IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MM&A Productions, LLC, an Arizona limited liability company, Plaintiff-Appellant, v. YAVAPAI-APACHE NATION, a federally recognized Indian Tribe; YAVAPAI-APACHE NATION'S CLIFF CASTLE CASINO, A BUSINESS ENTERPRISE OF THE Yavapai-Apache Nation; TRIBAL GAMING BOARD; and CLIFF CASTLE BOARD OF DIRECTORS, Defendants-Appellees.	2 CA-CV 2012-0040 Pima County Superior Court Cause No. C 20085949

OPENING BRIEF

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STATEMENT OF THE CASE

¶ 1 This case has had an extended life in the Superior Court as well as in this Court. However, for purposes of this appeal, only the most recent phases need be described.

¶ 2 On November 10, 2011, this Court granted relief in *MM&A Productions, LLC v. Tang*, No. 2 CA-SA 2011-0078, instructing the respondent judge to sign a proper order memorializing its denial of a motion made by MM&A Productions, LLC ("MM&A") pursuant to Rule 60(c). That motion had been brought by MM&A in January of 2009, for an order relieving it from having been three days late in appealing an order dismissing its suit for damages against the Yavapai-Apache Nation.

¶ 3 On January 20, 2012, the trial court signed such an order. Also on January 20, 2012, MM&A timely appealed from that order.

¶ 4 This Court has jurisdiction under A.R.S. § 12-2101(A)(2) ("special order made after judgment.")

STATEMENT OF FACTS

¶ 5 MM&A was doing business with the Yavapai-Apache Nation in connection with the latter's casino operations. MM&A sued the Nation for breach of a written contract. The Nation successfully moved in the

Superior Court for dismissal of the complaint, on the grounds that it had not waived its sovereign immunity.

¶ 6 The determinative issue in the motion to dismiss had been whether the Nation's sovereign immunity could be waived by an agent of the Nation having apparent authority. MM&A desired to appeal the dismissal of its complaint.

¶ 7 The issue of apparent authority supporting a waiver of tribal immunity is one which has divided state courts. The trial court in this case chose to follow one line of authority, *Chance v. Coquille Indian Tribe,* 327 Ore. 318, 963 P.2d 638 (1998), and reject another, *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004). In addition, the trial court ruling ignored entirely that the issue of sovereign immunity of Indian tribes, as well as under what type of authority such immunity can be waived, is a matter of federal law. *Smith v. Hopland Band of Pomo Indians,* 95 Cal. App. 4th 1 (2002). The trial court therefore did not consider that, under federal law, apparent authority *can* support a waiver of sovereign immunity. *C & L Enterprises, Inc. v. Citizens Bank Potawatome Indian Tribe,* 532 U.S. 556 (1982).

¶ 8 Whether the trial court's order of dismissal was correct is not now before this court. The only order from which MM&A now appeals is

the only one which it *can* appeal – the order of January 20, 2012 denying MM&A relief from the tardy noticing of an appeal from the dismissal of its case. It is clear, however, that the appeal MM&A wishes to take from the dismissal will present a substantial issue.

¶ 9 After receiving briefs and hearing argument on the Nation's motion to dismiss the complaint, the trial court undertook to resolve the motion by a written minute order explaining its reasoning, which it also intended to make the appealable judgment. The minute order contemplated a signature by the Court. At this point, confusion emanated from the trial court's chambers.

¶ 10 On December 19, 2008, an assistant clerk filed a minute order decision in the clerk's office, before it had been signed by the judge. Appendix A hereto, Minute Order February 4, 2009, ¶5 (hereinafter "App. A").[1]

¶ 11 On December 22, 2008, the unsigned order went to the office of MM&A counsel through normal delivery procedures. Because it was unsigned, counsel instructed the firm docketing clerk not to docket it for

[1] The referenced Minute Order is the trial court's unsigned decision denying Rule 60(c) relief. It was this order which this Court referred to in its special action relief which required the trial court to enter a signed order denying the Rule 60(c) relief. Virtually all record matters relating to this appeal are found or referred to therein. Appendix A to this brief is that February 4, 2009 decision.

appeal. Appendix B hereto, Transcript of hearing January 28, 2009, pp. 7, 8 (hereinafter "TR").[2]

¶ 12 A second order, identical to the unsigned order that a clerk had filed with very minor exceptions, *was* signed by the judge on December 19, 2008. That was the same day that a clerk had filed an unsigned version in the clerk's office.

¶ 13 The signed, December 19, 2008 order was received in the office of MM&A counsel on Christmas Eve day, December 24, 2008. App. A ¶ 4. That version of the order was not routed to the docket clerk in the office of MM&A counsel, and Jeffrey Willis, the lawyer in the Tucson office of MM&A's counsel does not remember seeing it. TR 8, 9.

¶ 14 Christmas Eve was a Wednesday, and Christmas was Thursday in 2008. On Friday, December 26, 2008, the trial judge signed *another* version of the minute order, identical to that which he had signed a week earlier. App. A ¶ 5.

[2] The entire story of the actions and inactions of MM&A counsel is found in a narrative by counsel to the court at the hearing upon MM&A's Rule 60(c) motion. Opposing counsel accepted the narrative, as did the trial court. Thus, the facts surrounding MM&A counsel's dealings in the matter are undisputed and do not rely upon any trial court determinations of credibility, or choices between conflicting versions. Appendix B to this brief is that hearing transcript.

¶ 15 The December 26, 2008 signed order was received in the office of MM&A counsel on Monday, December 29. TR 9. That order was properly docketed for an appeal. *Id.*

¶ 16 On January 13, 2009, the trial court discovered that it had signed two identical minute orders. It issued a *sua sponte* minute order which said:

> The Court having inadvertently signed two orders regarding Defendants' Motion to Dismiss,
>
> IT IS ORDERED that the order dated December 18, 2008 and signed December 26, 2008 is removed from the file and declared null and void.

¶ 17 The "null and void" minute order of January 13, 2009 did not arrive in the office of MM&A counsel until Friday, January 16th. TR 9. Attorney Willis, the responsible counsel for MM&A, was scheduled to depart for a family vacation inside the Grand Canyon on Saturday, January 17th, and did so. He did not return to his office until January 22. *Id. I10.*

¶ 18 The first thing that Willis did upon returning to his office on January 22 was to turn to this case, and figure out the significance of the court's January 13th "null and void" order. When he did, he realized that instead of having another three days to appeal the dismissal order of December 26th, there now was no such order, by fiat of the trial court.

¶ 19 He also realized that the effect of the "null and void" order also had been to cut off MM&A's appeal time at January 20, 2009, two days earlier than the day upon which Willis focused on the "null and void" order.

¶ 20 Willis filed a motion for relief under Rule 60(c) *immediately*, on the same day he returned to his office, and the very same day that he first examined the "null and void" order.

¶ 21 Willis filed a notice of appeal on the *next* day – January 23, 2009. The notice purported to appeal from the December 19th order; though three days late. It attempted to appeal from the December 26th order, notwithstanding the trial court's later dictate that the order had become "null and void." And the notice attempted to appeal from the January 13th "null and void" order.

¶ 22 The trial court denied Rule 60(c) relief. App. A. MM&A filed an amended notice of appeal, seeking to appeal that denial, although the ruling of February 4, 2009 was not signed.

¶ 23 This Court has previously dismissed MM&A's attempt to appeal the December 19, 2008 signed order, as untimely. No. 2 CA-CV 2009-0042. It dismissed the attempted appeal from the "null and void" order of January 13, 2009, finding it not to be an appealable order. *Id.* And it

dismissed the attempted appeal of the February 4, 2009 Rule 60(c) ruling, because it was not a signed judgment. *Id.*

¶ 24 MM&A unsuccessfully sought a signed order memorializing the denial of Rule 60(c) relief. Ultimately, special action relief from this Court was required to obtain it. No. 2 CA-SA 2011-0078. Having obtained the signed order, this appeal followed.

