Michael K. Jeanes, Clerk of Court
*** Filed ***
03/15/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2017-000010-001 DT 03/14/2017

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
T. DeRaddo
Deputy

TEMPE VILLAGES HOME OWNERS ASSOCIATION INC

DOUGLAS G ZIMMERMAN

v.

ARIZONA DEPARTMENT OF TRANSPORTATION (001)

MATTHEW T HERLIHY

DOWNTOWN JUSTICE COURT
OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2016–015162RC.

Defendant-Appellee Arizona Department of Transportation (DOT or Defendant) filed a procedural motion requesting that this Court strike Plaintiff-Appellant Tempe Villages Homeowners Association Inc.'s appeal as having been untimely filed. Plaintiff opposed Defendant's motion. The Court held oral argument on Defendant's motion on March 2, 2017. For the reasons stated below, this Court grants Defendant's motion.

I. FACTUAL BACKGROUND.

On January 19, 2016, Plaintiff filed a Complaint. The DOT answered this Complaint on Feb. 16, 2016, and moved to dismiss the Complaint with prejudice. The trial court initially denied DOT's Motion To Dismiss on March 28, 2016. On May 23, 2016, DOT filed a Motion For Relief From Order and (1) urged the trial court to reconsider its March 28, 2016 ruling; and (2) dismiss Plaintiff's action with prejudice. Defendant claimed Plaintiff's Complaint should have been dismissed because (1) A.R.S. §12–821.01(A) mandates that persons who have a claim against a public entity file—and serve—a claim within 180 days after the cause of action accrues; (2) the term "public entity" in A.R.S. §12–821.01(A) includes the State of Arizona and

any political subdivision of the State of Arizona; (3) Plaintiff failed to serve a written notice of claim on the Attorney General prior to filing its Complaint and A.R.C.P. Rule 4.1(h)(1) states that service upon the State is achieved via service on the Attorney General; and (4) Plaintiff's Complaint raised allegations that had not been included in its Notice of Claim.

Plaintiff failed to respond to this Motion For Relief From Order. Later, after the trial court reconsidered its March 28, 2016 denial and granted Defendant's Motion To Dismiss, Plaintiff alleged (1) it never received the Motion For Relief From Order; and (2) the Motion For Relief From Order had been sent to an incorrect address—80 E. Rio Salado. Plaintiff maintained its correct address—as reflected in the trial court file—was 40 E. Rio Salado.

After Defendant filed its May 23 2016 Motion For Relief From Order—but before the trial court ruled on it—the parties engaged in settlement negotiations. On June 24, 2016, DOT offered a settlement of $2,150.00. On July 5, 2016, the trial court signed a pre-prepared Judgment that Defendant prepared. This Judgment granted the Defendant's May 23, 2016 Motion For Relief From Order. However, the pre-prepared Judgment did not contain any final judgment language. The pre-prepared Judgment also had the incorrect address for Plaintiff's counsel and reflected the address was 80 E. Rio Salado.[1]

Although the trial court had signed a Judgment, the parties continued negotiating toward a settlement. On July 18, 2016, Defendant offered a settlement but said Defendant was "stuck" at $2,150.00. That same day, counsel for Plaintiff wrote an e-mail to Defense counsel stating Defendant should "consider this matter settled" but asking for additional time in which to get his client's approval. Defense counsel agreed. The following day Defense counsel withdrew the settlement offer.

On August 8, 2016, Plaintiff's counsel (1) filed a Motion For Reconsideration and Motion To Enforce Settlement (Motion For Reconsideration); and (2) requested that the trial court re-set the Pre-Trial Conference. On September 19, 2016, the trial court denied Plaintiff's Motion For Reconsideration. Two days later, the trial court sent a Notice of a Comprehensive Pre-Trial Conference. On September 20, eleven days after the trial court denied Plaintiff's Motion For Reconsideration, Plaintiff filed its Notice of Appeal.

Defendant filed a motion to strike Plaintiff's appeal as untimely. The crux of Defendant's claim is that Plaintiff needed to have appealed from the July 5, 2016 determination and any later request for reconsideration did not extend Plaintiff's time to file an appeal. Defendant asserted the fourteen day window in which to file an appeal was jurisdictional and any attempt to extend the time to file an appeal beyond the fourteen days following the trial court's signing of the Judgment was inappropriate. Plaintiff filed a responsive memorandum asserting its time to

[1] The 80 E. Rio Salado address had formerly been the address for Plaintiff's counsel. The correct address was 40 E. Rio Salado. Plaintiff's counsel used the 40 E. Rio Salado address throughout its pleadings.

appeal did not begin until the trial court ruled on Plaintiff's Motion For Reconsideration. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID PLAINTIFF FILE AN UNTIMELY APPEAL.

