Filed 4/16/18 Bagby v. Superior Court CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DOUGLAS A. BAGBY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; JOSEPH D. DAVIS, Real Party in Interest.	B287188 (Los Angeles County Super. Ct. No. BC663174)

Original proceedings in mandate. John P. Doyle, Judge. Petition granted. Alternative writ issued.

Douglas A. Bagby, in pro. per.; Law Office of Kenneth E. Chyten and Kenneth E. Chyten for Petitioner.

No appearance for Respondent.

Joseph Daniel Davis, in pro. per.; and Charlotte E. Costan for Real Party in Interest.

Petitioner Douglas Bagby brought a legal malpractice action against his former attorney, real party in interest Joseph Davis, arising from Davis' representation of Bagby in a tort action. The parties disagreed whether their contingent fee agreement was subject to arbitration. After Davis failed to respond to the complaint, Bagby requested entry of Davis' default. Davis sought and received relief from default. (Code Civ. Proc., § 473, subd. (b).)[1] Davis also successfully petitioned to compel arbitration of the malpractice action.

Bagby petitioned this court for a writ of mandate. We issued an alternative writ ordering the trial court to either (1) vacate its orders granting Davis' relief from default and his petition to compel arbitration, and enter new and different orders, or (2) show cause why this court should not issue a peremptory writ of mandate ordering the trial court to do so on the ground that Bagby had demonstrated his entitlement to relief. In response, the trial court vacated its order granting the petition to compel arbitration, but declined to vacate the order granting the motion to set aside the default. For reasons stated below, we find the trial court erred in granting Davis' motion for relief from default, as he made an insufficient showing of mistake or excusable neglect to justify such relief.

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[1] Unspecified statutory references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2013 Bagby, an attorney, was involved in a serious motor vehicle collision with Edward Grastorf, as a result of which Bagby sustained significant injuries, including the loss of one leg below the knee. Bagby retained Davis to represent him in a personal injury lawsuit. Two contingency fee agreements are involved.

With regard to the fees to be paid by Bagby, the first attorney-client contingent fee contract (2013 Fee Agreement), signed by Davis and presented to Bagby on or soon after September 10, 2013 contained, among other things, an arbitration provision, a section addressing the amount of legal fees and costs Bagby would pay Davis (depending on Bagby's recovery), Davis' billing practices, and a paragraph stating that, "[t]he rates set forth above are not set by law, but *were negotiated* between Attorney and Client." (Italics added.)

On September 15, 2013, by handwritten interlineation, Bagby made several modifications to the 2013 Fee Agreement, dated and signed the agreement, and returned it to Davis. Davis did not initial or otherwise indicate his acceptance of Bagby's modifications to the 2013 Fee Agreement, and did not return a fully executed 2013 Fee Agreement to Bagby.

Trial in Bagby's lawsuit arising out of the motor vehicle accident was first scheduled to start in January 2016. In April 2015, Davis informed Bagby for the first time that Bagby's modifications to the 2013 Fee Agreement were unacceptable, and refused to continue his representation in the personal injury litigation unless Bagby signed an

amended fee agreement. Bagby was reluctant to risk having the trial date continued due to a change in representation because Grastorf, a critically important witness, was over 95 years old and in declining health, and another important witness was 85 and suffering from cancer. Bagby believed he had no reasonable option other than to sign a new fee agreement. On June 3, 2015 Davis presented Bagby with an amended attorney-client contingency fee contract (2015 Fee Agreement), which Bagby signed that day. Like the 2013 Fee Agreement, the 2015 Fee Agreement contained an arbitration provision, a provision delineating Davis' compensation and costs (except as to Grastorf, with whom Bagby previously had reached a stipulated judgment), and a provision stating that "[t]he rates set forth above are not set by law, but *were negotiated* between Attorney and Client." (Italics added.)

The case proceeded to trial (which had been continued to June 2016). The jury apportioned 90 percent fault for the collision to Grastorf, and 10 percent to Bagby, and awarded damages to Bagby in excess of $5 million. By stipulated judgment the parties agreed to transfer ownership of Grastorf's real property to Davis and Bagby pursuant to percentages set forth in their contingency fee agreement. Judgment was filed on July 29, 2016.

In January 2017, Bagby terminated Davis' representation and requested return of his client files. The files were never returned.

