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Brown v. Brown Appellant's Brief Dckt. 41483

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IN THE SUPREME COURT OF THE STATE OF IDAHO

HEATHER G. BROWN

Plaintiff/Respondent,

vs.

MICHAEL L. BROWN,

Defendant/Appellant,

Supreme Court Docket No. 41483-2013
Kootenai County No. 2010-4386

APPELLANT'S BRIEF

Appeal from the District Court of the
First Judicial District of the State of Idaho
In and for the County of Kootenai

HONORABLE BENJAMIN R. SIMPSON
District Judge

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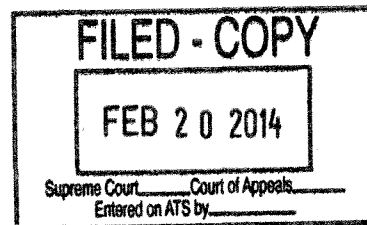


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I.
STATEMENT OF THE CASE
A. Nature of the Case

Appeal is taken from the District Court's Order of Dismissal and Judgment of Dismissal of Defendant's Appeal of the Decree of Divorce-said order and judgment having been entered on September 19, 2013 (R., Vol. I, pp 159-162), wherein the District Court Dismissed Defendant's Appeal as untimely. Defendant was served with the Decree of Divorce by the Court on July 24, 2013, just one (1) day before the Notice of Appeal was due to be filed. See R., Vol. I, p. 85 notes by clerk #2242 as to "refaxed" Decree.

B. Course of Proceedings

On June 14, 2013 a Decree of Divorce was file stamped by the clerk for the Magistrate's Division of the First Judicial District of the State of Idaho in and for the County of Kootenai, Case Number CV-2010-4386, signed by the Honorable Scott Wayman (R., Vol. I, p.78). On July 26, 2013 Defendant/Appellant, MICHAEL BROWN (hereinafter "Michael"), attempted filing his Notice of Appeal from the Decree of Divorce (R., Vol. I, p. 100). However, since the Notice was received by the clerk at 5:08 pm on the 43rd day which was a Friday, the Clerk recorded the Notice on July 29, 2013. See Vol. I, p. 100 record of facsimile date at the top of the page. On July 31, 2013 Michael filed an Amended Notice of Appeal (R., Vol. I, p.100) setting out the corrected dates of hearings. On September 3, 2013 Plaintiff/Respondent HEATHER BROWN (hereinafter "Heather") filed a Motion to Dismiss Michael's appeal as being untimely (Augmented R., Motion to Dismiss filed on September 3, 2013). On September 10, 2013 Michael filed a response in Opposition to Heather's Motion to Dismiss, with supporting

Affidavits (R., Vol. I page 109-155). The Clerk's certificate of service to the Decree of Divorce shows that on June 28, 2013 the Decree was faxed to counsel for Heather and to counsel for Michael. (R., Vol. I, p. 85). However, the facsimile number listed for Michael's counsel, which was provided to the clerk by Heather's counsel, was incorrect. (Id.) There is a handwritten notation on the Certificate of Service that it was "refaxed on 7/24/13 to Madsen", counsel for Michael, at Madsen's correct facsimile number (Id.). On September 17, 2013 the District court dismissed Michael's Appeal, as untimely and further entered judgment with respect to the same. (R., Vol. I pp. 159-161). Michael herein appeals the dismissal and judgment.

II. STATEMENT OF FACTS

Michael had only one (1) day to file his Notice of Appeal after receiving actual notice from the Court (R., Vol. I page 85). Heather's counsel's failure to include the correct fax number on the Clerk's Certificate of Service created a situation such that the Clerk did not provide actual or constructive notice to Michael of the final judgment. Accordingly, I.R.C.P. Rule 77(d) allows this Court to grant relief to Michael.

In the transcript on appeal, Heather's counsel argues that Michael's attorney had knowledge of the proposed Decree prior to the entry of the Decree and that should have given him sufficient opportunity to be prepared to appeal (Tr., p. 6, line 11; p. 8, line 5). The foregoing argument is not the status of the law as to time for appeal and notice of final order of the Court pursuant to I.R.C.P. 77. A *proposed* order or decree is not a final Decree entered by the Court. A proposed order or decree is not binding in any way and even if said order is ultimately entered

by the Court, the grounds for appealing an entered order or decree are vastly different and involve a myriad of different factors than objecting to the form or content of a proposed order or decree.

