieve a party”, the court presumably has no discretion to allow a void judgment to stand. If the judgment is void then court must rule on the motion and vacate it. Wright and Miller, Federal Practice and Procedure: Civil §2862.

Under CR 60(b)(6), a judgment should be set aside if it has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed. Here, Azpitarte gave testimony that he paid over \$55,000 and no judgment has been satisfied.

The county’s response, as argued earlier, should have been stricken because it is late. But if the court decides to consider the declaration of Draitus, two problems are apparent.

First, Draitus claimed that Azpitarte owed \$30,728.08 in abatement costs. She submits as evidence that a lien was placed on the property and that the lien was “satisfied”. However, the attachments to the Azpitarte

declaration showed that the payment was made “under protest” and there is no evidence that King County ever converted its lien into a judgment.

Second, Draitus claims that there is a \$24,750.00 judgment still outstanding. But this court should take judicial notice that in an unpublished decision, the summary judgment upon which this fine was based was reversed in King County v. Azpitarte, 130 Wash.App. 1047 (Wash.App.Div.1 12/19/2005), No. 54629-5-I

Since the county served its response late, Azpitarte should have been given an opportunity to point this out to the court, something he never was allowed to do.

For CR 60(b)(11), the court should only use the rule in a situation involving extraordinary circumstances that are not covered by any other section of CR 60(b). In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). Those circumstances must relate to 'irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings.' Yearout, 41 Wn. App. at 902. Here the defendant did not learn of the extension of the judgment until more than one year after the order had been entered because the county had led him to believe that the judgment was forgiven. While it is true that the existing

law in Washington counts the year for bringing a CR 60(b)(1) motion from the time of the judgment was issued and not from the time the defendant learned of the judgment, (See **Corporate Loan & Sec. Co. V. Peterson**, 64 Wn.2d 241, 391 P.2d 199(1964)), there is another irregularity here that is extraneous to the court's proceedings. That irregularity is that the defendant was led to believe that the judgment had been forgiven. He should not be prevented from bringing the motion simply because he did not learn of it due to misconduct from the County as this would constitute unjust enrichment for the County.

In **Suburban Janitorial Services v. Clark American** 72 Wn.App. 302, 863 P.2d 1377 (1993), Division I suggested as an alternate ground of decision , that the failure of the plaintiff to respond to a defendant's inquiries about the status of the case which in fact had already been defaulted would warrant vacation of a default judgment under CR 60(b)(11).. Here the misconduct by opposing party is even more egregious. In **Suburban**, the misconduct or misrepresentation was that of omission. Here the plaintiff and its attorneys, according to the uncontroverted declaration of the defendant, deliberately embarked on a fraud, by first lulling the defendant into complacency by assuring him the

judgment had been forgiven, then going behind his back by obtaining a judgment without giving him notice either before or after they noted the motion.

3. THE DEFENDANT'S MOTION WAS TIMELY.

The trial court ruled that the plaintiff's motion was untimely, because it was brought more than three years after the extension had been obtained. However, existing Washington case law supports the defendant's claim that his CR 60(b) motions were timely. According to CR 60(b) the motion must be brought within a "reasonable time." In a 1993 case, motion made seventeen months after judgment, when the party was ignorant of the fact of entry during that period, was held to be made during a reasonable time. **Suburban Janitorial Services v. Clarke American**, 72 Wn.App. 302, 863 P.2d 1377 (1993). Federal cases have found longer delays reasonable, depending on the circumstances. **United States v. Karahalias**, 205 F.2d 331 (2d Cir.1953).

Here the defendant alleges the plaintiff fraudulently induced him into believing the judgment had been forgiven, then obtained a judgment without notifying him it was going to do so or that it had done so once it obtained it.

“Reasonable time” has been equated to laches, thus requiring a demonstration of lack of diligence and prejudice to the opposing party. **In re Marriage of Maddix**, 41 Wn.App. 248, 703 P.2d 1062 (1985).

Considerations that may be relevant in determining timeliness of a motion to vacate are whether the nonmoving party is prejudiced by the delay and whether the moving party has a good reasons for failing to move sooner.

In re Marriage of Thurston, 92 Wn.App. 494, 963P.2d 947 (1998).

Here, the defendant had good reasons for his delay and the plaintiff has shown no prejudice whatsoever. The defendant filed a motion as soon as he learned of the plaintiff’s fraud, and delayed having the motion heard, while he was awaiting to have the status of his attorney clarified.

In a case involving fraud, Division I has held that fraud occurring after entry of judgment may be grounds for vacation of judgment.