QUESTION PRESENTED FOR REVIEW

¶ 25 The trial court issued three virtually identical dismissal orders, signing two of them. MM&A inadvertently did not docket the first of the signed orders for appeal, but did properly docket the second. The trial court *sua sponte* nullified the second signed order, so that it could not be appealed; doing so twenty-five days into the appeal time for the first order. MM&A counsel did not discover the reversal of course until one day after the appeal time had run on the first signed order. The question presented is whether MM&A should be granted relief under Ariz. R. Civ. P. 60(c) from that untimeliness, by the entry of an order that will permit an appeal from the dismissal of its complaint.

SUMMARY OF ARGUMENT

¶ 26 Under appropriate circumstances, Ariz. R. Civ. P. 60(c) can be invoked to obtain relief from the failure to timely file a notice of appeal from

a judgment of the Superior Court. The circumstances under which such relief is permitted are set forth in the governing case, *City of Phoenix v. Geyler*, 144 Ariz. 323; 697 P.2d 1073 (1985). The trial court denied such relief, concluding that MM&A had not made all necessary showings required.

¶ 27 *Geyler* requires a court to consider four "factors" in deciding whether to grant relief. It also requires a court to conclude that, in addition to satisfying those "factors," a movant has demonstrated that the case presents "extraordinary," "unique," or "compelling" circumstances justifying relief.

¶ 28 The trial court erroneously concluded that MM&A had not shown adequate "diligence" in pursuing an appeal. It also erred in concluding that there were no "extraordinary," "unique," or "compelling" circumstances.

¶ 29 Because the facts and issues involved in this case do not depend upon disputed testimony, debatable policy issues, or the credibility of witnesses, this Court has more latitude to substitute its own judgment for that of the trial court, and determine for itself that Rule 60(c) relief is appropriate. The more constricted "abuse of discretion" standard does not apply here.

¶ 30 MM&A could only appeal the Rule 60(c) decision. Until that is resolved, it cannot appeal the merits of the order of dismissal. But if this Court concludes that Rule 60(c) relief should be granted, this Court should deem the underlying dismissal order to have been appeal, and order the underlying dismissal order briefed and decided.

ARGUMENT

I
THIS COURT SHOULD GRANT RELIEF UNDER RULE 60(C), ENTERING AN APPROPRIATE ORDER FROM WHICH PLAINTIFF MAY APPEAL THE DISMISSAL OF HIS COMPLAINT.

¶ 31 **a. Standard of Review.** The overall standard of review of a trial court decision granting or denying relief under Ariz. R. Civ. P. 60(c)(1) or (6) is whether the that court abused its discretion. *City of Phoenix v. Geyler*, 144 Ariz. 323; 697 P.2d 1073 (1985). However, in this case, a more particularized standard of review applies. As the *Geyler* court also said:

> "Where, however, the facts or inferences from [the proceedings and events in the trial court] are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question [of the propriety of the Rule 60(c) ruling] is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers." *Geyler*, *supra*, 144 Ariz. at 329.

Accord, Gorman v. Phoenix,152 Ariz. 179, 182, 7331 P.2d 74 (1987)("when uncontroverted facts in the record reveal circumstances that we believe warrant relief . . . this court can and will overturn the trial court's discretionary ruling."); *Ulibarri v. Gerstenberger,* 178 Ariz. 151; 871 P.2d 698 (App. 1993)(refusing to set aside the judgment in these circumstances is harsh, rather than fair and equitable. In such a case, the appellate court can 'look over the shoulder' of the trial court and appropriately substitute its judgment for that of the trial court.)

¶ 32 Such is the case here. The uniqueness of the situation, comprising "extraordinary circumstances" calling for relief, is established by the sequence of the trial court's issuance of *four* orders in short order. This sowed confusion in the record, and contributed to the problem. Moreover, the facts relating to the actions – or inaction – of counsel for Plaintiff were also undisputed. The trial court as well as opposing counsel accepted the narrative description. Finally, as explained more fully below, there is here no debatable issue of weighing competing policies requiring trial court deference. No delay or prejudice would have been suffered by the defendant. A mere *two day* delay was involved between the most conservative time when an appeal should have been notice, and when it was.

¶ 33 The issue is simple. Should the trial court have used the discretion granted it under Ariz. R. Civ. P. 60(c) – either subsection (1) ("mistake, inadvertence, surprise or excusable neglect") or (6)("any other reason justifying relief from the operation of the judgment") – to enter an order making it possible for Plaintiff to appeal the dismissal of its case? The court could have done so in one of two ways. It could have vacated its minute order of January 13, 2009. This would have revived its signed minute-entry judgment of December 26, 2008, thereby making timely, and effective, the notice of appeal from that order, which Plaintiff filed on January 23, 2009. For the trial court to act in this manner would have been, literally, permitted by Rule 60(c) ("relief from the operation of the judgment" – that being the January 13th order). Alternatively, the court could have entered a fresh order of dismissal, if it found the necessary circumstances warranting it. Plaintiff could then have appealed from the fresh order. The circumstances *did* warrant such relief.

¶ 34 The principal case governing this issue is *City of Phoenix v. Geyler*, 144 Ariz. 323, 697 P.2d 1073 (1985). *Geyler* both sets out the considerations governing whether relief under Rule 60 is appropriate, and validates the procedure of entering a fresh judgment if the circumstances warrant. *Geyler* accepted the analytical framework of a Ninth Circuit case,

Rodgers v. Watt, 722 F.2d 456 (9th Cir. 1983) for determining whether an order under Rule 60(c) should be granted in order to permit a delayed appeal. *Geyler* adopted the four considerations identified in *Rodgers*:

- Absence of the notice to a party required by the Rules of Civil Procedure. (When Geyler was decided, the rule was 77(d). Now, Rule 58(e).);
- Lack of prejudice to the opposing party;
- Prompt filing of a motion after actual notice; and
- Due diligence, or reason for lack thereof, by counsel in attempting to be informed of the date of the decision.

Geyler, supra, 144 Ariz. at 328.

¶ 35 *Geyler* said that in addition to the *Rodgers* factors, "extraordinary," "unique," or "compelling" circumstances establish the proper standard for determining whether to grant Rule 60(c) relief. *Id.*

¶ 36 The trial court denied MM&A relief because, it held, MM&A's counsel had failed to satisfy the last *Geyler* factor of "diligence." App. A ¶ 2. It also held that MM&A had failed to demonstrate that any "extraordinary," "unique" or "compelling circumstances existed. That court did not base its denial of relief on any of the other three *Geyler* factors, although it noted the inclusion of them in the calculus of determining a Rule

60(c) motion to allow a delayed appeal. *Id.* ¶ 3 ("While the parties dispute the issues of prejudice and diligence, there is little dispute that MM&A's counsel received 77(d), now Rule 58(e) notice, and that MM&A promptly filed the motion following actual notice.")

¶ 37 It is clear that the first *Geyler* factor – Rule 58(e) notice – either supports the grant of relief here, or does not stand in the way of doing so. What *Geyler* meant by this factor was whether a party had been sent Rule 58(e) notice by the clerk of court, but for reasons which implicate Rules 60(c)(1) or (6) counsel did not receive *actual* notice. ("In *Park v. Strick,* 137 Ariz. 100, 669 P.2d 78 (1983),[] we held that 60(c)(6) could be utilized for such a purpose when the 'aggrieved party establishes a *lack of knowledge* that judgment has been entered, and asserts additional reasons that are so extraordinary as to justify relief.' " *Geyler, supra,* 144 Ariz. at 328, *emphasis added*.) This is because if a party has not even been sent Rule 58(e) notice, it can apply for an extension to file a notice of appeal, invoking Ariz. R. Civ. App. P. 9(a) (court may extend time to appeal if it finds, *inter alia,* that ". . . . a party entitled to notice of entry of judgment did not receive such notice . . .). And it could do so without the need to show the exceptional circumstances or dealing with any of the other considerations discussed in *Geyler*.

