

Original

No.36168-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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IVAN CAM  
Appellants,

v.

PERFIL CAM & ELENA CAM  
Defendants

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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Amended Brief of Appellants  
[Per Commissioner's Ruling]

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**Assignments of Error**

Assignment of Error No. 1: The Court below erred in failing to grant Appellant's CR 60(b) motion to vacate.

### **Issues Pertaining to Assignments of Error**

Issue No. 1: Should the Court vacate entry of judgment, in order to permit a litigant to timely appeal, where the litigant, represented by out-of-county counsel, reasonably experienced uncertainty whether the court, a visiting judge, intended to enter judgment *ex parte* as opposed to holding a presentment hearing?

## **STATEMENT OF THE CASE:**

### **FACTS**

This appeal is from the decision of the Skamania County Superior Court, the Hon. Judge Altman, declining to grant a CR 60 motion to permit refileing a judgment so a timely appeal of the substantive issues of the case could be brought.

#### **Underlying Dispute**

This a dispute between two brothers who were involved in opening the Bonneville Hot Springs Resort near Stevenson, Washington in the Columbia Gorge. [CP 1] PERFIL (PETE) CAM was the actual owner of the resort property, and IVAN CAM, his half-brother, invested time and money in the project. [CP 1, RP 50]

PERFIL CAM initially bought the land and the actual hot springs in 1997. [RP 136] IVAN's first involvement in the matter was to give PERFIL CAM \$ 178,000 cash to finance a suit to clear title, although this is disputed by PERFIL CAM. [RP 267]

While title was being litigated, IVAN told PERFIL he wanted in on the project. [RP 52] There was no written agreement. [RP 35] IVAN claimed to have invested \$3,000,000.00 TO \$4,000,000.00 total. [RP 303] PERFIL CAM admitted that IVAN contributed between \$1,100,000.00

and \$1,200,000.00 cash. [RP 54] The resort was worth approximately \$16,000,000.00 when finished. [RP 87]

PERFIL CAM also admitted that he initially agreed to sell IVAN CAM a 10% share, including a share of profits, for his investment. [RP 52] He said IVAN was to be allowed an interest of not more than 10%, to be determined by the percentage his investment bore to the total appraised value of the Resort. [RP 52-53] IVAN claimed at that time that PERFIL had agreed to let him purchase an additional 15% for a total of 25% interest in the business [RP 113] which PERFIL CAM denied.

During the period from 1997 to 2003 IVAN was heavily involved in the development and operation of the resort. IVAN routinely held himself out as a partner, [RP 67 – 71] and PETE knew this but made no effort to correct that impression. [RP 74] IVAN exercised discretion over numerous aspects of the building, decoration and planned operations of the business. [RP 64 - 80]

In 1998 IVAN was given a painting contract on the property worth \$ 167,000: IVAN was not to be paid for that in cash, but was to be deemed to contribute that much to the business. [RP 55] In 1999 there was a pipeline explosion that damaged the building in progress. [RP 55] PERFIL CAM hired IVAN CAM to do some of the repair work [RP 56] and

PERFIL CAM submitted sworn proof of loss documents to his insurer and in litigation against the pipeline company asserting that IVAN did painting work worth \$914,000. [RP 63 – 66] PERFIL CAM testified that he lied on those documents. [RP 173] IVAN also performed work that was initially bid out to other contractors. Out of the various insurance and lawsuit proceeds, PERFIL CAM testifies that IVAN received \$322,229.23. [RP 116] PERFIL testified at trial that he, not IVAN, did most of this work. [RP 127 – 128]

In 2002 - 2003 IVAN worked and lived almost full time at the Resort. IVAN was routinely held out to the public as an owner or manager. [RP 275 – 302] PERFIL CAM did nothing to reign in IVAN's activities for over 5 years, from 1998 through 2003. [RP 304] Finally in October, 2003, PERFIL CAM became concerned over allegations that IVAN was engaged in drug activities.[RP304] Then PERFIL CAM essentially evicted IVAN from the facility. [RP 88]

At trial PERFIL CAM argued that IVAN had caused substantial business losses and expenses which offset his investment. [CP 255]

## **PROCEDURE**

### **Underlying Lawsuit**

IVAN CAM's complaint was filed in November of 2003 [CP 1].

