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Brown v. Brown Respondent'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 Case No. CV-10-4386

RESPONDENT'S RESPONSE 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, presiding.

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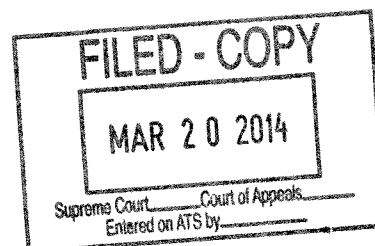


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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the District Court's September 19, 2013, Order Dismissing Appeal wherein the District Court dismissed Appellant's appeal as untimely. (R. Vol. I, pp. 159-162) The Notice of Appeal was faxed by the Appellant's attorney to the Court Clerk after the time to file the appeal had expired, which resulted in the appeal being dismissed for its untimeliness. (R. Vol. I, p. 100 and pp. 159-162)

B. Course of Proceedings

On June 14, 2013, a Decree of Divorce was entered for case number CV-2010-4386, signed by the Honorable Scott Wayman (R. Vol. I, p. 78). Appellant's Notice of Appeal was faxed to the Court Clerk on July 26, 2013, at 5:08 p.m. (R. Vol. I, p. 100). The Notice of Appeal was file stamped on July 29, 2013 (R. Vol. I, p. 100). On July 31, 2013, the Appellant filed an Amended Notice of Appeal (R. Vol. I, p. 103).

On September 3, 2013, Respondent filed a Motion to Dismiss Appellant's appeal as being untimely (Augmented R., Motion to Dismiss). On September 10, 2013, Appellant filed a Response in Opposition to Respondent's Motion to Dismiss, and supporting affidavits (R. Vol. I, pp. 109-155). On September 17, 2013, the District Court dismissed Appellant's appeal as untimely (R. Vol. I, pp. 161-162). Appellant now appeals the dismissal of his appeal (R. Vol. I, pp. 163-168).

III. STATEMENT OF FACTS

After multiple days of trial, and the Court reviewing all evidence and testimony, the Court, on May 31, 2013, placed its Findings of Facts and Conclusions of Law on the record (R. Vol. I, p. 78). Respondent's attorney faxed Appellant's attorney a proposed Decree on June 6, 2013, with a note indicating she would be filing the Decree on Monday June 10, 2013, unless she heard from counsel before then (R. Vol. I, pp. 122-144).

The Decree was subsequently sent to the Court and entered on June 14, 2013 (R. Vol. I, p. 78). Appellant claims the fax number on the Certificate of Service was not correct and he did not receive the signed Decree of Divorce until the Respondent contacted Appellant's attorney on Tuesday, July 23, 2013, and e-mailed counsel a copy of the signed Decree later that day (R. Vol. I, p. 118).

The Court Clerk re-faxed Appellant's counsel a copy of the Decree of Divorce on July 24, 2013 (R. Vol. I, p. 85). During a phone call on Thursday, July 25, 2013, Appellant's counsel told Respondent that he would be filing an appeal on Friday (Augmented R., Affidavit Motion to Dismiss). Appellant was required to file the Notice of Appeal before 5:00 p.m. on Friday, July 26, 2013, for the appeal to be timely. He did not file the Notice of Appeal until Friday, July 26, 2013, at 5:08 p.m. (R. Vol. I, p. 100). The Notice of Appeal was not file stamped by the Court Clerk until July 29, 2013 (R. Vol. I, p. 100).

Appellant's attorney explained his copier had shut down at the time he attempted to fax the Notice of Appeal (R. Vol. I, p. 119). Appellant's attorney also indicated he had a very busy

schedule between July 23, 2013, and July 26, 2013 (R. Vol. I, p. 168). Appellant now claims he did not have sufficient time to file his Notice of Appeal and asserts the District Court erred in dismissing his appeal as untimely (Appellant's Brief p. 11).

IV. ISSUES PRESENTED ON APPEAL

- A. Did the District Court error in dismissing the appeal, when the Notice of Appeal had been file stamped three days after the time to appeal had expired?
- B. Did I.R.C.P. 77(d) toll or extend the time Appellant had to file his appeal, when Appellant had actual knowledge and constructive notice of entry of the Decree of Divorce prior to the expiration of the time to timely file the appeal?
- C. Is either party entitled to attorney fees and costs on appeal?