On May 26, 2017, Bagby filed the verified complaint in the underlying action against Davis alleging breach of contract and

malpractice, and seeking declaratory and injunctive relief. Service of the summons and complaint was effected on June 1, 2017. Davis never filed a response to the complaint. Instead, on July 12, 2017, Davis wrote to Bagby stating his intent to file a petition to compel arbitration pursuant to the parties' contingency fee agreement.

On August 16, 2017, Davis filed a case management statement (CMS), in preparation for an August 30, 2017 case management conference (CMC). In a declaration in support of the CMS, Davis indicated his intent to file a petition to compel arbitration in the event the trial court did "not order [the matter] into binding arbitration [at the CMC] on August 30, 2017."

On August 24, 2017 Bagby advised Davis that if he did not provide a verified answer to the complaint by August 28, 2017, Bagby would seek entry of Davis' default. No answer was received and, on August 29, 2017, Bagby requested entry of Davis' default. Although Bagby did not know yet know it, Davis' default was entered effective August 29, 2017.

A CMC was convened on August 30. During the CMC, the court stated it would "not . . . take anybody's default."[2] When asked why no petition to compel arbitration had been filed, even though his CMS indicated the case belonged in arbitration, Davis informed the court he

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[2] In response, Bagby informed the court he had initiated the process seeking entry of Davis' default on August 29. The court reiterated that "[n]o default will be entered."

intended to file that petition soon. He explained that he had not yet done so because he "was hoping [the court] would either stay [the case] or order an arbitration." In response, the trial court informed Davis that "[n]o judge in history has ever just ordered arbitration." The court scheduled an OSC re arbitration for October 6, 2017, and instructed Davis to file a petition to compel arbitration, if appropriate, before that hearing.[3]

On September 21, 2017, Davis filed a petition to compel arbitration and dismiss the action or, alternatively, to stay the action pending arbitration. He argued that the 2013 Fee Agreement required that all disputes arising from his representation in the underlying tort action to be resolved by arbitration.[4]

Bagby opposed the petition arguing, in part, that as a defaulting party, Davis had no right to appear in this action, nor could he seek to compel arbitration.

On October 19, 2017 the court issued a tentative ruling indicating its intent to grant Davis' petition to compel arbitration. However, the tentative ruling acknowledged that Davis could not participate in the

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[3] The court's March 1, 2018, order issued in response to the alternative writ indicates that Davis and Bagby each filed a CMS in advance of the CMC. However, the record contains only Davis' CMS. Bagby informed the court at the CMC that he had not received a copy of Davis' CMS. Although the trial court's March 1, 2018 order states that the parties "exchange[d]" CMS's, Davis' CMS does not reflect that a copy was served on Bagby.

[4] Davis did not mention the 2015 Fee Agreement in his moving papers.

litigation because his default had been entered. (See *Garcia v. Politis* (2011) 192 Cal.App.4th 1474, 1479 [entry of defendant's default terminates defendant's right to participate in the litigation].) Nevertheless, the court observed that, "the extremely permissive rules that govern the vacating of defaults essentially require that [Davis'] default be vacated here. [Davis] has appeared and is now actively participating in the case." Accordingly, there was "no substantial basis under the circumstances for declining to vacate the default, particularly given the compelling public policy which mandates, all things being equal, that all litigants be provided with their day in court and that all disputes be decided on their merits or lack thereof."

On November 1, 2017, Davis filed a motion seeking relief from default pursuant to section 473, subdivision (b), based primarily on the ground of "excusable neglect."[5] Davis explained that he had not filed a response to the complaint because he intended to move to compel arbitration, and blamed Bagby for failing to warn him before taking his default. In opposition to Davis' motion, Bagby argued that Davis had not shown excusable neglect nor any basis to set aside a default. He noted that Davis was a seasoned attorney who simply failed to file a responsive pleading based on a mistaken belief that he was not required to do so. (*Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58 (*Jackson*) [bank's neglect in filing response to complaint was

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[5] Because Davis' motion did not include an affidavit of fault, he did not qualify for mandatory relief from default. (§ 473, subd. (b).)

inexcusable where its reason for not doing so was a mistaken belief that case was moot so that it had no obligation to file an answer].) Davis, Bagby argued, had not shown excusable neglect by waiting 112 days to respond to the complaint (in filing a petition to compel arbitration on September 21, 2017), particularly after Bagby warned Davis on August 24 that he intended to seek his default. In a declaration in support of his reply, Davis states that his mistake was in failing to realize that a formal petition to compel arbitration was necessary, and his erroneous belief that demanding arbitration in a CMS would permit the court to order the matter to arbitration.