The parties conducted some discovery through the end of 2004.

In January 2005 IVAN CAM's attorneys withdrew. [CP 11] PERFIL CAM waited 3 months and then on March 14, 2005 filed a motion for partial summary judgment and a note for trial setting. [CP 229, 14] Trial was set for August 22, 2005, only 5 months out. [CP 160]

IVAN CAM then located counsel in Spokane, VAN CAMP & DEISSNER, who appeared on June 2, 2005. [CP 156] Counsel for IVAN CAM immediately moved for additional time to respond to the summary judgment motion, [CP157] which was denied. [CP 187] Partial summary judgment was granted [Id.] and *lis pendens* on the property were dismissed. [CP 187, 189] A motion for reconsideration was filed timely but has never been heard. [CP 194]

IVAN CAM then immediately moved to continue the trial date. [CP 160] that motion was denied. [CP 185]

IVAN CAM then was forced to file bankruptcy. He moved to stay the trial due to the bankruptcy. [CP 201] That motion was denied except as to any separate counterclaims that might be pending. [CP 222 ]

IVAN CAM attempted to conduct discovery to prepare for trial, and was forced to bring a motion to compel. [214]

PERFIL CAM then moved for summary judgment 6 days before

trial. [CP 229] the Court heard the motion on shortened time, [RP 11] but denied it. [RP 29]

Then just before trial, IVAN CAM was arrested in Oregon on unrelated charges. [RP 263] He filed an emergency motion to continue trial; [CP 341] the court denied the motion and instead ordered that IVAN CAM be transported to confinement in Skamania County, [CP 293] and then attend trial while under arrest. [RP 48, 49, CP]

Trial took 3 days. [RP 1] Closing arguments were submitted in writing on September 9, 2005. [CP 978.1036] There was a motion to reopen filed in late September and responded to in mid-December 2005, concerning the judicial estoppel issue. [CP 1013, 1072] But in general, evidence was completed in August, 2005.

The court did not issue its memorandum ruling until February 13, 2006, 6 months later.[CP 1115]

### **Entry of Judgment**

Counsel for Defendant prepared a proposed set of findings, conclusions and judgment which were submitted along with a note for presentment without a specific date, but expected to be sometime in early June.[CP 1123]

Plaintiff filed an OBJECTION [CP 1143] stating:

IVAN CAM objects to the substance, but not to the form of the Proposed Findings and Conclusions, asserting that the Court erred in reaching its conclusions as to the amount of money owed to IVAN CAM.

IVAN CAM does not object to entry of the proposed FINDINGS subject to reservation of his right to appeal and/or pursue appropriate post-judgment motions should he so elect. Oral argument is not requested.

Counsel for Plaintiff did not sign the proposed judgment.

Plaintiff counsel exchanged e-mails with Defense Counsel indicating that IVAN CAM intended to appeal. [CP 1160] Defendant Counsel in turn advised *he would try to get the Court to sign without a presentment but was not sure if that would happen.* [Id]

At the same time Mr. Deissner called and spoke to Beth McComas, the Skamania County Court Administrator, asking what was happening. She replied that she wasn't sure what the court wanted to do, that there might be a presentment or might not and she needed to talk to Judge Altman. She said the first available dates would not be until June or later. Mr. Deissner said that was fine, he just needed to be informed so he could do what was needed. [CP 1160 - 1166]

This conversation happened after IVAN CAM filed his "Objection." Then Mr. Anderson wrote to the court asking the court to sign the final papers off docket. [CP 1112]

PERFIL CAM filed that letter requesting that the court sign

without presentment. [CP 1160] Counsel for Plaintiff perceived that letter to comprise only a request: he did not believe the presentment was stricken and was still waiting to hear from Beth McComas as to what the court was going to do. [Id] Based upon the history of the case he expected the court to want a face-to-face presentment. [Id] All the previous scheduled hearings had been held in person, with the exception of one time when Mr. Deissner was ill. [Id] Given Plaintiff's partial objection Mr. Deissner expected the court to set a presentment, and was waiting to hear the date.