¶ 38 The trial court also did not rest its denial upon any finding that the opposing party – the Yavapai-Apache Nation – would be prejudiced by granting relief. Clearly, no such prejudice could have existed. For the delay resulting from MM&A's mistake, followed by its prompt filing of a motion for relief under Rule 60(c), was miniscule. Had the trial court not confused the situation by signing and entering a judgment on December 26, 2008; and had MM&A's counsel not made the mistake it did in not docketing the earlier signed judgment for appeal; then MM&A's appeal could have been taken as late as January 20, 2009.[3] MM&A filed notices of appeal three days later, on January 23, 2009. Its notices purported to appeal from both signed judgments as well as – unsuccessfuly – its attempted appeal from the trial court un-signed order of January on 13, 2009. A three day delay could in no way have prejudiced the opposing party.

¶ 39 The trial court expressly concluded that MM&A *did* promptly file a motion, after receiving actual notice. Indeed, the motion was filed *one day* after counsel discovered the expungement by the court of the December 26, 2008 order, and the existence of the signed, but un-docketed order of December 19, 2008.

[3] The earlier judgment had been signed and entered by the trial court on December 19, 2008. The thirtieth day, for appeal, fell on a weekend followed by a Monday holiday (MLKing day). Therefore a notice of appeal filed on Tuesday, January 20, 2009, would have been timely.

¶ 40 Thus, the trial court order can only stand if, indeed, MM&A's counsel failed to act with diligence, which is to say its neglect was not excusable, *Geyler, supra*, 144 Ariz. at 328; and if there were no extraordinary circumstances.

¶ 41 In the trial court, counsel for MM&A conceded that there had been one point at which there had been "neglect." On Christmas eve of 2008, the signed order of December 19th had been returned to counsel's office by messenger service. Instead of being routed to the docketing clerk of the large law firm, it went into the secondary distribution in the office. Counsel did not remember having seen it. TR 8.

¶ 42 What must be remembered in assessing the significance of the foregoing error is that, on the very next day following a long Christmas weekend in 2008 (Thursday to Sunday) MM&A's counsel received a signed dismissal order, dated December 26, 2008; and properly had it docketed for appeal. Understandably, whatever had happened to the earlier signed order doubtless escaped any attention. Counsel had properly docketed a signed, appealable order, which allowed until January 26th to appeal.[4] There was no need for further worry about whether the December 19th order was or was not, in fact, the same as the unsigned December 18th order. (This was what

[4] The Monday following the thirtieth day.

MM&A counsel surmised may have been the reason that he did not remember focusing on the December 19th order. TR 9.)

¶ 43 The trial court also faulted MM&A's counsel for not having acted virtually instantaneously upon receiving the January 13th order nullifying the judgment of December 26th. That order had arrived at counsel's office on January 16. Lawyer Willis, the lead lawyer and to whose office in Tucson court orders were delivered, was about to depart for a family Grand Canyon trip. There was nothing in the trial court January 13th order making plain what was happening. "There was no flag that triggered that." TR 16. Willis placed the order in a routing box, and departed the next day for the five day trip. TR 10. The *first thing he did* upon returning to his office on January 22, 2009, was to take up the MM&A case, read the trial judge's January 13th order, examine the earlier orders, and file a Rule 60(c) motion *on the same day. Id.*

¶ 44 The trial court also concluded that MM&A's counsel had failed to explain why an assisting lawyer in the law firm's Phoenix office had not acted diligently. App. A ¶ 4. That lawyer did not receive court orders directly. Such orders went first to the Tucson office, where they were re-distributed to other firm staff and lawyers involved in the case, taking a day or more. Therefore, the trial court order of January 13th, which did not arrive

in the Tucson law office until January 16th, would not have arrived on the desk of the assisting lawyer from Phoenix until the next business day – January 20th – *at the earliest*. January 20th was also the *last day* available to appeal the signed order of December 19th.

¶ 45 In other words, these are the actions, one or more of which the trial court concluded constituted *inexcusable* fault:

¶ 46 1) When the signed order of December 19th arrived at the law office on Christmas eve day, it was not immediately docketed for appeal. Then, when the signed order of December 26th arrived at the law office on December 29th, no further attention was paid to the signed December 19th order, because of the existence of an appealable order which had been properly docketed.

¶ 47 2) When the January 13th order nullifying the December 26th order arrived on Friday, January 16th, counsel who was about to depart for a brief family vacation should have immediately worked on the order, realized its import, and filed a notice of appeal the very same day.

¶ 48 3) When (or more accurately, *if*) the January 13th order arrived on the desk of the assisting lawyer in Phoenix on January 20th, *he* should immediately focused upon it, realized its import, prepared and filed a notice of appeal from the December 19th order – by the end of *the same day.*

¶ 49 The trial court could not have denied relief to MM&A – and this Court should not do so – based upon a conclusion that MM&A's counsel were negligent. They have admitted that they were. But such negligence can nonetheless be *excusable* neglect, for purposes of granting judicial relief, permitting the appeal to proceed.[5]

¶ 50 The difference between negligence and excusable neglect, in the application of Rule 60(c), is well established, particularly in the federal jurisprudence of Fed. R. Civ.P. 60(b), from which Ariz. R. Civ. P. 60(c) was copied. "[F]or purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Pioneer Investment Svcs. Co. v. Brunswick Assoc. Ltd. Partnership,* 507 U.S. 380, 394, 113 S. Ct. 1497 (1993). *Accord*, *In re Vitamins Antitrust Class Actions,* 327 F.3d 1207, 1209-20 (D.C. Cir. 2003); *Union Pac. R.R. Co. v. Progress Rail Servs. Corp.*, 256 F.3d 781, 782 (8th Cir. 2001); *Cheny v. Anchor Glass Container Corp.,* 71 F.3d 848, 850 (11th Cir. 1996). In other words, negligence and excusable neglect can overlap. Negligence by the attorney can be, but is not always, excusable for purposes of Rule 60(c). In this case, it was.

[5] Such negligence *does* however, breach a standard of reasonable care owed by MM&A's counsel to their client.

¶ 51 In addition to meeting the four "factors" of *Geyler,* this case assuredly involves "extraordinary," "unique," or "compelling" circumstances justifying a grant of Rule 60(c) relief.

¶ 52 It is both "unique" and "extraordinary" that the trial court issued three different orders having virtually identical terms, two of them signed, within eight days. It is "unique" and "extraordinary" that, thereafter, the trial court, *sua sponte* and without advance notice to the parties, nullified the second signed order.

¶ 53 It surely was "unique" for the trial court to have had to confirm that "The Court also acknowledges its contribution perhaps to any uncertainty that might have resulted in the circumstances." App. A ¶ 9.

¶ 54 Being the last order, the December 26th signed order was the logical one to appeal. It *had* been known of and docketed by counsel, to appeal. At *best* and without any mistake at all by counsel, the trial court action nullifying the order of December 26, occurring twenty-five days into the thirty days allowed to appeal the order of December 19th, resulted in MM&A counsel having only *two days* after receipt of the order to figure out what had happened, prepare and file a notice of appeal. These are, indeed, "compelling" circumstances, calling for the grant of relief to MM&A so that it may appeal the dismissal of its case.

II
THIS COURT SHOULD ALSO DEEM THE RULE 60(C) RELIEF GRANTED AND AN APPEAL NOTICED, PERMIT BRIEFING OF THE APPEAL FROM THE ORDER OF DISMISSAL, AND DECIDE THAT ISSUE.