In a tentative ruling, later adopted as its order, the court granted the motion to vacate default and the petition to compel arbitration, finding: "whatever the discrepancies may have been in connection with the prior entry of [Davis'] default, the extremely permissive rules that govern the vacating of defaults essentially require that [Davis'] default be vacated here. . . . The Court finds that there is no substantial basis under the circumstances for declining to vacate the default."

On December 28, 2017, Bagby filed a petition seeking a writ of mandate. He argued that the trial court erred in granting the motion for relief from default because Davis had failed to demonstrate excusable neglect, and further erred in moving to compel arbitration. (§ 473, subd. (b).)

On January 22, 2018, this court issued an alternative writ of mandate (alternative writ), ordering the trial court, (a) after notice to the parties and an opportunity to be heard, to vacate its December 4,

2017 order granting Davis' motion for relief from default and petition to compel arbitration, and enter new and different orders denying the motion and petition; or (b) in the alternative, to show cause before this court why a peremptory writ of mandate ordering that it do so should not issue on the ground that Bagby had demonstrated an entitlement to relief.

On February 9, 2018, the trial court conducted a hearing on the alternative writ. On March 1, 2018, the court issued an order concluding that, although Davis violated some governing rules, and committed clumsy errors and omissions, he had been "sufficiently present and active at all relevant stages in these proceedings" with respect to handling his response to Bagby's complaint to demonstrate excusable neglect under the circumstances. Accordingly, the court found it properly exercised its discretion on December 4, 2017 in granting Davis' motion for relief from default, and declined to vacate that order.[6]

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[6] The court complied with that portion of the alternative writ regarding Davis' petition to compel arbitration and vacated its order granting the petition to compel arbitration.

On March 6, 2018, Bagby filed a motion to augment the record to include the reporter's transcript of the February 9, 2018 hearing. This transcript is unnecessary to our disposition. The motion to augment is denied.

DISCUSSION

1. *Section 473, subdivision (b)*

The discretionary relief provision of section 473, subdivision (b) provides in part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." This provision "applies to *any* 'judgment, dismissal, order, or other proceeding.'" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254 (*Zamora*).) "'In order to qualify for [discretionary] relief under section 473, the moving party must act diligently in seeking relief and must submit affidavits or testimony demonstrating a reasonable cause for the default.' [Citation.] In other words, the court's 'discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner . . . .' [Citation.]" (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419 (*Huh*).)

2. *Standard of Review*

In *Zamora*, the California Supreme Court instructed that "'[a] ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.' [Citation.]" (*Zamora, supra*, 28 Cal.4th at p. 257.) Because the law favors disposition of cases on their merits, any doubt about the application of section 473 should be resolved in favor of the party seeking relief from

default. For that reason, an order denying such relief is scrutinized more carefully than an order permitting trial on the merits. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 974, 980 (*Rappleyea*).)

A trial court has broad discretion in ruling on a motion for relief from default (see *Bailey v. Taaffe* (1866) 29 Cal. 422, 424), and reviewing courts tend to favor orders granting relief under section 473, subdivision (b) to effectuate the policy favoring trial on the merits. (See e.g., *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1140.) But this policy does not invariably prevail over competing policies, including those that favor "avoiding unnecessary and prejudicial delay, and preventing litigants from playing fast and loose with the pertinent legal rules and procedures." (*Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 339.) It is well-established that, while "courts are liberal in relieving parties of defaults caused by inadvertence or excusable neglect, . . . they do not act as guardians for incompetent parties or parties who are grossly careless as to their own affairs. There must be rules and regulations by which rights are determined and under which judgments become final." (*Gillingham v. Lawrence* (1909) 11 Cal.App. 231, 233–234.) This is a rule of necessity, for "'[w]hen inexcusable neglect is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law.' [Citation.]" (*Don v. Cruz* (1982) 131 Cal.App.3d 695, 701.)

Application of these principles here leads to the conclusion that the trial court erred in granting Davis' motion for relief from default.

