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No. 77479-4-I

IN THE COURTS OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

LARRY SPOKOINY,

Appellant,

vs.

THE WASHINGTON STATE YOUTH SOCCER ASSOCIATION,

Respondent.

BRIEF OF APPELLANT

Submitted By:

Larry Spokoiny, WSBA # 20274
Appellant

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A. INTRODUCTION

Appellant Larry Spokoiny (“Mr. Spokoiny”) seeks reversal of two erroneous King County Superior Court decisions, first by Commissioner Henry Judson and then by Judge Ken Schubert, whereby Respondent The Washington State Youth Soccer Association (“WSYSA”) was allowed to renew its underlying judgment without notice to Mr. Spokoiny and without following the hearing procedures outlined in RAP 7.2(e) for seeking relief from the trial court while a case is on appeal. Commissioner Judson's initial order was later compounded by Judge Schubert's *sua sponte* nunc pro tunc order which purports to correct WSYSA's alleged drafting error.

B. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Assignments of Error

The trial court erred on August 9, 2016 by entering its Order Extending Judgment while this case was on appeal before Court of Appeals, Division One, without following the hearing procedures outlined in RAP 7.2(e). Clerk's Papers (CP) at 3-4.

The trial court further erred on September 12, 2017 when it first denied Mr. Spokoiny's motion to vacate the extension and then *sua sponte*

entered a new Order Extending Judgment (Nunc Pro Tunc). CP at 174-179.

2. Issues Pertaining to Assignment of Error

- a) Can the hearing procedures set forth in RAP 7.2(e) for trial court action while a case is on appeal be circumvented?
- b) Should a party be permitted to schedule a matter for hearing with the court, but fail to give notice to the other side either before or after the hearing?
- c) Is a nunc pro tunc order appropriate to correct an error made by a party in drafting its own pleading?
- d) Does the nunc pro tunc order in this case have retroactive effect so as to extend the underlying judgment?

C. STATEMENT OF THE CASE

This action was commenced in King County Superior Court on January 23, 2004. The original judgment in this case was entered by the Honorable Mary Yu on July 8, 2004. The judgment awarded attorney's fee and costs to The Washington State Youth Soccer Association ("WSYSA"). The original judgment was not renewed within 10 years as required by RCW 6.17.020(3), and therefore expired on July 8, 2014. CP at 34.

The Court of Appeals entered a published decision in this case on July 5, 2005. Spokoiny v. Wash. State Youth Soccer Ass'n, 128 Wn. App.

794, 117 P.3d 1141 (2005). CP at 35.

More than 10 years later, WSYSA sought and obtained an ex parte Writ of Garnishment on August 24, 2015 and an ex parte Order Re Supplemental Proceedings on September 3, 2015. Mr. Spokoyny's Motion to Quash was denied by the trial court but timely appealed to the Court of Appeals on November 16, 2015. CP at 35.

On August 9, 2016, while the Court of Appeals' case was pending, and without any notice to Mr. Spokoyny or the Court of Appeals either before or after seeking relief from the trial court, WSYSA obtained an Order Extending Judgment plus \$20,471.00 in attorney's fees and \$2,133.41 in costs allegedly incurred on appeal. CP at 3-4, 35.

Oral argument on the Appeal was held on September 29, 2016. The Court of Appeals entered an unpublished decision on the Appeal on October 31, 2016. Although the Court determined that WSYSA was able to collect on the amended judgment, there was no ruling on the enforceability of the amended judgment past its original 10-year period. Furthermore, WSYSA was denied attorney's fees on appeal. CP at 36.

Mr. Spokoyny's subsequent Motion for Reconsideration was denied on December 14, 2016. Mr. Spokoyny filed a Petition for Review on January 13, 2017. The Supreme Court denied the petition for review on

May 3, 2017. CP at 36.

The Court of Appeals terminated its review upon issuance of the Mandate on July 21, 2017. CP at 36.

After the mandate was issued, Mr. Spokoyny filed his Motion for Order to Show Cause Regarding Vacation of Extension of Judgment on August 9, 2017. CP at 34-38. Oral argument was held before Judge Ken Schubert on September 8, 2017. Verbatim Report of Proceedings.