¶ 55 The only issue which this appeal can decide, at least technically, is the propriety of the trial court ruling on MM&A's Rule 60(c) motion. The Court's special actin order simply called upon the trial court to convert its unsigned minute order into a signed order so that it could be appealed. MM&A could then only appeal the Rule 60(c) ruling.

¶ 56 If this Court holds that Rule 60(c) relief should have been granted, it makes no sense to stop there, and remand the case to the Superior Court for the entry of a fresh order on the dismissal of the complaint, then to have MM&A file a notice of appeal and return to this Court with the merits issue.

¶ 57 This Court should – if it grants Rule 60(c) relief – deem the trial court order to have been entered, and the notice of appeal from that order taken. It should then order the parties to brief the merits appeal.

CONCLUSION

¶ 58 The United States Supreme Court has said, of Rule 60(b)(6) – which is Arizona Rule 60(c)(6) – that "the language of the 'other reasons'

clause . . . vests power in courts adequate to enable them to vacate judgements whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). Justice for this case means granting relief.

¶ 59 Respectfully Submitted.

Dated: May 9, 2012.

Michael J. Meehan
LAW OFFICE OF MICHAEL MEEHAN

By s/ Michael J. Meehan

Attorneys for Plaintiff -Appellant

CERTIFICATE OF COMPLIANCE

Under ARCAP 6(c) and 14(b), I certify that this Opening Brief uses proportionately spaced type of 14 points, is double-spaced using a roman font and contains 4,617 words.

Dated: May 9, 2012

By s/ Michael J. Meehan

CERTIFICATE OF SERVICE

A copy of the foregoing was served on all counsel of record this 9th day of May, 2012, via the Court's ECF system and via electronic mail upon:

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Dated: May 9, 2012.

By s/ Michael J. Meehan

APPENDIX A

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. PAUL E. TANG CASE NO. **C-20085949**

COURT REPORTER: NONE

DATE: February 4, 2009

MM&A PRODUCTIONS, LLC, an Arizona limited liability company,
Plaintiff,

vs.

YAVAPAI-APACHE NATION, a federally recognized Indian tribe; YAVAPAI-APACHE NATION CLIFF CASTLE CASINO, a business enterprise of the Yavapai-Apache Nation; TRIBAL GAMING BOARD; and, CLIFF CASTLE CASINO BOARD OF DIRECTORS,
Defendants.

RULING

IN CHAMBERS RE: PLAINTIFF'S EMERGENCY MOTION FOR REINSTATEMENT OF COURT'S ORDER GRANTING MOTION TO DISMISS

1. The Court has under consideration the Emergency Motion for Reinstatement of Court's Order Granting Motion to Dismiss Dated December 18, 2008 and Signed December 26, 2008 ("Motion") filed by MM&A Productions, LLC. ("MM&A"). The above-referenced defendants (collectively, the "Nation" or "Defendants") oppose, arguing that MM&A in essence seeks a delayed appeal for failing to timely file an appeal of this Court's signed minute entry order granting dismissal entered December 19, 2008. The Court has considered the parties' pleadings, their counsels' arguments, and the entire record. This ruling follows. Although the Court is sympathetic to the plight of MM&A, reluctantly, it must DENY the Motion for several reasons.

2. First, the Court is unpersuaded that MM&A has established the factors under Rule 60(c) and cases interpreting the rule that would warrant the Court's grant of relief. The Court is unconvinced that MM&A has met its burden demonstrating "diligence." *City of Phoenix v. Geyler*, 144 Ariz. 323, 332, 697 P.2d 1073, 1082 (1985). *See also Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983).

3. In *Geyler*, the supreme court specified certain factors to guide judges in determining whether to grant Rule 60(c) relief. These factors include the absence of Rule 77(d) notice, lack of prejudice to respondent, prompt filing of a motion after actual notice, and due diligence, or the reason for lack thereof, by counsel in attempting to be informed of the date of decision. *Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078. *Geyler*

Sybil Clarke
Judicial Law Clerk

noted that ultimately, "excusable neglect" turns on "diligence" as "diligence is the final arbiter of whether mistake or neglect is excusable." *Id.* at 332, 697 P.2d at 1082. Thus, relief under the rule may only be granted upon a showing of "extraordinary," "unique" or "compelling circumstances" in addition to the preceding four factors. *Id.* at 328, 697 P.2d at 1078. While the parties dispute the issues of prejudice and diligence, there is little dispute that MM&A's counsel received Rule 77(d), now Rule 58(e) notice, and that MM&A promptly filed the Motion following actual notice.

4. Considering the *Geyler* factors, the Court is unable to find diligence based on this record. First, it is undisputed that on or about December 22, 2008, MM&A's respective counsel received the Court's order that was signed and file-stamped December 19, 2008, granting Defendants' dismissal motion ("December 19 Order"). Rule 58(e) specifies that a judgment in the form of a signed minute entry is deemed entered on the date the Clerk affixes a file-stamp on such order. Rule 58(e), Ariz.R.Civ.P. Thus, a signed minute entry order that is filed with the clerk of the court constitutes a formal judgment, and the time for filing post-judgment motions and/or prosecuting an appeal runs from the time of filing. *Focal Point, Inc., v. Court of Appeals of State of Arizona, Div. One*, 149 Ariz. 128, 717 P.2d 432 (1986). As the December 19 Order was signed by this Court and filed with the clerk on December 19, 2008, the 30-day time for appeal commenced running on that date. MM&A's counsel in Tucson is unsure why his office failed to docket this signed order, and MM&A also provided no reasonable explanation for why co-counsel in Phoenix within the same firm failed to be alerted to entry of a final judgment, resulting from entry of the December 19 Order. However, MM&A's counsel conceded his office received the order on December 24, 2008.[1]

5. Next, the unsigned December 18, 2008 order, file-stamped December 19, 2008 at 8:48 a.m. ("December 18 Order"), was entered in error by the Clerk as it had not been signed by the Court.[2] On December 26, 2008, this Court, under the mistaken belief that it had in the first place, overlooked signing and entering any order, executed the December 18 Order upon its return from the Clerk (the "December 26 Order"). However, there is nothing to indicate that on December 26, 2008, the Clerk file-stamped the now erroneously executed December 18 Order as it remains file-stamped December 19, 2008, and thus, still 'entered' as of the date the Clerk originally affixed its file-stamp, or December 19, 2008. *See* Rule 58(e).

6. In addition, upon learning that it had inadvertently signed two orders of dismissal in the same matter, this Court rescinded the December 26 Order, which of course, was the December 18 Order that had been entered in error by the Clerk, notwithstanding that it had not been signed and yet, contained a signature line for the Court's approval. As the Court had not intended the December 18 Order to be entered in the first instance, it directed removal of the December 26 Order by order file-stamped January 14, 2009 ("January 14 Order"). This occurred six days prior to expiration of the appellate time for the December 19 Order. And, while during a

[1] Counsel said although the December 19 Order was processed by the intake clerk at his office, "for some reason, [it] was not placed in the docket system" but it was distributed "in the office" apparently to co-counsel on the matter. However, in any event, counsel said he had "no recollection of receiving it."

[2] An unsigned order or minute entry of course, is not a judgment and is subject to being vacated or modified. *Phillips v. Adler*, 134 Ariz. 480, 481, 657 P.2d 893, 894 (App.1982).

Sybil Clarke
Judicial Law Clerk

portion of this period, MM&A's Tucson counsel was unavailable, MM&A has failed to present any circumstances demonstrating an exercise of diligence by co-counsel within the same firm as well as any other personnel perhaps reasonably overseeing the unavailable attorney's calendar.[3]

7. Thus, in these facts, MM&A's respective counsel had actual notice of the December 19 Order five days after its entry by the Clerk. Counsel also possessed the December 26 Order, displaying a December 19 file stamp, by December 29, 2008, and counsel possessed the January 14 Order by January 16, 2009.