3. *Analysis*

Davis sought permissive relief under section 473 on the ground of mistake or excusable neglect. An "honest mistake of law" can provide "a valid ground for relief," at least "where a problem is complex and debatable." (*A & S Air Conditioning v. John J. Moore Co.* (1960) 184 Cal.App.2d 617, 620.) However, relief may properly be denied where the record shows only "ignorance of the law coupled with negligence in ascertaining it." (*Ibid.*) In considering whether a mistake of law furnishes grounds for relief, "'the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law.' [Citation.]" (*Torbitt v. State of California* (1984) 161 Cal.App.3d 860, 866 (*Torbitt*).) Here, the sufficiency of Davis' claim of mistake depends on whether he established sufficient justification for his failure to "determin[e] . . . the correct law," i.e., to discover the legal theory or appropriate procedure he contends would have prevented entry of default against him. He has provided no basis to answer this question in the affirmative. Rather, in his CMS and in the declaration submitted in support of his motion for relief from default, Davis explained simply that he had never had to seek to compel arbitration, and was "unaware that the matter had to proceed formally by way of a petition to compel arbitration" under section 1281.2, until the court readily "disabused" him of that notion at the CMC.

Mistake is not a ground for relief under section 473, subdivision (b) if "the 'mistake' is simply the result of professional incompetence,

general ignorance of the law, or unjustifiable negligence in discovering the law . . . .' [Citation.]" (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206 (*Hearn*).) Davis had the burden to show he exercised ordinary care under the circumstances to avoid entry of his default. (*Jackson, supra,* 141 Cal.App.3d at p. 58.) He did not.

"'The word "excusable" means just that: inexcusable neglect prevents relief.' [Citation.] [¶] The burden of establishing excusable neglect is upon the party seeking relief who must prove it by a preponderance of the evidence. [Citations.]" (*Iott v. Franklin* (1988) 206 Cal.App.3d 521, 528, fn. omitted.) "'Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances.' [Citations.]" (*Huh, supra*, 158 Cal.App.4th at p. 1419.) To warrant relief for inadvertence or neglect under section 473, "'a litigant's neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances. The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly inexcusable it does not justify relief. [Citations.] It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to . . . avoid an undesirable judgment. . . . Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. . . . The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and

against which ordinary prudence could not have guarded.' [Citation.]" (*Hearn, supra*, 177 Cal.App.4th at p. 1206.)

Conduct that amounts to substandard legal services or legal malpractice does not qualify as "excusable" because the negligence of an attorney (whose client is himself) may not be a basis for relief. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898.) "To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682; see *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 319 [finding mistake of law inexcusable where party made no effort to ascertain validity of erroneous belief re legal status of case].) Nor, given that Davis is a self-represented lawyer, does his failure to file a timely response to the complaint based on his personal belief that the case belonged in arbitration constitute excusable neglect.[7]

"'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not . . . excusable.'" (*Zamora, supra*, 28 Cal.4th at p. 258.) The duty of

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[7] In his declaration in support of the petition to compel arbitration, Davis stated that he and Bagby had discussed the matter and Bagby said he was "fully aware" of his obligation to arbitrate their dispute. Nevertheless, Bagby filed the complaint in May 2017. That fact alone was an obvious indication that, even if he may once have done so, by May 2017, Bagby no longer agreed that arbitration of this dispute was required or in order. As of June 1, 2017, Davis was unquestionably on notice of his obligation to respond to the complaint.

competence imposed on attorneys includes the obligation to know "'those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.' [Citation.]" (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 333.)

Here, Davis's course of conduct was well below the standard of professional competence. He took no action after Bagby did not respond to Davis' July 12 letter announcing his intent to compel arbitration. He failed to file an answer to the complaint after Bagby announced his intention to seek Davis' default unless he answered the complaint by August 28. Davis simply failed to "make a legitimate factual investigation [or to] engage in any legal research to determine whether or not such [a course of conduct] might be feasible." (*Torbitt, supra*, 161 Cal.App.3d at p. 865; see *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1007 [finding no excusable neglect where attorney was aware of the deadline and "'just let it slip by"'].)

Davis offers no reasonable excuse for this failure, and the only justification he did articulate for having taken no formal action to advance the action toward arbitration–his stated belief that the court would order the parties to arbitration–was properly rejected by the trial court (which said "no judge in history" had made such an order). As one trained in the law, Davis is charged with knowledge both of the limits of his own professional competence as an attorney and the means to enlarge his understanding. His inexcusable negligence as an attorney

must be imputed to him as a client. (See *Torbitt, supra*, 161 Cal.App.3d at p. 867; *Huh, supra*, 158 Cal.App.4th at p. 1419 [party seeking discretionary relief premised on the ground of attorney error must demonstrate the error was excusable, since attorney negligence is imputed to the client].)