In a pair of orders entered on September 12, 2017, Judge Schubert denied Mr. Spokoyny's motion to vacate and retroactively extended WSYSA's judgment by *sua sponte* nunc pro tunc order. CP at 174-179.

Mr. Spokoyny filed this appeal to Court of Appeals, Division One on October 11, 2017. CP at 180-187.

D. SUMMARY OF ARGUMENT

WSYSA failed to renew their judgment in a timely manner pursuant to RCW 6.17.020, and such judgment has now expired.

E. ARGUMENT

1. **The Order Extending Judgment dated August 9, 2016 should be reversed because WSYSA violated RAP 7.2(e) by failing to first seek permission from the appellate court prior to formal entry of its petition to extend the 2006 amended judgment, while seeking attorney's fees and costs allegedly incurred on the appeal in such petition.**

While Mr. Spokoyny's prior appeal to Court of Appeals (Division One) was still pending, and without any notice to Mr. Spokoyny or the Court of Appeals either before or after seeking relief from the trial court, WSYSA applied to the trial court and was granted an extension of the 2006 amended judgment. Furthermore, the trial court awarded WSYSA an additional \$20,471.00 in attorney's fees and \$2,133.41 in costs allegedly incurred on appeal. Clearly, the trial court's ruling changed the Court of Appeals decision, given that the appellate court specifically refused WSYSA's request for attorney's fees on appeal in its October 31, 2016 decision. CP at 1-4.

RAP 7.2(e) applies to the authority of the trial court to modify a judgment or motion after an appellate court accepts review. The rule states in part: "If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained *prior to the formal entry* of the trial court decision." RAP 7.2(e) (emphasis added). State Ex Rel. Shafer v. Bloomer, 94 Wash.App. 246, 973 P.2d 1062 (1999).

In order to determine whether the trial court complied with the requirements set forth in RAP 7.2(e), it must be determined whether the

trial court order extending the 2006 amended judgment affected the outcome of a decision currently under review. Mr. Spokoyny's appeal directly concerned the continuing enforceability of the 2006 amended judgment, and WSYA sought and was awarded over \$20,000 in attorney's fees and costs for the pending appeal (despite the later denial of these same fees and costs by the Court of Appeals).

In the instant case, WSYSA failed to provide any notice whatsoever of its motion to extend judgment to Mr. Spokoyny or the Court of Appeals either before or after seeking relief from the trial court. This lack of notice essentially blocked Mr. Spokoyny from challenging the extension of judgment. The trial court was unable to perform the necessary RAP 7.2 analysis because the fact of the pending appeal was not disclosed to the court commissioner who signed the extension order.

Extending enforceability of the 2006 amended judgment for an additional 10-year period is a significant change or modification that requires appellate court approval, especially where the 2004 original was not similarly extended. Fundamental fairness and the opportunity to be heard dictate that Mr. Spokoyny should have been provided notice of this secret hearing.

Finally, WSYSA does not even try to justify or explain why it

applied to the trial court and was awarded an additional \$20,471.00 in attorney's fees and \$2,133.41 in costs allegedly incurred on appeal in conjunction with the grant of an extension of the amended judgment. Clearly, the trial court's ruling changed the Court of Appeals decision, given that the appellate court specifically refused WSYSA's request for attorney's fees on appeal in its October 31, 2016 decision.

The Washington Supreme Court, by order of May 3, 2017, stated as follows: **“The Respondent's motion to strike Petitioner's RAP 7.2 argument, which the Respondent included in its answer to the petition for review, is also denied.”** (emphasis added) CP at 5-14.

Given that WSYSA failed to comply with the clear and unequivocal provisions of RAP 7.2(e) prior to seeking the August 9, 2016 trial court order, the resulting Order Extending Judgment should be reversed.