8. MM&A contends its counsel did not receive actual notice of the orders on their dates of entry. Yet, the time periods for filing post-trial motions or prosecuting an appeal run from the date of entry of judgment, even when a notice of entry is not actually received. *Park v. Strick*, 137 Ariz. 100, 102-3, 669 P.2d 78, 80-1 (1983); *Old Pueblo Transit Co., v. Corporation Commission of Arizona*, 73 Ariz. 32, 36, 236 P.2d 1018, 1021 (1951); *Lone Mountain Ranch, Inc. v. Dillingham Investment, Inc.*, 131 Ariz. 583, 584-5, 643 P.2d 28, 29-30 (App.1982).

9. This Court recognizes it possesses broad discretion concerning MM&A's request for relief under Rule 60(c). The Court also acknowledges its contribution perhaps to any uncertainty that might have resulted in the circumstances. Notwithstanding this, however, the Court is unable to grant MM&A's relief as the rule may be granted only upon a showing of the four *Geyler* factors, *in addition to* "extraordinary," "unique" or "compelling circumstances" -- none of which this Court finds in light of this record. *Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078.[4]

10. Finally, the Court is unconvinced that it possesses, as MM&A asserted at hearing, simply the "plenary" power to rescind the January 14 Order as doing so would effectively grant to MM&A a delayed appeal without consideration or application of the Rule 60(c) factors as enumerated above.

In light of the preceding, the Court DENIES MM&A's Motion.

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[3] Counsel said he left for the Grand Canyon with his family on January 17, 2009, after *having reviewed* the January 14 Order the day before, or January 16, 2009.

[4] MM&A's citations to *Lennar, Corp. v. Auto-Owners Ins. Co.*, 214 Ariz. 555, 151 P.3d 538 (App.2007) and *Coconino Pulp & Paper v. Marvin*, 83 Ariz. 117, 317 P.2d 550 (1957), are distinguishable. In *Lennar*, the trial court vacated and re-entered a judgment in order to allow Lennar to appeal, where the minute entry notice of entry of judgment had never been issued as per the trial court's usual practice. In contrast, in the facts here, MM&A's counsel received actual notice. Similarly, in *Coconino Pulp*, counsel failed to file an answer, resulting in a default judgment being taken. Given the difference in efforts expended between merely answering a complaint and thoroughly briefing and arguing a motion to dismiss, the Court is unable to find that counsel here exercised due diligence as counsel did in *Coconino Pulp*. Given the fact-intensive examination required to determine diligence, the Court is unable to find that counsel's efforts amounted to the same exercise of diligence, considering that counsel for MM&A noted that he had actually received the orders in this case, but had either overlooked or not reviewed them, and that he was unable to apprise the Court as to when (or indeed, whether) co-counsel in Phoenix had reviewed the orders. Furthermore, *Coconino Pulp* is factually inapposite, in that the parties here were aware that the Court had taken the matter under advisement and was going to issue a ruling.

Sybil Clarke
Judicial Law Clerk

DISTRIBUTION ONLY:

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Clerk of Court- Civil
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APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

MM&A PRODUCTIONS, LLC, an Arizona limited liability company, Plaintiff, vs. YAVAPAI-APACHE NATION, a federally recognized Indian Tribe; YAVAPAI-APACHE NATIONS CLIFF CASTLE CASINO, a business enterprise of The Yavapai-Apache Nation; TRIBAL GAMING BOARD; and CLIFF CASTLE CASINO BOARD OF DIRECTORS, Defendants.	No. C 2008-5949

BEFORE: THE HONORABLE PAUL E. TANG
Judge of the Superior Court
Division 28

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Motions Hearing)

January 28, 2009
Tucson, Arizona

Reported By:
Tracy K. Johnston, Official
RPR, Certified Reporter 50221

* * *

APPEARANCES

FOR THE PLAINTIFF MM&A PRODUCTIONS, LLC:
SNELL & WILMER, LLP
By: Jeffrey L. Willis, Esq.
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FOR THE DEFENDANT YAVAPAI-APACHE NATION:
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Kirkland, WA 98033

Tucson, Arizona
January 28, 2009
9:00 o'clock a.m.

P R O C E E D I N G S

(Whereupon, the following proceedings took place in open court.)

THE COURT: Good morning, everyone. Are we waiting on anyone else to join us?

MR. WILLIS: My colleague Rob Bernheim is coming, Your Honor, but we can start without him.

THE COURT: This is C 2008-5949, MM&A Productions versus Yavapai-Apache Nation, et al. -- actually, et ux., C 2008 -- I've already indicated the C number. Sorry about that.

Counsel, respectfully, will you please announce your appearances.

MR. WILLIS: Jeffrey Willis on behalf of plaintiff.

MR. CROWELL: Scott Crowell on behalf of defendant.

THE COURT: Welcome, gentlemen.

All right. We're gathered here with respect to the plaintiff's request to reinstate the Court's order granting

the motion to dismiss dated December 18, 2008, and signed December 26, 2008. This is an emergency motion. First of all, the record should reflect that I've reviewed the motion filed by the plaintiff as well as the defendant's response, which was faxed to me yesterday afternoon -- actually, before lunchtime. Does the plaintiff have a reply to that?

MR. WILLIS: We do not, Your Honor. Although I intend to address the points that are raised in the response in my comments to the Court this morning.

THE COURT: Okay. All right. Let me at least ask the parties, first of all, relative to the time for setting this hearing, I'll note that the Court received this emergency motion on Thursday, January 22 --

(Mr. Robert Bernheim enters.)

THE COURT: Welcome, Mr. -- is it Benheim?

MR. WILLIS: Bernheim.

THE COURT: Bernheim. Welcome to you, sir.

And it's my recollection from staff that Mr. Bernheim contacted our office looking for a hearing on Friday.

MR. WILLIS: I believe that's true. Rob?

MR. BERNHEIM: Yes, Your Honor.

THE COURT: And I guess we were available, but I understand that Mr. Crowell you wanted to appear not telephonically, but you were unavailable and then -- anyway,

the point is that the parties were unavailable for a hearing for either Monday or Tuesday because we were in trial yesterday, so today is the earliest time for having a hearing. Is that kind of procedurally where we're at in this emergency motion?

MR. WILLIS: I believe so.

MR. CROWELL: That's correct.

THE COURT: Is there any issue about how quickly the Court set that hearing in terms of, you know, the earliest time for setting a hearing for the parties at all?

MR. WILLIS: I don't believe so, Your Honor.

THE COURT: How about you?

MR. CROWELL: Well, Your Honor, the only point is that we had to rush a response on this based on it. And if the merits are grant -- if the merits of the motion are there, we don't see why it was set in an emergency hearing because he's still asking to go retroactively back to an order that's already been addressed.

THE COURT: I understand. But I'll note that defendants did file a response, although I haven't had a chance to review all of the cases. I've had an opportunity to glimpse some of them.

All right. Before we get to the merits of the arguments of the parties, let me ask this, do we need to take any evidence?

MR. WILLIS: Your Honor, I would be willing to be placed under oath and describe to you exactly what happened, although I'm not sure that's required because of the constraints that are on attorneys anyway.

THE COURT: I know. That's why I'm asking. If the parties are willing to stipulate to pretty much what's in the pleadings, I don't see the need for evidence. But I leave it up to the parties because, after all, I leave it to you guys to figure out what record you want to make.

MR. CROWELL: Well, Your Honor, our argument is that the evidence that has been averred in the declarations is insufficient under the record. So if they're willing to stipulate that no additional evidence will be submitted, that will be fine by our account.