Suburban Janitorial Services v. Clarke American, 72 Wn.App. 302, 863 P.2d 1377 (1993) (failure to respond to inquiries when default judgment had, in fact been entered.) That case is similar to the case here where the plaintiff explicitly obtained concessions and led the defendant to believe the judgment had been forgiven.

Furthermore, misconduct by the prosecuting attorney is present throughout this case. Youn-Jung Kim has made ex parte contact on three occasions. (See RPC 3.5) First in extending the judgment, next by obtaining a continuance, and finally by presenting documents to the court without giving the defendant a copy. She has shown an extreme lack of due diligence... a behavior that mocks the system. She submitted an affidavit from a legal assistant who claims ignorance of the address, even though it has been consistently used for over ten years and was shown on the appellants motion in the footer. No where in any of the pleadings is there any rational reason why this response could not have been served on time. Her misconduct has caused this litigation to be extended needlessly and has caused hardship on the defendant who is ADA handicapped. See (RPC 3.1)(RPC 3.2) She has refused to provide key evidence causing unnecessary delay and time to the defendant. (RPC 3.4). She has failed to properly supervise her nonlawyer assistant (RPC 5.3) submitting a declaration that she should have known was false and irrelevant (RPC 3.5).

According to the Americans with Disabilities Act, Section 12132, it is illegal for a public entity to discriminate on the basis of a disability.

Sec. 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

To establish a violation of the statute, the appellant must show that:

(1) he was disabled within the meaning of the statute; (2) he was "otherwise qualified" for the Court's services-i.e., that he could meet the essential eligibility requirements of such services, with or without reasonable accommodation; (3) he was denied the services because of his disability; and (4) the Court received federal financial assistance (for the Rehabilitation Act claim) or was a public entity (for the ADA claim) **Zukle v. Regents of Univ. of Cal.**, 166 F.3d 1041, 1045 (9th Cir. 1999).

Here it is undisputed that the defendant is disabled. He clearly, as a pro se litigant, was qualified to have his motion heard in a timely manner with reasonable accommodation. He was denied a prompt resolution of his motion because the court failed to make an accommodation for him, and the court was a public entity.

In general, a trial court must make findings of fact and conclusions of law sufficient to suggest the factual basis for its ultimate conclusion.

Groff v. Dep't of Labor & Indus., 65 Wn.2d 35, 40, 395 P.2d 633

(1964). The degree of particularity required in these findings 'depends on the circumstances of the particular case, the basic requirement being that the findings must be sufficiently specific to permit meaningful review.' **In re Dependency of C.B.**, 61 Wn. App. 280, 287, 810 P.2d 518 (1991) (citing **In the Detention of Labelle**, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). The purpose of the requirement of findings and conclusions is to insure the trial judge 'has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.' **Labelle**, 107 Wn.2d at 218-19 (quoting **State v. Agee**, 89 Wn.2d 416, 421, 573 P.2d 355 (1977)).

Here there is a complete absence of findings by the court to justify why it could not accommodate Mr. Azpitarte. There was no explanation as to why he should have to make another trip, and face the hardship of climbing stairs, after having to walk long distances because there are not enough handicap parking spaces, or why he should have to face the indignity of altering his medications so he could come to court in pain but lucid enough so he could make arguments. There was no explanation by the court as to why it could not have delayed the hearing a few minutes or

maybe even an hour or two so he could read the response, instead allowing to the county another few days of delay and thus force the defendant-appellant to make another trip to a courthouse that is not ADA compliant.

There was no discussion by the court as to the reasons it would not address the issue of a satisfied judgment, such as credit for the other payments or credit for making an agreement with Steve Wright or what payments were to be credited to what.

There was no explanation provided by the Court as to why it wanted to give another continuance because the County did not serve their response on time, when it did not notify Mr. Azpitarte it would be filed late, even though it's counsel had his phone number and address, or why the County should be given a third chance after needlessly delaying the proceedings twice.

There was no explanation by the court as to why Mr. Azpitarte should be held accountable for not responding to the extension of judgment, when he had been tricked by the county into thinking there was no judgment left. Mr. Azpitarte had good reasons for every delay he had in responding to the motion.

Finally, there was no explanation by the court as to why this extension should not have been set aside because of the uncontroverted testimony by the appellant that a fraud had taken place. According to the testimony of Mr. Azpitarte, county officials had assured him that the judgment was forgiven if he would move the cars.

The court should have stricken the response of the county, along with its objections of timeliness. The civil rules are clear, there was absolutely no excuse for the county not getting its objections in on time.

CONCLUSION

For all the reasons stated above, the appellant requests that the ruling of the trial court be reversed and the judgment extension vacated.

Dated this 28th day of November, 2011


Richard Azpitarte