On June 6 Mr. Deissner wrote an email to Brad Anderson asking when the presentment was going to occur. Mr. Anderson replied that the judgment was entered on May 3. [CP 1160]

### **Cr 60(b) Motion**

Plaintiff filed a motion under CR 60(b) [CP 1158] which was denied on 3/15/2007. [CP 1229] This appeal was then timely filed. [CP 1231]

## **ARGUMENT**

### **I. CR 60 MOTION**

The court below erred by failing to grant Plaintiff's CR 60 motion.

#### **A. Standard of Review**

A trial court's denial of a motion to vacate a judgment under CR

60(b) is reviewed for an abuse of discretion. A court abuses its discretion by exercising it on untenable grounds or for untenable reasons.<sup>1</sup>

### **B. Error by Trial Court**

CR 60 provides in part for relief from judgment for:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(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 party seeking to vacate a default judgment under CR 60 must

demonstrate four factors:

(1) the reason for the party's failure to timely act, i.e., whether it was the result of mistake, inadvertence, surprise or excusable neglect.

(2) the existence of substantial evidence to support, at least prima facie, a defense to the claim asserted;

(3) the party's diligence in asking for relief following notice of the entry of the default; and

(4) the effect of vacating the judgment on the opposing party.<sup>2</sup>

#### **1. Excusable Neglect**

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<sup>1</sup>*DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 1 P.3d 587 (2000).

<sup>2</sup>*Gutz v. Johnson*, 117 P.3d 390, 128 Wash.App. 901 (2005) ¶ 73.

Plaintiff allowed the judgment to be entered through excusable neglect and upon irregular procedure.

In a similar case, *City of Goldendale v. Graves*, 88 Wash. 2d 417, 423, 562 P.2d 1272 (1977) the district court sent a letter to defendant's attorney notifying him a transcript had been sent to the Superior Court, which was filed without coming to the attention of the defendant's attorney, causing him to miss a deadline. The attorney wrote the clerk of the court inquiring when the transcript had been filed, only to receive a motion for dismissal of the appeal for want of prosecution, which was granted. The Supreme Court found excusable neglect, stating:

[N]eglect does not bar relief if "excusable." The concept of excusable neglect is not uncommon. It is found in other contexts, e.g., RCW 4.32.240; CR 60(b). See RAP 1.2(a); cf. RAP 18.8. ... Each case of excusable neglect must rest on its own facts. *See First Nat'l Bank v. Stilwell*, 50 Ind. App. 226, 232, 98 N.E. 151 (1912). In the instant case, the record shows defendant's attorney in good faith made every effort to pursue this appeal in timely fashion. The very short 5-day delay in noting the case for trial resulted from pure inadvertence with no resulting prejudice in fact. Undoubtedly, a defendant may be bound by the acts of his attorney and an attorney is responsible for the acts of his office clerks. However, it is not necessarily unreasonable for an attorney in carrying on his law practice to assume his office clerks will exercise normal judgment and to rely upon the correctness of his office clerks' conduct in the course and scope of their employment. The Court of Appeals stated in its majority opinion that if a court is "unable to correct an injustice where a defendant or his attorney was unable to comply with the rules through no intent or act of his own volition[,] [t]his is not reasonable." *Goldendale v. Graves*, 14 Wash. App. 925, 929, 546 P.2d 462 (1976). Moreover, no one was

prejudiced by the very short delay in noting the case for trial. We agree with the Court of Appeals that under the particular circumstances here, justice requires relief.

In this case the excusable neglect was failing to repeatedly call (“bird dog”) the Clerk or Court Administrator to find out what the Court was going to do about signing the judgment, after the Court Administrator had agreed to inform counsel what was happening but did not. Counsel relied on a history in this case where it has been difficult to schedule hearings, so it was commonplace to tentatively set hearings and then wait for the Court Administrator to notify counsel when the hearing would occur. It was also common for the court to require in-person hearings. Counsel for Plaintiff did not intend to waive presentment and made it clear in several documents that he intended to appeal the court’s decision.