Time To File Appeal

Generally, an appeal from a Justice Court action must be filed within 14 days from the date of the entry of the trial court's judgment, ruling or order. See Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.) Rule 4(a). This Court lacks the jurisdiction to consider appeals that are untimely filed and the timely filing of the Notice of Appeal is the single exception to SCRAP—Civ. Rule 2 which allows this Court to liberally construe the SCRAP—Civ. in the interest of justice. The trial court entered Judgment on July 5, 2016. Accordingly, the last day in which to file the Notice of Appeal from this Judgment would have been July 19, 2016.

Plaintiff did not file its Motion For Reconsideration until August 8, 2016,—34 days after the trial court signed the Judgment. The trial court did not rule on Plaintiff's requested Motion For Reconsideration until September 19, 2016,—62 days after the trial court signed the July 5, 2016 Judgment. Plaintiff did not file its Notice of Appeal until Sept. 30, 2016. If Defendant was appealing from the July 5, 2016 Judgment, its Notice of Appeal would have been untimely and the case would need to be dismissed. However, after the July 5, 2016 Judgment was entered, Plaintiff filed a Motion for Reconsideration which was not denied until September 19, 2016. Accordingly, if, as Plaintiff maintained, it was appealing from the denial of its Motion for Reconsideration—and not from the Judgment—Plaintiffs' Notice of Appeal was filed within 14 days and was timely. Plaintiff's Notice of Appeal reflects this position. In its Notice of Appeal, Plaintiff asserted it was appealing from the final order or final judgment entered on 9/19/16.

Time Extending Motions

Motions for Reconsideration are not motions that extend the time for appeal. Rule 4(e), SCRAP—Civ. lists four types of motions that extend the time for appeal: (1) a motion granting or denying a motion for judgment notwithstanding the verdict pursuant to A.R.C.P. Rule 50(b); (2) a motion granting or denying a motion to amend or make additional findings of fact pursuant to A.R.C.P. rule 52(b); (3) a motion granting or denying a motion to alter or amend the judgement pursuant to A.R.C.P. Rule 59(l); and (4) a motion granting or denying a motion for a new trial pursuant to A.R.C.P. Rule 59(a). Motions for reconsideration are made pursuant to A.R.C.P. Rule 7.1(e) and are not among the listed time-extending motions. Plaintiff did not refer to its motion by Rule and did not list A.R.C.P. Rules 50(b), 52(b), 59(a) or 59(l) by name. In discussing whether a particular motion could be construed as a time-extending motion, Division 2 of our Court of Appeals stated:

> Finally, in *Farmers Insurance Co. v. Vagnozzi*, 132 Ariz. 219, 221, 644 P.2d 1305, 1307 (1982), our supreme court "reaffirm[ed] the holdings of *Hegel* and *Desmond* that in order for a party to be assured of the time-extending qualities of

a motion for new trial, [the party] must both refer to rule 59 as authority for the motion and describe grounds set forth in that rule." The court in *Vagnozzi* further stated:

> *Hegel* and *Desmond* apply to situations in which the trial court has made a ruling on the questioned motion without indication by the trial court of what rule is involved. In such instances the motion, to be considered as one for a new trial, must both refer to rule 59 as authority for the motion and set forth as grounds for the motion those grounds found in rule 59.... [T]he trial court may treat a so-called "motion for rehearing" as one under rule 59, and, when the trial court has stated in the record its intention to do so, the motion will also be treated by the appellate courts as one under rule 59(a).

132 Ariz. at 221–22, 644 P.2d at 1307–08.

Neither of the two alternative requirements our supreme court has established was met here. First, Burkhamer's objection neither cited nor otherwise referred to Rule 59, or any of its grounds, or any other civil procedure rule. Therefore, unlike the situation in *Desmond*, we cannot say Burkhamer's objection "substantially satisfies the requirements enunciated in *Hegel." Desmond,* 123 Ariz. at 476, 600 P.2d at 1108. Second, although a trial court may treat an undesignated or otherwise deficient motion "as one under rule 59," thereby bestowing the appeal time-extending benefits of ARCAP 9(b), that result hinges on the trial court's having "stated in the record its intention to do so." *Vagnozzi*, 132 Ariz. at 222, 644 P.2d at 1308. Nothing in the record here suggests that the trial court treated Burkhamer's objection to the judgment as one of the time-extending motions prescribed in ARCAP 9(b) or that the court even implicitly, let alone expressly, "inten[ded] to do so." 132 Ariz. at 222, 644 P.2d at 1308.