Notwithstanding the trial court's contrary conclusion, Davis failed to adequately demonstrate that his failure timely to file a response to the May 2017 complaint was the act of a reasonably prudent person in his circumstances, or occurred through no fault of his own. Davis, a seasoned litigator who, by his own account, has been practicing law in California for many decades, does not dispute that he was properly served with the summons and complaint on June 1, 2017. The summons informed him that he had 30 days to respond, or risk an adverse judgment. (See *Rappleyea, supra*, 8 Cal.4th at pp. 978–979, 984–985.) Instead, Davis attributes his failure to answer to his inexperience dealing with this particular issue coupled with a hope or belief that the court would simply order the parties at the CMC into arbitration, despite Bagby's assurance that he intended to seek Davis' default. At best, Davis was, despite his experience, unreasonably uninformed. (*Id.* at p. 979.) ""It is the duty of every party desiring to resist an action . . . to take timely and adequate steps . . . to avoid an undesirable judgment."" (*Price v. Hibbs* (1964) 225 Cal.App.2d 209, 215.) Davis is a seasoned litigator. Yet, his only response to the complaint was the July 12 letter he sent to Bagby. To the extent Davis believed that letter was a sufficient substitute for filing a proper

response to the complaint, his actions do not constitute excusable neglect. A party cannot have a judgment set aside because he was "'mistaken as to the legal [consequences] of his actions'" and "[i]n retrospect, . . . realizes that he made a mistake." (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1264–1265.) Davis' mistake was one of unreasonable judgment and general ignorance of the law or unjustifiable negligence in discovering governing law, none of which provides appropriate grounds for relief. (*Hearn, supra*, 177 Cal.App.4th at p. 1206.)

"Inadvertence" as used in the statute similarly employs the "'reasonably prudent person'" standard. An experienced litigator's decision to ignore a valid summons and complaint is not reasonably prudent. Such a person is well aware that ordinary prudence demands a timely response. A party's intentional disregard of service does not justify setting aside a default. (*Price, supra,* 225 Cal.App.2d at p. 217.) While criticizing Bagby for moving rapidly to seek his default, Davis made no effort himself after July to contact Bagby to follow-up on his demand for arbitration, or request an extension of time to respond to the complaint. Under the circumstances, the only reasonable conclusion is that entry of Davis' default did not result from his mistake, inadvertence or excusable neglect. Rather, it was the clear consequence of Davis' failure to exercise ordinary and reasonable prudence to avoid that result. (See *Hearn, supra*, 177 Cal.App.4th at pp. 1206–1207.)

Davis failed to carry his burden. Most fundamentally, he failed sufficiently to demonstrate a colorable basis for relief under the statute. He suggests that the taking of his default was attributable to reasonable mistakes of fact or law, but does not identify any reasonable, excusable mistake. It was his burden under section 473, subdivision (b) to demonstrate "'that due to some mistake, either of fact or of law, . . . or through some inadvertence . . . or neglect which may properly be considered excusable, the judgment or order from which he seeks relief should be reversed.' [Citation.]" (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1410.) It is insufficient to assert a general state of misapprehension bearing on a possible defense. Davis must specify the actual cause of his failure to present a legitimate defense, and explain why it should be excused. Davis made no genuine effort to do this, and the effort he did make was unreasonable on its face. The trial court erred in granting him relief. (See *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611–612 [section 473 not "'intended to be a catch-all remedy for every case of poor judgment . . . which results in dismissal'"].)[8]

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[8] Ordinarily, if a party makes a timely motion for relief from default, accompanied by an affidavit of fault alleging a good defense, and the opposing party fails to show he will suffer any prejudice if the matter proceeds to trial on the merits, only "very slight evidence will be required to justify a court in setting aside the default." (*Sofuye v. Pieters–Wheeler Seed Co.* (1923) 62 Cal.App. 198, 205.) Here, we need not address the issue of prejudice, because Davis failed to make the initial showing of mistake, inadvertence or neglect.

DISPOSITION

The petition is granted. The alternative writ is discharged. Let a writ of mandate issue commanding respondent superior court to vacate its order dated March 1, 2018 granting real party in interest's motion for relief from default, and to enter a new order denying that motion. Costs in this original proceeding are awarded to petitioner Bagby. (Cal. Rules of Court, rule 8.493(a)(1)(A), (2).)

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.