

FILED
SUPREME COURT
STATE OF WASHINGTON
6/14/2024 3:18 PM
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S. Ct. No.
COA No. 39547-2-III

Case #: 1031785

SUPREME COURT OF THE STATE OF WASHINGTON

In re C. S., child.

WAYNE JANKE and DORIS STRAND,

Respondents,

and

RONALD SIMON AND TERESA SIMON,

Petitioners.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Ronald and Teresa Simon ask this Court to accept review of the Court of Appeals opinion in Part B.

B. COURT OF APPEALS DECISION

The unpublished Court of Appeals opinion which the Simons want reviewed was filed April 23, 2024. A copy of the opinion is attached as Appendix A. Their motion for reconsideration was denied on May 16, 2024. A copy of the order denying the motion for reconsideration is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err by entering its December 16, 2022 amended order imposing \$2,500 attorney fees to Ms. Strand's counsel as a CR 11 sanction?

2. In its December 16, 2022 amended order, did the court erred by entering these findings?

2.1. After reviewing the case record to date, the basis for the motion, and pleadings of the parties, the court finds there is good cause

to enter this order. Based on the repetitive nature of several successive CR 60 motions on the same grounds, CR 11 sanctions are appropriate.

2.5. The Simons' repeated motions on the same issues, especially when the prior motions were denied, evidence the Simons' failed to conduct any inquiry in the actual or legal basis for their asserted, and now repeated, claims.

2.6. The Simons' repeated motions on the same issues are interposed for improper purposes and intended to harass and unnecessarily increase the cost of this litigation.

3. Did the trial court err by denying the Simons' motion to vacate the December 16, 2022 amended order?

D. STATEMENT OF THE CASE

In appeal no. 380564, Division III affirmed in part and reversed in part in an unpublished opinion filed June 2, 2022. (CP 9). The court remanded the issue of sanctions to the trial court for consideration of whether a CR 11 sanction was appropriate in light of the standards for imposing it. (CP 13-15). The mandate instructed the

trial court to hold further proceedings pursuant to the remand in the Court of Appeals' opinion. (CP 8).

On November 16, 2022, Ms. Strand's counsel mailed a notice of presentment without oral argument on the CR 11 issue. (CP 4-7). The Simons did not receive the notice and did not respond. The amended order was entered on December 16, 2022. On December 27, 2022, the Simons moved for reconsideration and a stay of the amended order. (CP 19).

In a declaration in support of the motion, the Simons declared under penalty of perjury that they did not receive notice of presentment in the mail. (CP 20). They averred:

5. What is more, the mail had not been delivered to the area where our address of service is located since mid-November [2022]. We made complaints to the Postal Service, the city and other agencies. The media picked up the complaints. Channel KHQ contacted Cathy McMorris's office regarding the problems with our mail service. Ms. McMorris's office called us and told us the matter is under investigation

and it is an issue of the whole area and not just us.

6. In addition to our declaration incorporated herein, please see the declaration of Jane Marks, our Neighbor, establishing the disrupted service because of the postal problems in our area. For that reason, the Order and Presentment should be set aside and reheard. . .

At the hearing on the Simons' motion, the court considered it "as a request for a CR 60 motion to set aside the prior order." (RP 4). The court indicated the only thing before it was the issue of the CR 11 sanction. (RP 7). After hearing Ms. Strand's counsel, the court denied Ms. Simon's request to present to the court "letters from the post office saying that mail has been terminated on our block" because the letters were not timely filed. (RP 11). According to Ms. Simon, the letter stated that, due to the safety issues concerning snow, ice, and construction, delivery following between the 600 and 900 block of South Thor has been temporarily suspended by

the post – the post office.” (*Id.*). The court refused to consider it:

I’m going to stop you right there, ma’am. I’m not going to consider that. That’s not your testimony. And I just indicated that you cannot provide any further declarations today, as they do not comport with our time schedules and our local rules. Just because you read it into the record doesn’t mean it’s part of our record. I’m striking that and I’m not considering that. (*Id.*)

The court further stated “the only evidence you’ve provided this Court is a declaration from somebody named Jane Mark [*sic*].” (RP 12). The judge commented the declaration did not tell her anything about the Simons’ mail:

You brought this motion, so it’s incumbent upon you to provide whatever information you want to base your argument on to the Court prior to the hearing. You’ve not done that. (*Id.*).