James v. State, 215 Ariz. 182, 158 P.3d 905 ¶¶ 15–16 (Ct. App. 2007). As with the situation described in *James v. State, id.,* nothing in the trial court's record—as presented with the current procedural motion—indicates the trial court treated Plaintiff's Motion For Reconsideration as a time-extending motion for purposes of extending Plaintiff's time to file his Notice of Appeal from the July 5, 2016 Judgment. Additionally, and unlike appeals from the Superior Court to the Court of Appeals, the SCRAP—Civ.—which govern appeals from a justice court action—do not include rule 60 relief requests as time extending motions.[2]

Plaintiff's Motion For Reconsideration

Plaintiff's Motion For Reconsideration was brought pursuant to the Justice Court Rules of Civil Procedure (JCRCP), Rules 128 and 141. JCRCP Rule 128 is the functional equivalent of A.R.C.P. Rule 7.1 while JCRCP Rule 141 is the Justice Court parallel to A.R.C.P., Rule 60.

[2] The Arizona Rules of Civil Appellate Procedure (ARCAP), Rule 9(e).

Neither A.R.C.P. Rule 7.1(e) nor A.R.C.P. rule 60 is a time extending motion for purposes of SCRAP—Civ..[3] Consequently, if the only consideration was the title of the motion or the rule cited in Plaintiff's motion, Plaintiff's Notice of Appeal would have been untimely. That, however, was not the only question.

Plaintiff raised related questions. Although Plaintiff's motions did not specifically raise issues under A.R.C.P. Rules 50, 52 or 59(a) or 59(l), courts may look to the substance and not the form of a motion when determining what type of motion has been made. In *Hegel v. O'Malley Insurance Co*., 117 Ariz. 411, 573 P.2d 485 (1977), opinion after reinstatement of appeal sub nom. *Hegel v. O'Malley Ins. Co.,* 122 Ariz. 52, 593 P.2d 275 (1979), our Supreme Court addressed whether an improperly titled motion that referenced A.R.C.P. Rule 59(a) would be a time-extending motion. The Supreme Court held:

> We believe that a logical extension of the holding in Maganas is that a motion to vacate a judgment can be considered as a motion for new trial if the motion states that it is brought pursuant to Rule 59(a). The notion that only the title of a motion must be examined appears to be contrary to the purpose of the Rules of Civil Procedure which is to insure that every action receives a just, speedy and inexpensive determination. Rule 1, Rules of Civil Procedure, 16 A.R.S. It would be the height of formalism to ignore the obvious intent and substance of a motion because it was inappropriately titled.
>
> Counsel, of course, have the obligation and burden of filing properly styled motions which clearly indicate the nature of the relief sought and the appropriate legal references to support the motion. A reading of the motion in question in this case clearly indicates the nature of the relief sought and the appropriate legal reference. The label on the motion has caused the controversy, for it is not the same as those listed in Rule 73(b)(2), Rules of Civil Procedure, 16 A.R.S. which extend the time for perfecting an appeal. If the motion had been labeled as one for a new trial, there would be no issue presented. Such formalism should not be allowed to defeat the just determination of cases on their merits.
>
> We hold that irrespective of the title of a motion, if its substance shows clearly that it seeks relief under Rule 59(a) on the grounds set forth in that rule with appropriate reference to the rule as authority for the motion, the motion must be treated as a motion for new trial under Rule 59(a). As thus treated the filing of

[3] A.R.C.P. Rule 7.1(e) provides—in relevant part:

> No motion for reconsideration shall be granted, however, without the court providing an opportunity for response, a motion authorized by this Rule may not be employed as a substitute for a motion pursuant to Rule 50(b), 52(b), 59 or 60 of these Rules, and **shall not operate to extend the time within which a notice of appeal must be filed**.

(Emphasis added._

> the motion tolls the running of the appeal time under Rule 73(b). Any suggestion to the contrary in Slonsky is overruled.

Hegel v. O'Malley Ins. Co., Agents & Brokers, id., 117 Ariz. at 412, 573 P.2d at 486.

Our Supreme Court allowed motions for reconsideration to be used as time-extending motions where the party alleged one of the grounds for relief listed by Rule 59(a) and specifically referred to the rule. *Desmond v. J.W. Hancock Enterprises, Inc.* 123 Ariz. 474, 475–76, 600 P.2d 1106, 1107–08 (1979). The Supreme Court stated:

> Although the motion is not precisely and artfully drawn, we hold that it substantially satisfies the requirements enunciated in Hegel, supra. While there is no specific reference to subsection (a), the motion does refer to Rule 59 and the language quoted above clearly alleges that the plaintiffs had been denied a trial on the merits because of the order of dismissal. An order depriving the moving party of a fair trial is one of the grounds for a new trial under Rule 59(a)(1).