The Court in its memorandum opinion [CP 1115] focused on a couple of issues that Appellant respectfully asserts indicate an abuse of discretion.

First the court found that procedure had been completely user friendly to Plaintiff counsel. In fact counsel was placed at a considerable ‘home town’ disadvantage.

Second, the court’s focus was entirely on its own interpretation of counsel’s “Objection” rather than on counsel’s reasonable interpretation of

the surrounding circumstances, which in a nutshell were that counsel did not know whether the court would want a presentment hearing or not. True, counsel did not *want* a presentment hearing. But counsel had often not got what he wanted in this case, procedurally. The Court seemed to take this as a matter of course, but counsel didn't, and couldn't read the court's mind: instead counsel was waiting to hear if the Defendant's "request" to sign off docket would be granted, or if the matter would be heard.

So in deciding the CR 60 motion the court's reason for not finding excusable neglect was that the Court acted reasonably. That isn't the issue. The issue is whether, under the circumstances, *counsel* acted reasonably in expecting something different than what happened. IVAN CAM's counsel was never informed *whether* the request to sign off docket would be granted. So the issue here is not whether the Court was proper in signing the final papers. That was just fine. The problem lay in IVAN CAM's counsel not being told that the court *would* sign the papers; which is what would have triggered the obligation to "bird dog" the clerk's office to determine *when* the order was signed.

## **2. Irregular Procedure**

Skamania County Local Rules require that "Matters not regularly

noted on the motion calendar **will not be heard except by consent of all parties.**<sup>3</sup> Other local rules indicate that hearings are to be held in open court unless agreed otherwise.<sup>4</sup> In this case the judgment was entered without a presentment hearing.

Plaintiff objected to the findings, at least as to content, and did not authorize *ex parte* presentation, so there was not “consent of all the parties” to the court hearing this matter off docket.

Second, *ex parte* matters should be “heard in chambers,” but the signing occurred in Goldendale rather than Stevenson, so was out of county, and Rule 5(I)(F) require it “be coordinated through the Klickitat/Skamania County Court Administrator.” The word “Coordinate” implies that the Court Administrator will contact both parties to assure they know the hearing will proceed, which did not occur.

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<sup>3</sup> Skamania County Local Rule 4(c).

<sup>4</sup>Skamania County Local Rule 5(I) states:

D. *Ex parte* matters may be heard in chambers on any judicial day (preferably on Motion Days) before Court is convened or after Court is recessed. These matters need not be noted for placement on the Clerk's docket. ...

F. All hearings that are to be held in courts outside of the county where the case has been filed **shall be coordinated through the Klickitat/Skamania County Court Administrator.** The Court Administrator shall then notify the clerk in which the case has been filed of the out-of-county hearing date and time. [Emphasis added]

The Court below ruled that Plaintiff's response to the proposed judgment was reasonably understood to comprise consent to entry of the judgment.

First, for purposes of a CR 60 analysis, the question of what the court reasonably believed is not at issue. Excusable neglect focuses on the state of mind of the attorney, not on the court, and the reasonableness of that belief.<sup>5</sup> Counsel clearly did not intend his objection to result in entry of the judgment without further notice.

Second, the record before this court is undisputed that Appellant counsel spoke to the court administrator, was told that the court's procedure was not then known, asked the Court Administrator to inform him what procedure the court would follow, and reasonably expected her to do so. [CP 1160] This conversation took place after the "objection" was filed but before the letter requesting that the papers be signed off docket was sent. Ms. McComas did not tell IVAN's counsel that he had waived notice of the matter being signed: she said it was not determined

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<sup>5</sup>See *Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577, review denied 130 Wn.2d 1005 (1996) (State of Washington's reasonable belief that outside counsel was representing its interests constituted excusable neglect); contrast *In re Estate of Stevens*, 94 Wn. App. 20, 971 P.2d 58 (1999) (trust beneficiary's belief that possible cotrustee represented her interests was unreasonable).

what was going to happen, and did not refuse the request to inform IVAN's counsel what was going to happen. Again had counsel known the court was going to sign then he would have "bird dogged" the clerk's office; he did not know.