V. 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 of the District Court to determine whether it committed error with regard to the issue presented on appeal. *Vierstra v. Vierstra*, 153 Idaho 873, 876-877, 292 P.3d 264, 267-268 (2012). Whether the District Court had jurisdiction over an action is a question of law, over which this court exercises free review. *City of Eagle v. Idaho Dep't of Water Res.*, 150 Idaho 449, 450-51, 247 P.3d 1037, 1038-39 (2011).

VI. ARGUMENT

- A. Did the District Court error in dismissing the appeal, when the Notice of Appeal had been file stamped three days after the time to appeal had expired?

If an appeal is not timely filed, the Court lacks jurisdiction to hear the appeal. *Bower v. Mabey*, 119 Idaho 922, 811 P.2d 847 (Ct.App. 1991). Idaho Rules of Civil Procedure 83(s) states

that failure to physically file a notice of appeal within the time limits “shall cause automatic dismissal of such appeal upon motion of any party, or upon initiative of the district court.”

According to I.R.C.P. 5(e), the Clerk is charged with officially accepting and entering, via date stamp, various pleadings when they are filed. Further, I.C.R.P. 5(e) states in reference to fax filings that “filings may be made to the court only during the normal working hours of the clerk and only if there is a facsimile machine in the office of the filing clerk of the court.”

In *Cather v. Kelso v. Western Mortgage Loan Corporation*, 103 Idaho 684, 652 P.2d 188 (1982), the Idaho Supreme Court looked at the definition of when something is “filed” and discussed former laws governing county offices requiring they be open from 9:00 a.m. to 5:00 p.m. Later, the legislature provided that county commissioners prescribe days and hours of operation. *Id.* at 688, 192. In *State v. Ciccone*, 150 Idaho 305, 246 P.3d 958 (2010) the Supreme Court reviewed whether an appeal had been timely filed. The Idaho Supreme Court explained:

[T]he placing of the clerk’s file stamp on the judgment constitutes the entry of the judgment; and the judgment is not effective before such entry. Thus, in order to be effective, a judgment must be file stamped by the Clerk of the Court. The stamp contains administrative information including the date, hour and minute at which the document is filed, I.R.C.P. 5(d) and (e) and the date evidenced by the filing stamps serves as a reference point from which to calculate the 42-day period for appeal. *Id.* at 307, 960.

In the case at hand, the Appellant did not file a timely appeal. For the appeal to be timely, it was required to be filed by July 26, 2013. The appeal was not filed until July 29, 2013. For this

reason, the District Court did not err in dismissing the appeal because the District Court did not have jurisdiction.

- B. Did I.R.C.P. 77(d) toll or extend the time appellant had to file his appeal, when appellant had actual knowledge and constructive notice of entry of the Decree of Divorce prior to the expiration of the time to timely file the appeal?

Because the Appellant had actual knowledge the Decree of Divorce was entered before the time to appeal expired, Idaho Rules of Civil Procedure 77(d) does not allow the time to appeal to be extended or tolled. Idaho Rules of Civil Procedure 77(d) states in part, “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 of the court records and the party affected thereby had no actual notice.”

Herret v. Herret, 105 Idaho 358, 361, 670 P.2d 63, 66 (Ct.App. 1983) gives a clear answer to the question of whether I.R.C.P. 77(d) extends jurisdiction to a district court over an appeal, where the notice of appeal was filed after the time to appeal has expired, by explaining, “[t]he difference lies in when the appellant received actual notice.” (emphasis added)

To explain this difference, *Herret* analyzed *Cline v. Roemer* and *Dustin v. Beckstrand*, where time was tolled because appellant received actual notice after the time to file post trial motions had expired. *Cline v. Roemer*, 97 Idaho 666, 551 P.2d 621 (1976); *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982). The *Herret* court then looked at *Tanner v. Estate of Cobb*,

where the time was not tolled because appellant received actual notice before the time to file post trial motions had expired. *Tanner v. Estate of Cobb*, 101 Idaho 444, 614 P.2d 984 (1980).