MR. WILLIS: We have one piece -- I'm not sure it's evidence. I'll describe it to the Court. It's part of the narrative of what happened. And I guess what I would suggest is after I describe it, if Mr. Crowell has an objection or wants to explore it further, then we can deal with that at that time.

THE COURT: Okay. Does that work for you, Mr. Crowell?

MR. CROWELL: Yes, Your Honor.

THE COURT: Okay. All right. This is your motion, Mr. Willis.

MR. WILLIS: Thank you, Your Honor. Let me start by saying that I believe that both parties agree that the resolution of the issues that are raised by the emergency motion is within the sound discretion of this Court. So that Your Honor will be acting within your authority in resolving the matters that we've raised.

Basically what we're seeking is justice for our client, MM&A, in the context of an unfortunate series of events that has led us to this courtroom attempting to protect the right of our client to appeal your decision that there is no jurisdiction in this Court to resolve the merits of the dispute between our client and the Yavapai-Apache Nation. And I raise that initially because the seminal case or the case relied primarily on by the Yavapai-Apache Nation, which is City of Phoenix versus Geyler, notes specifically on page 1073 of the P.2d publication that in that case, the party seeking relief had had its full day in court. That's the initial distinction of that case. Here the resolution was based on a preliminary issue which is whether or not the Court had jurisdiction, not whether or not there was merit to the underlying claims for breach of contract.

Having said that, let me describe to the Court what happened that brings us here. On December 18th, you issued a minute entry which was filed on December 19th, which ruled in favor of Yavapai-Apache Nation dismissing the matter

for lack of jurisdiction. That minute entry order was not signed. It was received by our office on December 22. And it was received in the regular course. I believe there's a box for matters involving our firm and the Pima County Superior Court in the clerk's office, which E-Z Messenger or Hawkins, or whatever they're called now, picks up on a daily basis. Our practice is, is to have all of those -- everything that's in the box at the clerk's office delivered to the front desk of our office in Tucson where we have personnel who review it and determine whether or not it should be distributed immediately to the lawyers, whether or not it should go to the docketing clerk, or whether it should go up to the service that we have that distributes papers in the office. That happened on December 22. And, in fact, that ruling was delivered to the docket clerk who, on December 22nd, sent me an e-mail saying that the motion to dismiss has been granted, but it's not signed by Judge Tang, please advise if there is some docketing to be done on this matter. And I advised that no, because it wasn't a signed minute entry, there was no docketing to be done on that matter.

On December 24th, which was Christmas Eve, according to our records, we receive the December 19th order that Your Honor signed and which differed in some respects from the December 18th order. This was received -- it was processed by the intake clerk at the office, but for some reason was not

placed in the docket system. It didn't go to the docket clerk, it went to the secondary level of distribution in the office.

I do not recall seeing that minute entry. I'm not saying I didn't, but I don't recall seeing it. I believe that if I did, I assumed it was just the same thing I had received a couple of days before and stuck it in my out box, but I have no recollection of receiving it.

On December 29th, which was a Monday, the Monday following Christmas, we received the December 26th signed order, which was the December 18th unsigned order now signed, which again was picked up at our box. That ruling was delivered to the docket clerk, and I received an e-mail on that date saying, all right, I've now received the signed ruling, what should I docket. And I put notice of appeal, motion for new trial in my responsive e-mail on the 29th of December.

And if Your Honor would like a copy of this e-mail string or if Mr. Crowell would like a copy -- actually, I have one -- I would be glad to give it to you or to him. In fact, would you like to see it?

MR. CROWELL: I would like a copy, yes.

MR. WILLIS: On January 13th, Your Honor issued an order which vacated the December 26th signed minute entry order from which we had docketed the appeal time. We received that last -- a week ago Friday. I know I received that, but I put it in my out box. And on Saturday morning I left for a

family trip to the Grand Canyon where I was incommunicado for roughly five days. When I came back on Thursday, the date that we filed our motion, my first order of business was to just reassure myself that January 26th was the appeal date for this case. And in so doing, I discovered -- I reread your order vacating the December 26th order and the reference to a second order which, by the way, your order vacating the December 26th minute entry order did not specifically reference the December 19th order. It simply said that I signed two orders in this case, so I'm withdrawing this one. But I did look at it. I went back to the file, discovered that we had received the December 19th order, but it hadn't been docketed, and then immediately filed this motion.

Now, what we ask you to do, Your Honor, is to ensure through the exercise of your discretion that an injustice is not done to our client MM&A by depriving it of its ability to appeal the decision. This can be done in two ways. You can withdraw your January 13th minute entry, which would restore the December 26th signed order, which would make our notice of appeal filed last week timely. Or you can exercise your discretion under Rule 60(C) and simply set an effective date upon which your minute entry order dismissing the case for lack of jurisdiction would be deemed to be final.

Now, the first route, simply withdrawing the first order -- or the January 13th order, I believe you could do

within the exercise of your discretion based on these circumstances without engaging in any detailed or elaborate analysis. But even if you do analyze this under Rule 60(C), Sections 1 or 6 -- 1 is excusable neglect and 6 is the any other reason that would justify relief. We believe that we've satisfied those standards.

Under the circumstances of this case, where the multiple orders were issued during a holiday season where we do have an established procedure for docketing dates that, for some reason inadvertent, did not catch the December 19th order, we believe that satisfies any standard of excusable neglect starting from the Coconino Pulp case in 1958 through the Lennar case decided last year.

As to subsection 6, I mean, Your Honor, the subsection 6, which is sort of the dragnet clause of Rule 60(C), if there was ever a situation that would call out for exercise of your discretion under that, this would be that case. There is no prejudice to the Nation. At most, the appeal will take four or five days longer than it would have otherwise taken; and there is no reason, really, Your Honor, in the interest of justice why the relief we seek should not be granted.

I can address the request for attorney's fees or open this for attorney's fees if you'd like that now, Your Honor, or I can wait and rebut whatever Mr. Crowell has to say.

THE COURT: Whatever you feel like you want to --

MR. WILLIS: Well, let me make these few brief comments. Under Rule 54(A), an application for attorney's fees is to be filed within 20 days after the mailing of the order establishing the predicate for an application for attorney's fees. It doesn't require a final order. It doesn't require a signed order. All it requires is the paper representing the decision and it's keyed into the mailing date from the clerk of the court.

54(A) also requires that a request for attorney's fees be made in the pleadings and that wasn't done. They say, well, we never filed an answer so we couldn't file a request for attorney's fees. But they could have asked for attorney's fees in their motion to dismiss, which they did not. But, more importantly, that issue is completely unlinked to the issue that brings us before you today. Whether or not they have either waived or failed to preserve their ability to get attorney's fees, let alone whether 12-341.1(A) even applies to this situation, because it was a dismissal for lack of jurisdiction as opposed to on the merits, are matters that can be resolved if they choose to file an application for fees. We can object on the basis it wasn't timely. We can object on the basis it wasn't asked for in the motion itself or the reply. But there is no reason that it should be linked to the relief that we're seeking from you here today.

THE COURT: Thank you.

MR. WILLIS: Thank you.

THE COURT: Mr. Crowell.

MR. CROWELL: Well, Your Honor, I'll first address the merits of the motion. And if there's a word that just keeps coming back both in the case law and in my analysis of the facts that they presented, it's a lack of diligence. We actually even have more of that presented in oral argument today when he says: For some reason, the December 18th order was not placed in the docketing system.

Then he says on the December 19th order --

THE COURT: You mean December 19th order was not docked.

MR. CROWELL: He said that they received the December 19th order dated December 18th unsigned.

THE COURT: No, no. I think he was talking about the December 19th order that was signed. That one was not docketed.