### **3. Other Reasons Justifying relief**

Appellants were reasonably confused whether the Court was going to sign and enter judgment, and could not have been expected to monitor the Clerk's office without having been told that the Court would accept the judgment as an ex parte submission. This comprises extraordinary circumstances under CR 60(b)(11).

*Topliff v. Chicago Insurance Co.*, 130 Wash.App., 301 122 P.3d 922 (2005) held that CR 60(b)(11) was available for relief from judgment where a default was taken against an insurance company when the Secretary of State failed to forward process to them. The court noted that

CR 60(b)(11) applications should be reserved for situations involving extraordinary circumstances 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). Moreover, those circumstances must relate to 'irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings.'

The lack of notice comprised an effective denial of due process:

The extraordinary circumstances deprived CIC of an opportunity to respond to the Topliffs' suit. Notice and opportunity to be heard are the basic pillars of due process. Without due process, our

proceedings lack fundamental fairness.

CR 60(b)(11) was appropriate to redress the failing.

Extraordinary circumstances are ones that go beyond excusable neglect.<sup>6</sup> Professor Trautman<sup>7</sup> says,

[A]n irregularity is regarded as a more fundamental wrong, a more substantial deviation from procedure than an error of law. An irregularity is deemed to be of such character as to justify the special remedies provided by vacation proceedings, whereas errors of law are deemed to be adequately protected against by the availability of the appellate process. Other than that, the most that can be said is that it must be left for the court in each instance to classify.

In this case Plaintiff expected to be advised by the court administrator – because he spoken with her – *whether* there would be a presentment or not; and if not, that the court would enter the order ex parte. Given this knowledge, Plaintiff would then have had the burden to monitor for entry, and could not complain if he blew past the deadline for appeal. But absent that bit of critical knowledge, Plaintiff could not anticipate the need to monitor the clerk, and merely waited for the anticipate scheduling of a presentment.

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<sup>6</sup>*Friebe v. Supancheck*, 94 Wash.App. 1023, 992 P.2d 1014, 98 Wash.App. 260 (1999)

<sup>7</sup>Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash. L. Rev. 505, 515 (1960) Quoted in *In re Furrow*, 115 Wash.App. 661, 63 P.3d 821 (2003)

The court below ruled that it would have been improper for the Court Administrator to have notified Plaintiff of the order's signing. [RP Supp.] This is a fairly remarkable concept to the Appellant, the idea that the Court Administrator is somehow not allowed to keep counsel advised of the procedural status of a pending matter. Appellant can find no rule or decision which suggests that it would be improper for a Court Administrator to tell a litigant that a judge had decided to sign an ex parte order rather than hold a presentment. To the contrary, the Skamania County Local Rules §5(I) require "coordination" of out of county matters through the Court Administrator.<sup>6</sup>

Because Judge Altman was in Goldendale, the court in Stevenson and Plaintiff counsel in Spokane, there were numerous delays and difficulties scheduling hearings in this case. The delays in entering judgment were significant: the greater part of one year passed with no word from the court at all. This cannot be called an ordinary case from a logistical standpoint. Plaintiff counsel justifiably relied upon the assistance of the Court Administrator, and she apparently decided notice was not necessary.

Finally, this case falls squarely into the category of

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<sup>6</sup> Footnote 4 above.

“knowing silence.” Opposing counsel’s had sent an email saying he would try to get Judge Altman to sign the papers off docket, but that he was not sure if this would happen. He never wrote again to say, this *will* happen. Deliberate silence in the face of knowledge that a party intends to proceed in a matter may justify CR 60(b)(11) relief.<sup>7</sup> Appellant does not contend that Mr. Anderson violated the rules here, but he was aware of IVAN CAM’s intent to appeal, and was aware that there was ambiguity whether the court would sign the judgment off docket; Mr. Anderson has offices in the same town as the Skamania County Clerk’s office and unquestionably Mr. Anderson was somehow made aware that the judgment had entered, yet he communicated none of this to IVAN CAM’s lawyer. As in the *Suburban Janitorial* case, even if there was no duty to speak, and no misrepresentation, these facts still constitute a persuasive “other reason justifying relief from the operation of the judgment.” CR 60(b)(11).