On January 20, 2023, the court denied the motion to set aside the December 16, 2022 amended order, which remained in full force and effect. (CP 66). The Simons

appealed. (CP 62). Division III affirmed in an unpublished opinion; reconsideration was denied.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review is warranted under RAP 13.4(b)(1) as the Court of Appeals' decision conflicts with decisions of the Supreme Court.

The Court of Appeals first determined “[t]he Simons are correct that the trial court abused its discretion by denying their motion on a basis not supported by the record.” (Op. at 1). Stating it was placing substance over form, the court then ignored the error because the Simons “do not contend that the December 16, 2022 amended order is incorrect.” (*Id.*). To the contrary, the court’s opinion is just the opposite and elevates form over substance. It thus conflicts with its cited authority, *First Fed. Sav. Y Loan Ass’n of Walla Walla v. Ekanger*, 93

Wn.2d 777, 781, 613 P.2d 129 (1980). Review is warranted under RAP 13.4(b)(1).

The Court of Appeals missed the whole point of the Simons' moving to vacate the December 16, 2022 amended order. It was the court itself in no. 380564 that remanded the CR 11 sanctions issue because the order lacked sufficient findings of fact. Without notice to the Simons, the trial court entered findings purportedly in support of the sanctions. They had no notice of the proposed findings and could not respond in any event because they had no notice of the presentment on December 16, 2022, and the proposed amended order. (Op. at 2).

The Court of Appeals misapprehended the Simons' contention that the amended order entered without notice made the order unenforceable. The court was wrong when it stated in a footnote the Simons had an opportunity to be meaningfully heard by raising their

concerns in their CR 60 motion. (Op. at 1, fn.1). They were heard on the notice issue by the Court of Appeals, but they were unheard by both the trial court and appeals court as to why the CR 11 sanctions were unwarranted.

The Simons did not get notice of the presentment as it was sent by mail and they did not receive any mail during the time the notice was mailed. Due process requires notice and the opportunity to be heard. *Watness v. City of Seattle*, 11 Wn. App.2d 722, 733, 457 P.3d 1177 (2019), *review denied*, 195 Wn.2d 1019 (2020). And CR 11 procedures must comport with due process. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992). Due process was not followed here.

The trial court ignored the Simons' "concerns in their CR 60 motion." They were not heard and the court simply dismissed on procedural grounds the Simons' concerns, without even considering them. That is a violation of due process. The Court of Appeals' opinion

conflicts with *Bryant*.

Since the amended order is of no force and effect, the court's findings of fact on the sanctions cannot be sustained. This is the Simons' argument regarding the erroneous findings of fact; it has nothing to do with whether substantial evidence supports them. The argument is plain and the Court of Appeals missed it. The amended order should be vacated and the matter remanded to the trial court for a hearing on presentment with the Simons having the opportunity to respond with appropriate notice. See *In re Marriage of Gharst*, 25 Wn. App.2d 752, 525 P.3d 250 (2023).

In these circumstances, review is warranted under RAP 13.4(b)(1) because the Court of Appeals' opinion conflicts with *Ekanger* and *Bryant*.

F. CONCLUSION

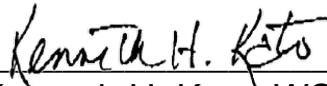
Based on the foregoing facts and authorities, the Simons respectfully ask this Court to grant their petition.

CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17, I certify that this document contains 1512 words.

DATED this 14th day of June, 2024.

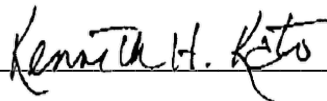
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on June 14, 2024, I served through the eFiling portal a copy of the petition for review on Spencer Harrington.



APPENDIX A

FILED
APRIL 23, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Custody of:)	No. 39547-2-III
)	
C.S. [†])	
)	
_____)	
)	
WAYNE JANKE and DORIS STRAND,)	
)	
Respondents,)	UNPUBLISHED OPINION
)	
and)	
)	
RONALD SIMON and TERESA SIMON,)	
)	
Appellants.)	
)	

LAWRENCE-BERREY, C.J. — Ronald Simon and Teresa Simon appeal the trial court’s January 20, 2023 order denying their requests to vacate the December 16, 2022 amended order and stay related proceedings. The Simons are correct that the trial court abused its discretion by denying their motion on a basis not supported by the record. Nevertheless, placing substance over form, we affirm on the basis that the Simons do not contend that the December 16, 2022 amended order is incorrect.

