

original

No.36168-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IVAN CAM
Appellants,

v.

PERFIL CAM & ELENA CAM
Defendants

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

Appellant's Reply Brief

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ARGUMENT

I. CR 60 MOTION

1. Excusable Neglect based on Confusing Circumstances

The Respondent, like the Court below, focuses on Appellant Counsels poorly worded objection to the final judgement as giving the Court carte blanche to sign the papers. Actually we agree: Judge Altman had every right and reason to sign the papers given what he knew.

What he didn't know was that the Skamania County Court Administrator had told Appellant Counsel she was uncertain whether Judge Altman would be signing the documents or would schedule a presentment, and would keep Appellant Counsel informed of the scheduling.

This case involved unusual and, from a practical if not a rules standpoint, irregular proceedings. The focus in excusable neglect is what counsel reasonable believed. See *Hardesty v. Stenchever*, 82 Wash. App. 253, 917 P.2d 577 (1996).

2. Irregular Procedure

Even if Judge Altman felt counsel's 'objection' was a waiver of the requirements of the Skamania County Local Rules for setting the

presentment, counsel for Ivan Cam was left 'holding the bag,' expecting the Court Administrator to call back. Had counsel known there was not going to be a presentment, he would have 'bird dogged' the Clerk's office. Local Rule 5(I)(F) requires presentments "be coordinated through the Klickitat/Skamania County Court Administrator." It was reasonable for counsel to expect to hear something back from her. 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 what was going to happen, and did not refuse the request to inform IVAN's counsel what was going to happen.

3. Other Reasons Justifying relief

Extraordinary circumstances are ones that go beyond excusable neglect. *Friebe v. Supancheck*, 94 Wash.App. 1023, 992 P.2d 1014, 98 Wash.App. 260 (1999). Because of the very unusual relationship of the

parties – court and one lawyer in Stevenson WA, Judge in Goldendale, WA and other counsel in Spokane WA; the unusual and extreme delay in the Court entering its memorandum decision; and the inconsistency in requiring or not requiring attendance at hearings, coupled with the Court Administrator’s and opposing counsel’s silence, this case falls into the extraordinary circumstances category.

4. Knowing Silence

Add to the above the fact that Opposing counsel 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*, and never wrote again to say, this *will* happen. So counsel for Ivan Cam:

- could not reasonably predict whether Judge Altman would want a presentment hearing or not;
- was told the opposing counsel was not sure if Judge Altman would want a presentment hearing;
- was reasonably expecting the court administrator to tell him whether there would be a presentment hearing, or the Judge would just sign the document in chambers.

Justifying CR 60(b)(11) relief. *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).

4. RAP 18.8(b)

Ivan Cam's motion under CR 60 stands on its own without reference to RAP 18.8(b). The error was committed at the trial court level, not the appeal level, and there is no reason to ask for additional time to appeal an order that should not have been entered under those circumstances.

Appellants do note, however, that in *Beckman v. State*, 102 Wn. App. 687, 11 P.3d 313 (2000) the Appellant *knew* a presentment was held but failed to calendar the time for appeal.

II. MERITORIOUS DEFENSE

The defense relevant to this motion initially is whether Ivan Cam would have been able to proceed with his case - i.e., would have had the right to appeal. In the declaration supporting the motion [CP 1160] counsel stated:

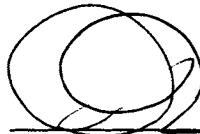
Ivan Cam wishes to appeal from the Court's decision and is deprived of his opportunity to appeal. I think the Court's decision in this complicated case is justifiably subject to appellate review, and Mr. Cam should have that chance.

Counsel for Perfil Cam did not object to the presence of meritorious defense nor raise the issue in argument.

CONCLUSION

This Court is requested to vacate the judgment entered hereinto 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.

April 5, 2008



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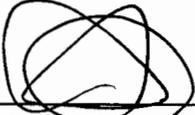
CERTIFICATE OF SERVICE

I hereby certify that on ~~January 25, 2008~~ ^{April 7, 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:
Kelly Walsh
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April ~~8~~ ⁷, 2008


Dustin Deissner WSB# 10784

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