#### **4. RAP 18.8(b)**

This was not a proceeding under RAP 18.8(b) but recent decisions under that rule informed the court’s opinion that the Plaintiff was required

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<sup>7</sup>*Suburban Janitorial v. Clarke American*, 72 Wn. App. 302, 863 P.2d 1377 (1993) cited in *Matia Investment Fund, Inc. v. City of Tacoma*, 119 P.3d 391, 129 Wash.App. 541 (2005)

to “bird dog” the Clerk’s office to find out when the opinion was signed. Appellant believes the RAP 18.8(b) analysis supports his position that procedure in this case was irregular and Appellant’s neglect was excusable.

In *Beckman v. State*, 102 Wn. App. 687, 11 P.3d 313 (2000) the State failed to timely appeal a judgment. The State sought extension of time to appeal under RAP 18.8 and not under CR 60(b). The standard under RAP 18.8 is much more “narrow” and “stringent,” providing:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal . . . . The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. ...

The 'extraordinary circumstances,' required under that rule are:

circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct.<sup>8</sup>

Yet even under the more stringent case this situation would justify an extension of time under RAP 18.8(b). In *Beckman* a presentment had been noted for a specific date; nobody appeared on the day of the

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<sup>8</sup>See *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988).

presentment, and the judgment was entered that day and not timely appealed.

Here, a presentment was noted, without a set date but presumably for early June, then ambiguously withdrawn in favor of an unclear request for the court to sign the order *ex parte* – there was never a clear date given on which the order would be signed, not was Plaintiff advised that the order would be signed at all without presentment. Had it been signed on the original presentment date there would still be time to appeal.

The *Beckman* case does say that there is no obligation to give notice of the entry of a judgment. That is true where it is regularly noted up, presented and signed. But that is not true where, as here, the date for presentment was always up in the air. Under those circumstances it is unreasonable to expect counsel to guess when the judgment will be dealt with.

## **B. MERITORIOUS DEFENSE**

IVAN CAM believes he would likely have succeeded in his appeal as to the substantive issues on appeal. The basis for this claim is offered in a summary form at this time only to support the CR 60 motion, as follows.

### **1. PROCEDURAL ISSUES**

Continuances of trial dates are within the sound discretion of the

trial court.<sup>9</sup> A trial court abuses its discretion where its actions are manifestly unreasonable, based on untenable grounds, or based on untenable reasons.<sup>10</sup> This court should compare *Jarstad v. Tacoma Out. Rec.*, 10 Wn. App. 551, 519 P.2d 278 (1974), to this case where IVAN CAM was without counsel when a note for trial was filed, IVAN CAM had almost no opportunity to conduct in depth discovery, and the only real reason for not granting a continuance was that the court was uncertain when the next trial date would be available.

IVAN CAM then declared bankruptcy and the trial should have been stayed for that bankruptcy under § 362 of the Bankruptcy Code.<sup>11</sup>

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<sup>9</sup> *Jankelson v. Cisel*, 3 Wn. App. 139, 473 P.2d 202 (1970); CR 40

<sup>10</sup> *Moreman v. Butcher*, 126 Wn.2d 36, 891 P.2d 725 (1995)

<sup>11</sup> 11 U.S.C. §362(a) provides that the filing of a bankruptcy petition:

[O]perates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; . . . .

(3) any act to obtain possession of property of the estate or of property from the estate . . .".

The automatic stay clearly applies to stay counterclaims against a Debtor,<sup>12</sup> but not necessarily counterclaims that arise directly out of the Debtor's affirmative claims. *Id.* Here the court stayed only those counterclaims that were not simply opposed to IVAN's own claims; but those counterclaims could and did overwhelm his affirmative claims, and should have been stayed; and to stay them would have required staying the whole case due to their intertwining.

Finally IVAN CAM was arrested on unrelated charges, and attended trial in custody. He was unable to sleep comfortably and so was not at his best at trial; he was unable to participate meaningfully in his case outside of court.