“In *Cline and Dustin*, actual notice was not received until **after** the original time for appeal had expired. Under these circumstances, the time for appeal begins to run anew from the date the appellant receives actual notice.” *Herret* at 360, citing *Cline v. Roemer*, *supra* and *Dustin v. Beckstrand*, *supra*. (Emphasis added) However, when an appellant has actual notice **before** the time to appeal has expired, as in the case at hand, the time to appeal is not tolled. *Tanner* at 445.

In these cases, it was explained in *Herret*, that *Tanner* would apply. “In *Tanner*, however, the appellant received actual notice while the original period still had thirteen days to run. The Court concluded that the appellant had sufficient notice to file his appeal before the original period expired and therefore it was not necessary to toll the period, even though the Clerk did not give notice.” *Id.* Therefore, the *Herret* court concluded the time would not be tolled when appellant received actual notice ten days before the time to appeal had expired. *Id.*

Moreover, the Idaho Supreme Court has shown a distinction between formal notice from the Court Clerk and actual knowledge of an entry of judgment. “Actual knowledge of a judgment will cause the time to appeal to begin to run even if formal notice pursuant to I.R.C.P. 77(d) has not been given.” *Cline v. Roemer*, 97 Idaho 666, 667, 551 P.2d 621, 622 (1976). The Affidavit of Henry Madsen dated September 10, 2013, indicates he became aware of the signed Decree on July 23, 2013 (R. Vol. I, p. 118).

In this case, Appellant had actual notice of the Decree of Divorce three days **before** the time to appeal had expired. Appellant chose to wait until the eleventh hour and after the time to appeal had passed to file his notice. Appellant's attorney makes an issue of having one day to discuss the appeal with his client. Yet, Appellant's attorney wrote in his Affidavit in Support of Defendant's Response in Opposition to Plaintiff's Motion that he had discussed the potential appeal and costs multiple times with his client in June, 2013 and later (R. Vol. I, pp. 117-118). Counsel for Appellant had already made an inquiry as to the costs of appeal prior to July 23, 2013 (R. Vol. I, p. 118).

Appellant's focus is on when the Clerk faxed the order. However, this still does not extend his time to file since "The fact that the clerk's office had not given notice as required by I.R.C.P. 77(d) is of no help to appellant if he otherwise had actual notice of the entry of judgment before the original time for appeal expired." *Herret* at 361. Even without taking into account that Appellant had actual knowledge as of July 23, 2013, it is important to note in this case that the Court Clerk faxed the Decree of Divorce to the Appellant before the time to file the appeal had expired.

In addition to the Appellant's actual knowledge derived by both Respondent informing Appellant's attorney and the Clerk faxing the entered decree, the Appellant also had constructive notice the Decree of Divorce was entered before the time to appeal expired. In *Swayne v. Otto*, the Idaho Supreme Court discussed constructive notice as it relates to I.R.C.P. 77(d). *Swayne v. Otto*, 99 Idaho 271, 580 P.2d 1296 (1978).

In *Swayne*, judgment was entered on March 28, 1975. *Id.* at 272. A hearing was held on April 11, 1975, on appellants' motion to disallow costs. *Id.* This same day, Appellant contacted the Court Clerk and received incorrect information from the Court Clerk that the judgment had not been entered, even though the judgment had been entered. *Id.* Several inquiries were made by the Appellant throughout the year and each time, Appellant was informed by the Court Clerk that no judgment had been entered. *Id.* "The holding of the district court was that appellant's had 'constructive notice' that the judgment had been entered, notwithstanding the alleged omissions and errors of the clerk, from the fact that the hearing for costs on April 11, 1975, the judgment was marked 'filed' March 28, 1975, and was in the Court's file at the hearing and available to counsel." *Id.* The Idaho Supreme Court affirmed the District Court's decision and dismissed the appeal in this case.