MR. CROWELL: Well, okay. My recollection of what he said is that the docketing clerk received the unsigned order.

THE COURT: Okay.

MR. CROWELL: You're correct. My recollection of what he said is that the docketing clerk received the unsigned order and said, in e-mail, what do I do about it. Response

back, well, it's not signed, don't enter it. Lack of diligence number one.

Then he says regarding the December 19th signed order, one, I don't recall seeing it; and if I did see it, I will presume that it's the same thing I saw before. Well, when he received and became aware that there was an unsigned order, there should have been a red flag that went on that said we may have an issue here regarding the docketing of the proper time for appeal. There's nothing in their statement of the record that provides any kind of diligence or explanation of why either the first unsigned order or the first signed order were not put into the docketing system. And then to add on top of that the December 26th order, which date they did go on, is file stamped December 19th. So you have a third opportunity to have docketed the proper date into the docketing system which didn't come about.

Now, I understand that mistakes happen. But I don't agree with the statement that this is broadly within the sound discretion of this Court. The case law lays out standards. And it says if you're going to be relieved from the very clear circumstances of an untimely appeal, that you have to go beyond just a mere inadvertence and have shown that you had exercised diligence. There were three times where red flags should have gone off that says at a minimum we have confusion here as to what the proper date is. Instead, they're

asking this Court to excuse all of that without explanation, without an exercise of diligence, and to simply move forward with the December 26th date.

Another part of this explanation is when -- of their explanation, which I think is a fourth lack of diligence, is he says, well, in terms of the Court's order that wound up vacating the December 26th order, when we figured all this out, well, I had family commitments and was out of town and found out, you know, the last day. But there's no explanation whatsoever of why his co-counsel didn't look at that order and immediately respond to it. Had he done it, they could have filed a timely appeal.

So the real problem that I have with this motion being granted is that there is no evidence presented to the Court that demonstrates the type of diligence necessary on the part of the moving party in order to be able to be excused by this Court and put the Yavapai-Apache Nation in the prejudice position of now having to spend more time and more attorney's fees being hauled further into a court which lacks jurisdiction over the matter, attorney's fees that we're going to incur.

We made a deliberate decision to not seek attorney's fees. Our request for attorney's fees now is not based on let us back in. Our attorney's fees request now is saying if you're going to grant a motion that is based in deep equity power of the court to excuse them from jurisdictional

and clear rules of this Court, then minimize that prejudice to us by allowing for an award of attorney's fees. That's the equitable grounds in which we are seeking that, to offset the mitigation or mitigate the prejudice that we are going to suffer if you are going to grant this extraordinary relief the plaintiff is requesting.

Now, we believe that the correct decision is to say that the diligence isn't presented in the record here. And the December 19th order is the final order and they just simply suffer the consequences of not having filed an appeal. But if you're going to grant that, we are clearly prejudiced by having to incur the additional burdens. The Court can mitigate that prejudice by allowing for an award of attorney's fees.

THE COURT: Thank you.

Anything else?

MR. WILLIS: Yes, Your Honor. Let me explain about Mr. Vanacour. He is in our Phoenix office. He is on our distribution list for everything in this case, but he would have received your order of January 13th. And since we received it on that Friday, the following Monday was a holiday, the soonest he would have received it was the following Tuesday. And, again, since there was nothing in the order that said I'm vacating the order I signed on the 26th of December in favor of the one I signed on the 19th, there was no flag there that I think would have triggered that. Plus he, like me,

assumed that the docketing system had worked and that whatever dates were critical had been docketed, which we now know they weren't.

It's interesting, whenever we find ourself in a situation where we're talking about either exercise of diligence or excusable neglect, hindsight is always 20/20. I would like to be able to come in and say to you the reason that the December 19th order was not sent to the docket clerk was because we had a fire or some other extraordinary event. But the fact of the matter, it was human error. And human error is what the courts have addressed in the context of excusable neglect and the context of due diligence.

We acknowledge there was a mistake. Was the mistake such that it could have been done by reasonable people exercising due diligence? I think the answer here is clearly it could have been. Clearly it was. There were so many extraneous factors: Christmas Eve, two signed orders. Oh, by the way, no final judgment. Frankly, if they had sought attorney's fees in the regular course, they would have been required to apply for attorney's fees, await the resolution of that, and then submit a 58(A) judgment, which they did not do.

I really have nothing more to say unless Your Honor has questions about the process. I think it's apparent that it didn't work. And the circumstances under which this confusion has arisen are very understandable.

With regard to the request for attorney's fees, I just have to characterize this as opportunistic. They made a deliberate decision not to seek attorney's fees, but now when we're talking about a delay of maybe three or four days in the overall proceedings of this case, they're now somehow prejudiced because they can't? I just don't understand that. But again, as I said before, that is an issue that is not logically or legally linked to the one we come before you with, Your Honor, and might reflect just a very cynical attempt to take advantage of this situation. I have nothing further, unless you have questions.

THE COURT: You can be seated, if you prefer, or stand. I do have a few questions.

Can you clarify for me MM&A's position that the Court has the ability to rescind the January 13th order. And, if so, under what standard and on what bases? Isn't it still a Rule 60 analysis?

MR. WILLIS: I don't think so, Your Honor. Because what you were doing in the January 13th order was purely administrative and purely within the operation of your chambers. What would have happened if you hadn't rescinded that? You would have had a December 19th signed order, which was appealable. You would have had a December 26th order, which was appealable, which is really all we're asking that you take us back to. I think it's within your plenary powers to

rescind any order that you make, and especially any order that you make which is designed by you to clear up what you believe to be was an administrative error or administrative ambiguity. So I would say plenary power.

THE COURT: Mr. Crowell, what's your response to the Court's question?

MR. CROWELL: This is clearly a motion for relief from the failure to file a timely appeal and needs to be viewed from those standards. The mechanisms that the Court may use, if it decides to grant that order, you know, I believe that it's correct the Court could theoretically vacate all the orders and reinstate a new judgment, but it still comes back to the standard based on seeking the ability to file an untimely appeal.

THE COURT: Okay. Mr. Willis, was January 19th a workday at the firm?

MR. WILLIS: No, it was not, Your Honor. It was the Martin Luther King holiday, we're closed.

THE COURT: So even though it's an official holiday, does that mean there wasn't anybody working that day?

MR. WILLIS: I'm sure that there was a few poor souls in the office. I wasn't there, so I can't tell you that for sure, but that seems to be the case.

THE COURT: All right. Can I ask you about Mr. Van -- what's his last name?

MR. WILLIS: Vanacour.

THE COURT: Vanacour? Would he have received the December 19th signed order?

MR. WILLIS: He would have received the December -- well, that's a good question, Your Honor. That's a very good question. I can answer that with a phone call. I don't know.

THE COURT: Okay. Let me follow-up with some additional questions. Is the order which the Court signed on January [s/c] 26th, which is, of course, dated December 18th, file stamped the 19th of December --

MR. WILLIS: Right.

THE COURT: -- which is originally the unsigned order --

MR. WILLIS: Right.

THE COURT: -- is there a file stamp of December 26 for that order?

MR. WILLIS: My impression was that it was -- I thought it was entered on the 26th. The copy that I have in front of me does not have a file stamp. But I don't know if we checked the docket or otherwise, but I was under the impression that it was actually entered on the 26th.

THE COURT: I guess that's what -- is that potentially an important issue to the parties?

MR. WILLIS: It could be.

THE COURT: I guess I need to get some clarification of what MM&A's position is on the difference between a file stamp order of December 19th in the morning of -- I can't recall what time -- it was like 8:48 in the morning, I think.

MR. WILLIS: 8:48, that's correct.

THE COURT: -- that is ultimately signed December 26th. When did the time run from, the file stamp date or the date that the Court signs it?