IVAN CAM asserts that, analogous to Administrative law, where a series of actions which are individually defensible may give rise to cumulative unfairness great enough to invalidate the actions, relief is appropriate<sup>13</sup>

## 2. SUBSTANTIVE ERRORS

IVAN CAM asserted that he had entered into a joint venture with

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<sup>12</sup>*Polello v. Knapp*, 68 Wn. App. 809, 847 P.2d 20 (1993); *Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995)

<sup>13</sup>*Chrobuck v. Snohomish County*, 78 Wn.2d 858, 480 P.2d 489 (1971); *Smith v. Skagit County*, 75 Wn.2d 715, 739, 453 P.2d 832 (1969)

PERFIL CAM that gave him an ownership interest in the Bonneville Hot Springs Resort. The Court basically found that IVAN CAM invested money but had no interest in the profits. However the Court erred as a matter of law in failing to find that IVAN CAM was involved in a partnership or joint venture with PERFIL CAM to develop the Bonneville Hot Springs Resort. IVAN CAM contributed a significant amount of money, a significant amount of time and personal efforts, and was held out to the public as having a partnership interest. As a matter of law this creates a de facto partnership.<sup>14</sup> Joint ventures arise based upon either express or implied contract where there is

- (a) a common purpose and intention to act as joint venturers;
- (b) a community of interest; and
- (c) an equal right to a voice accompanied by an equal right of control.<sup>15</sup>

All of which existed here. IVAN CAM was promised a minimum 10% “interest” in profits, held himself out as a partner and PERFIL did not dispute that act for years.

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<sup>14</sup>RCW 25.05.055 provides,  
(1) Except as otherwise provided in subsection (2) of this section, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

<sup>15</sup>*Adams v. Johnston*, 71 Wn. App. 599, 860 P.2d 423 (1993)

Upon dissociation of the partnership IVAN CAM should have been entitled to a full accounting of the partnership and his share of the partnership assets.<sup>16</sup>

The Court Below also erred in applying judicial estoppel. There was No Underlying Final Judgment in the Oregon case, thus no “benefit” or “acceptance” to IVAN CAM from the supposedly inconsistent position.<sup>17</sup> Then, although PETE CAM lied in other litigation the court did not apply judicial estoppel to PETE CAM.

In short, there are substantive issues should the court permit

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<sup>16</sup>RCW 25.05.170:

(2) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

- (a) Enforce the partner's rights under the partnership agreement;
- (b) Enforce the partner's rights under this chapter, including:
  - (i) The partner's rights under RCW 25.05.150, 25.05.160, or 25.05.165;
  - (ii) The partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to RCW 25.05.250 or enforce any other right under article 6 or 7 of this chapter; or
  - (iii) The partner's right to compel a dissolution and winding up of the partnership business under RCW 25.05.300 or enforce any other right under article 8 of this chapter; or
- (c) Enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

<sup>17</sup> *Deveny v. Hadaller*, 161 P.3d 1059, 139 Wash.App. 605 (2007); *Johnson v. Si-cor Inc.*, 107 Wn. App. 902, 908, 28 P.3d 832 (2001).

vacating the judgment and, ultimately, allowing an appeal.

**C. DUE DILIGENCE**

There is no issue raised that Appellant failed to raise this issue promptly and with due diligence. The motion was filed within days of learning that Judgment had been entered.

**D. EFFECT OF VACATING**

PERFIL CAM would suffer no prejudice by vacating this judgment. He has tendered the amount of the judgment to the court, the liens on his property are gone, and the only thing remaining is to resolve the appeal.

## CONCLUSION

This Court is requested to vacate the judgment entered herein [CP 1156] to permit Appellant to reenter said judgment, and proceed with an appeal on substantive issue. Alternatively the court should simply permit Appellant to proceed on those issues in this court.

January 25, 2008

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line extending to the right.

Dustin Deissner WSB# 10784  
Attorney for Appellants

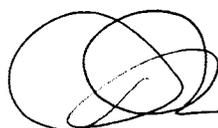
CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2008 I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to the following:

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopier (fax)

To:  
Bradley Anderson  
700 Washington St. Ste 701  
Vancouver WA 98660

January 25, 2008



Dustin Deissner WSB# 10784

BY  
DEPUTY

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