[†] To protect the privacy interests of the minor child, we use their first and last initial in the caption. Gen. Order 2012-1 of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

FACTS

Previously, Ronald Simon and Teresa Simon appealed the trial court's order striking their CR 60 motion and its imposition of CR 11 sanctions. We affirmed the trial court's striking of their CR 60 motion, but reversed the sanctions order without prejudice because it lacked sufficient findings of fact.

On November 16, 2022, Doris Strand noted for presentation her amended order striking the Simons' CR 60 motion and imposing CR 11 sanctions. On that date, Strand mailed to the Simons the notice of presentment and the proposed amended order. The notice reflected a presentment date of December 16, 2022.

On December 16, 2022, the trial court signed the amended order. The order reflected that the Simons received notice of presentment but did not appear.

On December 27, 2022, the Simons filed a motion to vacate the December 16, 2022 order, to grant a new hearing, and to stay proceedings until the new hearing. In a declaration supporting their motion, they explained that they and nearby neighbors had not received mail service since mid-November, and that they had made complaints to the postal service about this. They argued lack of service deprived the trial court of jurisdiction to enter the order. They did not argue that the order itself was incorrect.

The trial court heard the Simons' motion on January 20, 2023. The court's comments reflect its belief that the Simons had not denied they received mail, but had

only asserted that one of their neighbors had not received mail. On that basis, apparently, the court denied the Simons' motion.

The Simons timely appealed.

ANALYSIS

This court reviews a trial court's denial of a CR 60 motion to vacate for abuse of discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 337, 314 P.3d 380 (2013). A trial court operates within its discretion when its findings derive from the factual record, its conclusions apply sound law, and its decisions are not manifestly unreasonable. *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

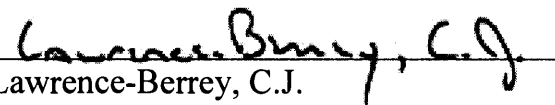
Here, the trial court abused its discretion when it misunderstood the factual record. Specifically, the undisputed evidence is that *both* the Simons and their neighbor failed to receive mail during the relevant period. Nevertheless, we may affirm a trial court on any correct basis argued by the parties. *Anaya Gomez v. Sauerwein*, 180 Wn.2d 610, 624-26, 331 P.3d 19 (2014).

Strand argues the Simons' appeal places form over substance, and that the amended order is appropriate because the Simons "have provided no evidence that the court order would have been different if they had appeared" at the December 16, 2022 hearing. Br. of Resp't at 7. We agree.


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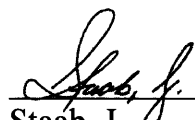
Whenever possible, the rules of civil procedure should be applied so substance prevails over form. *First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger*, 93 Wn.2d 777, 781, 613 P.2d 129 (1980). CR 60(b) prescribes bases and timelines for parties to request relief from *erroneous* judgments and orders. As a matter of substance then, a motion to vacate an order should explain in what manner the judgment or order is erroneous. Because the Simons failed to explain how the December 16, 2022 amended order is erroneous, we affirm the trial court on this alternative basis.¹

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.


Lawrence-Berrey, C.J.

WE CONCUR:


Pennell, J.


Staab, J.

¹ On appeal, the Simons assign error to three findings of fact supporting the trial court's December 16, 2022 order. However, they fail to include any argument in their brief addressing these purported errors. "A party that offers no argument in its opening brief on a claimed assignment of error waives the assignment." *Brown v. Vail*, 169 Wn.2d 318, 336 n.11, 237 P.3d 263 (2010).

The Simons also argue that their failure to be notified of the December 16, 2022 hearing deprived them of their opportunity to be meaningfully heard. We disagree. The Simons had an opportunity to be meaningfully heard by raising their concerns in their CR 60 motion.

APPENDIX B

FILED
MAY 16, 2024
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WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**


In the Matter of the Custody of:)	No. 39547-2-III
)	
<u>C.S.[†]</u>)	
WAYNE JANKE and DORIS STRAND,)	
)	
Respondents,)	ORDER DENYING
)	MOTION FOR
and)	RECONSIDERATION
)	
RONALD SIMON and TERESA SIMON,)	
)	
Appellants.)	

The court has considered appellants' motion for reconsideration of this court's opinion dated April 23, 2024, and is of the opinion the motion should be denied.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

PANEL: Judges Lawrence-Berrey, Pennell, and Staab

FOR THE COURT:



ROBERT LAWRENCE-BERREY
CHIEF JUDGE

[†] To protect the privacy interests of the minor child, we use their first and last initial in the caption. Gen. Order 2012-1 of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

June 14, 2024 - 3:18 PM

Filing Petition for Review

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