2. **A nunc pro tunc order is only appropriate to correct clerical errors by court personnel, and not to correct errors committed by parties in drafting their own pleadings.**

In State v. Hendrickson, 165 Wn.2d 474, 198 P.3d 1029 (2009), the Washington State Supreme Court discussed in detail when nunc pro tunc orders are appropriate and when they are not:

"A retroactive entry is proper only to rectify the record as to acts which did occur, not as to acts which should have occurred." State v. Smissaert, 103 Wn. 2d 636, 694 P.2d 654 (1985). A nunc pro tunc order "records judicial acts done at a former time which were not then carried into the record." State v. Petrich, 94 Wn.2d 291, 616 P.2d 1219 (1980). A nunc pro tunc order "may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." State v. Ryan, 146 Wash. 114, 261 P. 775 (1927). Thus, for example, a nunc pro tunc order is not appropriate to reopen a matter that was previously closed in order to resolve substantive issues differently. Instead, a nunc pro tunc order is generally appropriate to correct only ministerial or clerical errors, not judicial errors. A clerical or ministerial error is one made by a clerk or other judicial or ministerial officer in writing or keeping records.

A nunc pro tunc order allows trial courts "to date a record reflecting its action back to the time the action in fact occurred." Hendrickson, 165 Wn.2d at 478. This "retroactive entry is proper only to rectify the record as to acts which did occur, not as to acts which should have occurred." Ibid. (quoting State v. Smissaert, 103 Wn.2d 636, 694 P.2d 654 (1985)). Specifically, a nunc pro tunc order translates the court's intention into an order. Ibid.

Thus, nunc pro tunc orders are not appropriate to correct judicial errors, which are errors of substance. Ibid.; In re Marriage of Stern, 68 Wn.App. 922, 846 P.2d 1387 (1993). Rather, they are generally

appropriate to correct only clerical or ministerial errors, which are errors "made by a clerk or other judicial or ministerial officer in writing or keeping records." Hendrickson, 165 Wn.2d at 479.

Per State v. Luvene, 127 Wash. 2d 690, 903 P.2d 960 (1995), a nunc pro tunc order is appropriate only to record some act of the court done at an earlier time but which was not made part of the record. State v. Smissaert, 103 Wash. 2d 636, 694 P.2d 654 (1985). It cannot be used to remedy the failure to take an action at that earlier time. State v. Mehlhorn, 195 Wash. 690, 692-93, 82 P.2d 158 (1938).

"A nunc pro tunc order allows a court to date a record reflecting its action back to the time the action in fact occurred." Hendrickson, 165 Wn.2d at 478. A judgment nunc protunc may be used to record action previously taken, but it may not properly be used to alter a prior judgment. Keves v. Dep't of Motor Vehicles, 11 Wn. App. 957, 528 P.2d 283 (1974). In other words, a judgment nunc pro tunc is used "to record judicial action taken and not to remedy inaction." Ibid. (quoting Osborne v. Osborne, 60 Wn.2d 163, 372 P.2d 538 (1962)).

The Court of Appeals reviews a trial court's exercise of its authority to enter a nunc pro tunc order for abuse of discretion. Hendrickson, 165 Wn.2d at 478. A trial court misuses its nunc pro tunc

power and abuses its discretion when it uses such an order to change its mind or rectify a mistake of law. But where the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a nunc pro tunc order stands as a means of translating the court's intention into an order. Ibid.

In the instant case, the trial court lacked authority and therefore abused its discretion in granting the *sua sponte* nunc pro tunc order. WSYSA's erroneous Order Extending Judgment was not a clerical or ministerial error made by a clerk or judicial officer. Although there is no testimony in the record or even any assertion in a legal pleading where WSYSA claims to have made a drafting error in requesting and receiving over \$20,000 in attorney fees and costs, to the extent that an error was made, WSYSA made the error and not a clerk or judicial officer.

Accordingly, a nunc pro tunc order was not appropriate to correct WSYSA's error. Indeed, this mistake could have been avoided entirely had WSYSA simply followed the hearing procedures outlined in RAP 7.2(e).


F. ATTORNEY'S FEES AND COSTS ON APPEAL

Mr. Spokoiny requests attorney's fees and costs on appeal pursuant to RAP 18.9 and applicable law.

G. CONCLUSION

Based on the foregoing, the two King County Superior Court orders extending WSYSA's judgment should be REVERSED.

RESPECTFULLY SUBMITTED this 16th day of April, 2018.

By: _____

Larry Spokoyny, WSBA # 20274
Pro Se / Attorney

LARRY SPOKOINY - FILING PRO SE

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