Michael only received notice of the Decree of Divorce after being contacted by Heather on July 23 when she wanted to know when her property would be distributed. See Vol., I, p. 118, ¶ 20. Ms. Brown stated that she no longer had an attorney but was calling based on her receiving the Decree of Divorce from her previous attorney. Id. Michael and Michael's counsel were unaware of the entry of the Decree of Divorce and Heather emailed it on July 23, 2013 at 5:31 p.m. Id. p. 148. The email from Heather was opened and responded to at approximately 2:08 p.m. the next day, July 24, 2013. Id. On July 24, 2013, counsel for Michael instructed his staff to obtain a copy of the Decree of Divorce from the Courthouse as she had not sent it as she promised during office hours. See Vol. I, p. 114, ¶¶ 2-4. The foregoing was the first time Michael or his counsel were informed of the possible entry of a final judgment.

On July 24, 2013, Michael's counsel's staff began contacting the court reporter in order to determine how much a trial transcript would cost for the appeal. Id at ¶ 8. After research of the potential hearing dates for transcript costs were located and relayed to the clerk, a response was received the same day. Id at ¶¶ 9 & 10. Thereafter, Michael's counsel's legal assistant began attempting contact with Michael to inform him of the potential costs of filing an appeal and to confirm the issues he wished to appeal. Id at ¶7. After two days of determining whether or not an appeal should be filed and attempts to contact Michael, a Notice of Appeal was faxed to the District Court shortly before 5:00 p.m. on Friday, July 26, 2013; however, the transmission

did not go through the fax machine until 5:08 p.m. See Vol. I, ¶¶ 33 & 34. The Clerk stamped the Notice of Appeal on Monday, July 29, 2013 at 7:13 a.m., which was forty five (46) days after the Decree was file stamped by the clerk.

It is virtually impossible for counsel to weigh the advisability and confer with a client regarding whether or not an appeal is appropriate in one (1) day, which is what happened here. As this court is well aware, filing a Notice of Appeal, when the appeal is not well founded in law, could expose the client and the attorney to monetary sanctions and attorney fee awards for filing a frivolous appeal, pursuant to I.A.R.P. Rule 11.2, Idaho Code §12-121. It was important for the client and counsel to discuss whether or not there were actually appealable issues in the Decree prior to filing a Notice of Appeal. One day simply does not give sufficient time to do all of the tasks associated with determining the appealability of a case. See also Elec. Wholesale Supply Co., Inc. v. Nielson, 136 Idaho 814, 828, 41 P.3d 242, 256 (2001):

An award of attorney fees on appeal pursuant to I.C. § 12–121 is proper only where this Court is left with the abiding belief that the appeal was “brought or pursued frivolously, unreasonably, and without foundation. *Stanley v. McDaniel*, 134 Idaho 630, 7 P.3d 1107 (2000) (citing *Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 305, 939 P.2d 1382, 1384 (1997)); I.C. § 12–121.

III. ISSUES PRESENTED ON APPEAL

- (a) Did the District Court err in Dismissing Michael’s appeal as untimely?
- (b) Does IRCP 77(d) extend the time in which Michael had to file his appeal?
- (c) Is Michael entitled to attorney fees and costs on appeal?

**IV.
STANDARD OF REVIEW**

The standard of review from a district court ruling, acting in its appellate capacity, is for the appellate court to review the decision to see if the issue was correctly decided. See Borley v. Smith, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010), which states:

On appeal of a decision rendered by district court acting in its appellate capacity, we directly review the district court's decision to determine whether it correctly decided the issues presented to it on appeal. *Idaho Dept. of Health and Welfare v. Doe*, 148 Idaho 124, 126, 219 P.3d 448, 450 (2009).

See also State v. Schoonover, 125 Idaho 953, 954, 877 P.2d 924, 925 (Ct. App. 1994), which states:

When an appeal is taken from a decision of the district court rendered in its appellate capacity, we examine the record from the magistrate division independently of, but with due regard for, the district court's decision. *State v. Barker*, 123 Idaho 162, 163, 845 P.2d 580, 581 (Ct.App.1992).

Thus, it is for the Supreme Court to independently determine the timeliness of Michael's filing of his Notice of Appeal and whether IRCP 77(d) extended the time when Michael's Notice of Appeal was due to be filed.

**V.
ARGUMENT**

(a) Did the District Court Err when it dismissed Michael's Appeal as untimely?