Desmond v. J. W. Hancock Enterprises, Inc., 123 Ariz. at 476, 600 P.2d at 1108. Our Supreme Court reaffirmed this standard in *Farmers Ins. Co. of Arizona v. Vagnozzi*, 132 Ariz. 219, 221, 644 P.2d 1305, 1307 (1982) and said:

> We reaffirm the holdings of Hegel and Desmond that in order for a party to be assured of the time-extending qualities of a motion for new trial, he must both refer to rule 59 as authority for the motion and describe grounds set forth in that rule.

In order to be considered a time-extending motion, a motion for reconsideration must list both the procedural rule as well as contain the necessary grounds to support the request for relief. The failure to include a reference to the Rule is fatal. As our Court of Appeals more recently held:

> Munger Chadwick is correct that "[w]e will look to the substance and not the form" in determining what type of motion has been made, *Ray Korte Chevrolet v. Simmons*, 117 Ariz. 202, 204, 571 P.2d 699, 701 (App.1977), and that a motion for reconsideration does not extend the time for an appeal to be taken. Ariz. R. Civ. P. 7.1(e); *see* Ariz. R. Civ. App. P. 9(b) (listing motions that extend time for appeal and omitting motion for reconsideration); *James v. State*, 215 Ariz. 182, ¶ 12 & n. 6, 158 P.3d 905, 908 & n. 6 (App.2007) (motions not enumerated under former Rule 73(b), now Rule 9, Ariz. R. Civ. App. P., do not extend time for appeal). However, a motion may be treated as a time-extending motion for new trial, whatever it is labeled, if it "refer[s] to rule 59 as authority for the motion and set[s] forth as grounds for the motion those grounds found in rule 59." *Farmers Ins. Co. of Ariz. v. Vagnozzi*, 132 Ariz. 219, 221, 644 P.2d 1305, 1307 (1982).

Munger Chadwick, P.L.C. v. Farwest Dev. & Const. of the Sw., LLC, 235 Ariz. 125, 329 P.3d 229 ¶ 4 (Ct. App. 2014). While Plaintiff indicated grounds that may have met the criteria for Rule 59(a) relief, Plaintiff failed to refer to Rule 59, A.R.C.P.[4] in its Motion For Reconsideration.

Plaintiff's Motion For Reconsideration raised an important constitutional issue indicating an irregularity in the proceedings re Plaintiff's assertion it was never properly served with a copy of Defendant's May 23, 2016 Motion—because the Motion was sent to an incorrect address. Plaintiff claimed it lacked the legal opportunity to respond to Defendant's Motion. In contrast, Defendant claimed Plaintiff's counsel had actual knowledge of the State's May 23, 2016 Motion. While the party's respective briefs and oral argument revealed procedural improprieties, Plaintiff failed to preserve its issue(s) for appeal because Plaintiff failed to timely file its Notice of Appeal. Because the requirement for the timely filing of a Notice of Appeal is jurisdictional, this Court must dismiss Plaintiff's appeal.

This decision may seem harsh. However this Court is constrained to reach this result because this Court is bound by the precedent set by our Court of Appeals and Supreme Court. This Court lacks the authority to modify these decisions. *Mullin v. Brown*, 210 Ariz. 545, 115 P.3d 139 ¶ 14 (Ct. App. 2005).

Based on the foregoing, this Court dismisses Plaintiff's appeal. .

IT IS THEREFORE ORDERED granting Defendant's procedural motion to strike Plaintiff's Notice of Appeal.

IT IS FURTHER ORDERED dismissing Plaintiff's appeal.

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[4] A.R.C.P. Rule 59(a) states:

> A verdict, decision or **judgment may be vacated and a new trial granted** on motion of the aggrieved party **for any** of the following **causes materially affecting that party's rights**:
>
> 1. **Irregularity in the proceedings** of the court, referee, jury or prevailing party, or any order or abuse of discretion, **whereby the moving party was deprived of a fair trial**.
> 2. Misconduct of the jury or prevailing party.
> 3. Accident or surprise which could not have been prevented by ordinary prudence.
> 4. Material evidence, newly discovered which with reasonable diligence could not have been discovered and produced at the trial.
> 5. Excessive or insufficient damages.
> 6. Error in the admission or rejection of evidence, error in the charge to the jury, or in refusing instructions requested, or other errors of law occurring at the trial or during the progress of the action.
> 7. That the verdict is the result of passion or prejudice.
> 8. That the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law.

(Emphasis added.)

IT IS FURTHER ORDERED remanding this matter to the Downtown Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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