In the case at hand, the Court made its oral findings of fact and conclusions of law on the record on May 31, 2013 (R. Vol. I, p. 78). On June 5, 2013, Appellant's attorney received a proposed Decree from Respondent's attorney with the statement, "Henry, Attached for your review is a copy of our proposed Decree of Divorce with Exhibits 1 and 2. I will be sending to the Judge on Monday, June 10, 2013 if I do not hear from you before then." (R. Vol. I, p. 122). Like *Swayne*, Appellant had "constructive notice" the judgment had been entered. Therefore, there exists no basis for the time in this case to be tolled or extended under I.R.C.P. 77(d).

C. Is either party entitled to attorney fees and costs on appeal?

Respondent should be entitled to attorney fees and costs because Appellant's appeal is frivolous, unreasonable and without foundation. Appellant argues he should receive attorney fees and costs if he is successful on appeal. In support of this request, Appellant argues counsel for Respondent indicated Appellant had notice to appeal from the date he received their proposed Decree of Divorce (Appellant's Brief p. 10). Contrary to Appellant's Brief, Respondent makes no argument in her memorandum or at hearing that the time to appeal started before entry of the Decree, i.e. the date counsel for Appellant received the proposed Decree (Augmented R., Motion to Dismiss and TR Motion to Dismiss). Respondent simply draws attention to such relevant facts because they do tend to show the Appellant did have notice that the Decree had been entered, once it had been entered.

"In addition to an award of fees pursuant to I.C. §12-121 and I.R.C.P. 54(e)(1) at the trial level, attorney fees may also be awarded on appeal." *Huerta v. Huerta*, 127 Idaho 77, 80, 896 P.2d 985, 988(Ct.App. 1995). During the Motion to Dismiss in this case, the District Court indicated, "Mr. Madsen has admitted he had actual notice within the 42-day period. The Court finds the issue is clear, based upon the applicable rules. It is jurisdictional." (TR. Motion to Dismiss, p. 9, Lns. 22-25).

The focus by Appellant in this case is on a misapplication to settled law clearly analyzed in *Herret* and other relevant cases, with no request or justification to establish new legal standards deviating from existing case law.

Where the appellant fails to present any significant issue on appeal regarding a question of law, where no findings of fact made by the trial court are clearly or arguably unsupported by substantial evidence, where we are not asked to establish any new legal standards or modify existing ones, and where the focus of the case is on the application of settled law to the facts, the appeal is deemed to be without foundation. Under those circumstances, attorney fees should be awarded to the respondent. *Troche v. Gier*, 118 Idaho 740, 742, 800 P.2d 136, 138 (Ct. App. 1990).

In this case, Appellant has failed to present a significant issue on appeal while forcing Respondent to incur unnecessary and burdensome fees and costs in defense of this appeal. Respondent requests attorney fees and costs, pursuant to I.C. §12-121, I.R.C.P. 54(e)(1), I.A.R.'s 40 and 41.

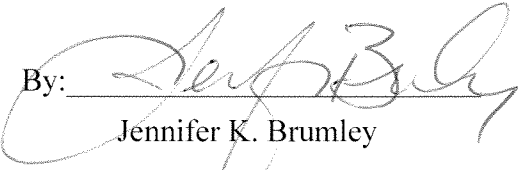
VII. CONCLUSION

The District Court did not error in dismissing Appellant's appeal as untimely. Appellant's counsel had access to the court file and notice from Respondent that the proposed Decree of Divorce was going to be filed with the Court. Moreover, Appellant had several days before the time to appeal had expired to file the Notice of Appeal in this case. At the time Appellant's attorney had actual knowledge the Decree of Divorce had been entered, Appellant had all the rights he would have had if he learned of the Decree on June 14, 2013. He instead chose not to react until after the time to appeal had passed.

Respondent requests reimbursement of the costs and fees she has been required to pay to defend this appeal and requests this Court find that the District Court did not error in dismissing Appellant's appeal as untimely.

Respectfully submitted this 19 day of March 2014.

AMENDOLA, DOTY & BRUMLEY, PLLC
Attorneys for Respondent

By: 
Jennifer K. Brumley

CERTIFICATE OF SERVICE

I certify that on the 19 day of March, 2014, I caused a copy of the foregoing to be served by the method indicated below on the following:

Henry Madsen
MADSEN LAW OFFICES, PC
1044 Northwest Blvd., Suite B
Coeur d'Alene, ID 83814

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