Herret v. Herret, 105 Idaho 358, 670 P.2d 63 (Ct.App.1983) states that the time frame for a party to file its Notice of Appeal is tolled until the party receives actual notice of the judgment:

This, coupled with the fact that the clerk failed to give notice of judgment, "affects" the time for appeal under I.R.C.P. 77(d). When the original time for appeal expires before the appellant receives actual notice, the appellant is deprived of any opportunity to appeal an adverse decision. Under these

circumstances, the time for appeal begins to run anew from the date the appellant receives actual notice. *Cline v. Roemer, supra; Dustin v. Beckstrand, supra.*

In the instant case Michael's counsel received actual notice from the Court forty one (41) days after the entry of the Decree, one (1) day before the running of the time to file the appeal. Michael's Notice of Appeal was filed with the court on July 29, 2013, within 42 days of the court's "refaxed" service of the Decree. Michael's original Notice of Appeal was faxed to the district court on July 26, 2013 and was received by the clerk at 5:08 p.m., therefore, since it was received after business hours, the clerk file stamped in on July 29, 2013 (at 7:13 a.m.). Michael's Notice of Appeal was filed within five (5) days of his actual notice of the entry of Decree.

Cline v. Roemer, 97 Idaho 666, 667, 551 P.2d 621, 622 (1976) states:

It is not disputed that a clerk of the court failed to give Roemer notice of that judgment as required by I.R.C.P. 77(d). Roemer argues that until he is given notice by the clerk, the time for appeal does not begin to run, and this appeal is timely.

Roemer's argument failed, as the court found that Roemer had actual notice of the judgment, prior to the clerk of the court's mailing of said notice. Michael's facts are distinguishable from Cline in that Michael had neither actual nor constructive notice of the entry of the final judgment prior to July 23, 2013.

(b) Does IRCP 77(d) extend the time in which Michael had to file his Appeal?

IRCP Rule 77(d) provides:

Immediately upon the entry of an order or judgment the clerk of the district court, or magistrates division, shall serve a copy thereof, with the clerk's filing stamp thereon showing the date of filing... Lack of notice of entry of an order or

judgment does not affect the time to appeal or to file a post-judgment motion, or relieve or authorize the court to relieve a party for failure to appeal or file a post-trial motion within the time allowed, **except where there is no showing of mailing by the clerk in the court records and the party affected thereby had no actual notice.** (emphasis added)

Here, the clerk waited fourteen (14) days before serving the Decree on the interested parties, and then, due to the bad facsimile number provided to the court by Heather's counsel, Michael was not served with notice until forty one (41) days after entry of the Decree.

Dustin v. Beckstrand, 103 Idaho 780, 786, 654 P.2d 368, 374 (1982), held: ["I.R.C.P. 77(d)] specifically states that failure to comply will not relieve a party from the time limits for appeal unless the party had no actual notice" (emphasis added).

(c) Is Michael entitled to attorney fees and costs on appeal?

Under I.C. §12-121, Michael's attorney fees and costs are appropriate if he is successful with this appeal and if this Court makes a finding that the Respondent defended this appeal frivolously. See Gonzalez v. Thacker, 148 Idaho 879, 231 P.3d 524 (2009).

Idaho Appellate Rule 40 provides for costs to a prevailing party at appeal. Additionally, Idaho Appellate Rule 41 allows a party to request attorney fees and the Appellant so requests the opportunity to submit a memorandum and affidavit in support if this Court so orders it. Michael hereby requests attorney fees and costs on appeal based on the Respondent's frivolous defense.

At hearing and in their memorandum in support of their motion to dismiss as untimely, counsel for Heather argued, in effect, that Michael had notice to appeal from the date he received their proposed Decree of Divorce which is contrary to I.R.C.P. 83 and I.R.C.P. 77(d). See Tr., p. 6 Ins.11-25; pp. 7-8 and page 4 and 5 of Respondent's Motion to Dismiss, Augmented Record.

Therefore, Heather's arguments at the District Court were not based upon law and/or based upon a good faith argument for a change in said law and therefore frivolous.

**VI.
CONCLUSION**

The case law supports a dismissal if the appellant had sufficient time to prepare and file a notice of appeal. However, in this case, one day was not sufficient time to prepare and file a notice of appeal. The filing of the notice of appeal in this case was file stamped 46 days after entry of judgment, but only 5 days after Michael's counsel's having received Notice of the Decree from which he appealed.

An appellant must have sufficient time in order to file a notice of appeal. The Supreme Court has ruled 10 days is sufficient time; but not a lesser amount of time.

Further, Appellant requests reimbursement of his costs and fees as he has been required to appeal the District Court's decision as a result of her Motion to Dismiss Notice of Appeal.

Based upon the foregoing, Appellant, Michael Brown request this Court find that the District Court erred in dismissing his appeal as untimely and order attorney fees and costs to Appellant.

Respectfully submitted this 18 day of February, 2014.

MADSEN LAW OFFICES, PC,
Attorneys for Plaintiff/Appellant

By: _____


HENRY D. MADSEN

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on this 18th day of February, 2014, two bound, true and correct copies of the foregoing *APPELLANT'S BRIEF* were delivered to the party shown below by regular mail, addressed as follows:

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