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

RICHARD AZPITARTE, *appellant*

v.

KING COUNTY, *appellee*

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 CIVIL DIVISION

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

APPELLANT'S REPLY BRIEF

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

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REPLY ARGUMENT

The Respondent submits its reply brief, ignoring the central issue raised by this appeal, which is the allegation that it performed a fraud upon the appellant and then the court by first making a representation to the appellant that it had forgiven the debt because he had performed a certain act in lieu of paying judgment, then goes behind the appellants back, without notifying the court that it had forgiven the debt, and obtains a fraudulent judgment. No where in its brief, nor in the record does the respondent try to controvert this allegation of the plaintiff. This allegation came in uncontroverted in the trial record, and then the county tries to feebly argue that the allegation was somehow based upon hearsay, when it never objected to the allegation coming in as evidence. A party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence." *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007 (1996) (citing ER 103). The failure to object to the admission of evidence at trial or to testimony from State witnesses precludes appellate review. *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000); *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985),

cert. denied, 475 U.S. 1020 (1986). Under RAP 2.5(a), appellate courts will not address issues not raised below, except under circumstances not present here

THE RESPONDENT'S STATEMENT OF THE CASE

There is nothing submitted by the respondent that attempted to controvert appellant Azpitarte's contention that an agent for the county told him that it would forgive the judgment if Mr. Azpitarte moved his automobiles. Azpitarte states this both in his declaration and in oral argument. Indeed, the record supports his contention as there is nothing in the record that suggests that the county called off supplemental proceedings for any other reason than what Azpitarte testified to. The county does not address this issue in its statement of the case. It simply chooses to ignore the most significant argument to the plaintiff's case.

The county also asserts that as of May 2007, Azpitarte had not satisfied the judgment. This is under dispute, and the court made it very clear it was not ruling that the judgment was unsatisfied, by inviting Azpitarte to file a motion to enter a satisfaction of judgment because the judge was not ruling on that issue.

1. APPELLANT BROUGHT HIS MOTION WITHIN A REASONABLE TIME.

The record shows that the appellant filed his first motion to set aside the judgment within two days of learning of the judgment for the first time. His declaration filed on November 11, 2009 (CP 45-51) along with his motion to set aside (CP 52-77). This was just two days after he learned of the judgment for the first time (CP 46). While this motion was stricken, his attempt to bring this motion to motion a second time should have been excused because the appellant was awaiting the outcome of his attorney's disciplinary proceeding, which could have been reversed at any time.

The respondent misconstrues *Suburban v. Clarke American*, 72 Wn. App. 302, 306-307, 863 P.2d 1377 (1993). While the court did rule that a CR 60 (b)(1) was untimely, a motion brought shortly after learning of the judgment was timely in that case. Here the appellant first learned of the judgment on November 9, 2009, promptly brought a motion to set aside the judgment, had to strike the motion when his counsel was

unexpectedly suspended, then brought a second motion within one year of learning of the judgment. Under these circumstances the motion was timely.

The county concedes that the critical period in determining whether the time was reasonable was the time of learning of the judgment and the filing of the CR 60 motion citing *Lockett v. Boeing Co.* 98 Wn. App 307,312, 989 P.2d 1144,1147). But both the court and the county claim that this was three and a half years instead of less than a year.

Inexplicably, the county boldly asserts that the “appellate provided no admissible evidence as to when he learned of the order extending judgment.” However by looking at CP 49 the appellant provided direct, uncontroverted testimony under penalty of perjury, that he filed the first motion to set aside within two days and the second in less than a year. The county filed no objection in the record to the submission of this testimony. Now on appeal, for the first time, it suggests in a footnote that this testimony was inadmissible because the declaration was not written at the same time as the motion. The respondent cannot provide any authority for the notion that a motion or declaration entered into the record is stricken because the hearing for which it was scheduled was stricken. The

appellant made it clear on his second motion that he was relying on his first declaration, (CP 82) in making the motion and there is nothing in the record that the court struck the declaration. If the county felt that reference to that declaration was improper, it should have objected. As stated earlier, a party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence." *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007 (1996) (citing ER 103). The failure to object to the admission of evidence at trial or to testimony from State witnesses precludes appellate review. *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000); *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

Considerations in determining a CR 60(b) motion's timeliness are prejudice to the nonmoving party and whether the moving party has good reasons for failing to take appropriate action sooner. *Luckett*, 98 Wn. App. at 312-13 (citing *In re Marriage of Thurston*, 92 Wn. App. 494, 500, 963 P.2d 947 (1998), review denied, 137 Wn.2d 1023 (1999)). Here the county has cited to no reason as to why it was prejudiced by the delay of less than one year. The appellant on the other hand, demonstrated good reasons for

delaying because he was fearful of proceeding forward with the motion without counsel and was awaiting the outcome of his attorney's suspension which was non-disciplinary and of unknown duration.

2. BY ACCEPTING CONSIDERATION FROM AZPITARTE AND ESSENTIALLY SETTTLING THE CASE, THE COUNTY COULD NOT REOPEN THE CASE WITHOUT NOTICE.

The Respondent cites to *Bjurstrom v. Campell*, 27 Wn.App.449, 450-451, 618P.2d 533, 534 (1980) claiming that the appellant had to appeal the original judgment. However this case is distinguishable from *Bjurstrom*. In *Bjurstrom*, the defendants knew about the judgment but waited 8 years to bring a motion to set it aside rather than appealing the order directly.

Here, Azpitarte never knew about the judgment because of the fraud perpetuated by the respondent. He had every reason to believe that the judgment had been forgiven. In fact, by its actions and representations, the respondent had ended this case, by accepting the consideration given by Azpitarte. To allow a party to do what the county did and then allow it to unilaterally abrogate the agreement without notice would encourage other parties to engage in the same kind of fraud to illegitimately obtain a

judgment that it had already forgiven for consideration. The court should not be a party to unjust enrichment by the county through fraud.

The County cites to a third division case *State v. Hotrum*, 120 Wn.App. 681, 685, 87 P.3d 766 (2004) for the proposition that the order granting an extension of judgment should not be granted. However, the facts of this case are readily distinguishable from *Hotrum* and it is those facts that demonstrate why this division should not adopt the rule of the third division.

In *Hotrum*, a criminal defendant argued that he should have been given notice so that he could argue whether his payments had been properly applied. The court concluded that the purpose of the extension was to statutorily extend jurisdiction for the purpose of collecting restitution owed. The court noted that the extensions “did not modify the original terms of the judgment for the purpose of collecting restitution owed.”

However *Hotrum* did not involve a case where a party had already agreed to end the case for consideration. So in this case the court is being called upon to join in fraudulently abrogating a settlement to the case.

Here, the county never denied it made an agreement and it never contended that Azpitarte failed to live up to his side of the bargain. Rather than simply extending the period of time for collecting a judgment that had not been collected, the court resurrected a case that had been concluded. This is why the court in *Hotrum* was mistaken. It only considered a very limited set of circumstances in which the validity of an extension could be challenged. For this reason this division should adopt a different rule. But even if this court does adopt the *Hotrum* rule, it should not apply it in this case because the facts of this case require that notice be given because the county was attempting to resurrect an essentially settled case.

3. THE COURT LACKED JURISDICTION TO ENTER AN EXTENSION OF JUDGMENT.

As argued above, notice was required if the county wanted to abrogate its agreement to end the case. The facts in this case are readily distinguishable from *Lindgren v. Lindgren*, 58 Wn. App. 588, 794 P.2d 526, 529 (1990) which ruled that the court had continuing jurisdiction on a motion to vacate. There the court ruled that once jurisdiction is properly acquired, a superior court has continuing jurisdiction from beginning to end. But *Lingren* did not involve a case where a party had already agreed

to end the case. In *Lindren*, the party opposing the vacation had just availed itself of the court's jurisdiction by attempting to garnish. That is unlike here, where the County had already agreed to end the case and halted all attempts to collect on the judgment. Having already agreed to have the court end its jurisdiction, it is disingenuous for the county to invoke the jurisdiction it had already agreed to end.

Moreover, the appellant never waived jurisdiction. He contested jurisdiction as soon as he learned of it, and avoided getting a ruling only because he was awaiting the outcome of his attorney's situation before proceeding.

4. THE COURT ABUSED ITS DISCRETION BY GRANTING MULTIPLE EXTENSIONS OF TIME WITHOUT NOTICE TO THE APPELLANT.

The county attempts to invoke CR 6(b) for the proposition that a continuance could be granted without notice because the hearing for which the continuance was sought had not occurred yet. However, the county conveniently failed to have the court note that its motion to continue actually had a two fold purpose. It not only continued the trial date, it also extended the deadline for responding which had already passed. Under CR 6(b)(2) this deadline could only have been accomplished with notice.

Similarly, the county was again late on its second response, so when it showed up in court asking the court to consider its late response, it was again asking the court to enlarge the time after the time expired. CR 6 (b)(2) then requires a showing of excusable neglect. No such showing was ever offered.

The county attempts to argue that Azpitarte somehow invited the error of the lower court by refusing to agree to a continuance. This ignores the fact that Azpitarte was not required to agree to a continuance, especially when it was a hardship on him, when the county had offered absolutely no reason why its dilatory response was excusable neglect.

The county contends that Azpitarte's argument about the American with Disabilities Act was not "evidence" so the court should ignore it. However, in this context, the appellant's pro se argument was in effect, an offer of proof, as to what facts could be proved, if the county had not sandbagged and shown up with a response that he had never even seen yet. In that situation there was not enough time for him to draw up a declaration on the spot to get his evidence before the court. In this regard, having had the appellant's disability brought to its attention, the court

should have put Mr. Azpitarte on the stand to determine if his allegation was true.

At any rate, Mr. Azpitarte cured this evidence problem when he submitted his declaration as part of the motion for reconsideration, which is now properly before the court.

Dated this 22nd day of May, 2012


Richard Azpitarte.