MR. WILLIS: Well, it can't run before the Court signs it. That's another point that Mr. Crowell made. He said we should have done some docketing based on the unsigned order. An unsigned order doesn't trigger anything other than the 20 days to file a request for attorney's fees.

THE COURT: Let me go back to that issue, if I could.

MR. WILLIS: Okay.

THE COURT: From your perspective, did you or Mr. -- I can't --

MR. WILLIS: Vanacour.

THE COURT: -- Vanacour. And I apologize to him right now because obviously I've mispronounced his name many times. What's the date that your firm received the December 26 signed order, which is dated December 18th, which is file stamped December 19th at 8:48 in the morning?

MR. WILLIS: We received that on December 29th, out of the box in the clerk's office, which, that's why I believe that it was, in fact, entered on the 26th.

THE COURT: Okay. And is there an issue -- what would be the firm's protocol for addressing a file stamp order of December the 19th that's not signed until the 26th?

MR. WILLIS: The docket would go off of the date of the signature because, obviously, a signed order could not be entered before it was signed.

THE COURT: All right. Then assuming that's the case, is there any dispute that the firm received the December 19th order, which is file stamped December 19th and I think also signed by this Court December 19th?

MR. WILLIS: There is no dispute that it was received. What I determined happened was it did not make it to docket.

THE COURT: And how did you -- how was that -- what kind of fact finding occurred to reach that determination?

MR. WILLIS: We have a log of everything that is brought in from Hawkins & Campbell that is done by clerical personnel. And this log shows that on December 24th, in the morning, we received the December 19th order, but it also indicates that rather than docket, it went to the Pitney Bowes or the company that does just general distribution and mail. So that's where the human error occurred. There was no

docketing effort on that day. I don't know if it was because the docketing clerk was out or because -- or for some other reason that it just didn't get to docket. But if the right set of eyes had seen that order, it would have been -- I would have gotten a call that says, okay, we now have a signed order and the dates would have gone from December 19th. The right set of eyes didn't see that order, but they did see, on the following Monday, the December 26th signed order which is what then was used to put the docketing dates in place.

THE COURT: Let's turn in terms of the other issue regarding Rule 60. Is there any dispute on the part of MM&A, notwithstanding the distinction raised by MM&A as to the Geyler case, otherwise the standards mentioning Geyler are the standards that are applicable?

MR. WILLIS: Well, yes, Your Honor. And let me go through those standards. If you're analyzing this under Rule 60, it's odd that Rodgers versus Watt was under Rule 60(B), but it appears that Geyler extended the analysis to Rule 60(C). You have the absence of 77(D) notice, which is now 58(D). And 58(D) talks about -- it talks about minute entries generally, but what it really focuses on is the notice you get from the clerk of court when a final judgment is entered, which has in the notice date of entry X. So a 77(D), which is now a 58(E) notice in this context, certainly in the Geyler case because they were talking about final judgments in the Geyler

case, it's talking about the notice from the clerk that a final judgment has been entered. There was no such notice issued in this case, because there has never been anything called a final judgment that has been submitted to Your Honor for signature. So, yes, there was a notice. Was it the notice that the court had in mind in Geyler? I don't think so, but there was notice.

Second factor, lack of prejudice to respond. They cannot seriously argue that they're prejudiced by having the appeal date go from January 20th to the 26th. I'm sorry, there's just -- there is no basis to find prejudice there at all.

Three. Prompt filing of a motion after actual notice. We did that. We filed it the first day that it was cognitive and asked for an early hearing.

And then four, due diligence or reason for lack thereof by counsel in attempting to be informed of the date of the decision. I've explained the circumstances to you, Your Honor. I believe, again, under the Lennar case last year and the Coconino Pulp case in 1958, we satisfy number four.

So I believe if you want to analyze this under Rule 60 and determine that the best course of events is simply to say I am going to make my ruling dismissing the case based on lack of jurisdiction effective on January 28th, 2009, that's perfectly within your discretion under Rule 60(C).

THE COURT: What about the last factor mentioned

in Geyler that Rule 60(C) relief may only be granted upon a showing of extraordinary, unique, or compelling circumstances in addition to meeting the four factors -- the four Rodgers factors?

MR. WILLIS: Well, Your Honor, I think we satisfy that as well. It's certainly within your discretion to make the determination that the circumstances giving rise to this confusion satisfy that, but I do believe it's satisfied.

THE COURT: Okay.

MR. WILLIS: Again, we're talking here, too, obviously the confusion was caused by human error on the part of either a lawyer or someone working for a law firm. It wasn't caused by any representative other than an attorney of the client. But the party that is really adversely affected is MM&A. You have it within your discretion to ensure that this unnecessary potential adverse affect doesn't occur. We submit that on this record you would be perfectly within your discretion in either vacating the January 13th order or simply announcing another effective date for entry of your decision.

THE COURT: Thank you.

Mr. Crowell, obviously you get the word to respond to the various questions that the Court posed to Mr. Willis.

MR. WILLIS: May I make one more comment? If I haven't made this clear, Mr. Vanacour is in the Phoenix office.

Everything from this case goes to the Tucson office. So the administration of the case, if you will, is done here. Mr. Vanacour is on the circulation list, but there's obviously at least a day, if not more, delay from when we get it in Tucson to when he gets it in Phoenix.

THE COURT: Thank you. Mr. Crowell.

MR. CROWELL: I'll be very brief, Your Honor, just three points. First, the exhibit to their motion with the December 26th signed order has file stamped on it December 19th. At a minimum -- there actually may be more than three points.

The statement that if I receive a December 19th file date and a December 26 signature, I'm just simply going to go by the December 26 signature for purposes of docketing strikes me as dangerous, number one. But, number two, in terms of the level of diligence necessary to make the kind of relief that they're asking this Court to have, it's another one of those red flags. It's an opportunity right then and there to have tried to ascertain the correct date or get clarification from this Court of the correct date and they didn't do that.

I find the excuse that co-counsel is in Phoenix and, therefore, add more days to the time it's going to take for these orders to get to counsel of record in this case, frankly, to be a little bit surprising. My office is in Kirkland, Washington. My local counsel advises me of orders in

these cases virtually spontaneously upon receiving them. It's just the first thing that they do. So I find that not to be a legitimate answer.

The thing that really bothers me, though, is in opening statement he said I don't recall seeing the signed December 19th order. If I did see it, I presumed it was what I had already seen and passed on. That's a paraphrase of what he said, but we have a court reporter that can read it back specifically. Then his rebuttal he says if the December 19th signed order had been seen by the right set of eyes, it would have been properly docketed. Well, that seems to be very contradictory to what he said. In terms of trying to present to this Court the type of extraordinary circumstances that's necessary for the relief to be granted, the total lack of an explanation of why the signed December 19th order was not properly docketed appears to me to be fatal in terms of trying to meet the standards that the case law clearly states.

We're going to be subject to an appeal that is untimely filed if this relief is granted. That's prejudice. But the key -- I don't think this analysis goes beyond the failure to provide the type of extraordinary circumstances and demonstrate the type of diligence necessary to grant the kind of relief that the case law says is required in order for this kind of relief to be granted. I just don't see it. Thank you.

THE COURT: Thank you, Counsel.

MR. WILLIS: Your Honor, may I address the last point -- or the next to last point of counsel?

THE COURT: Sure.

MR. WILLIS: The order dated December 19th, the December 19th signed order, came in on Christmas Eve. In the regular course of events at our firm, one, it should have gone to docket, but that didn't happen. It didn't go to docket, it went to general distribution. That means I would have gotten it probably sometime in the afternoon of December 24th. I don't recall getting it. I don't recall seeing it. The next day -- the next business day for our firm was December 29th, which is the day we received the signed order dated December 26th. And that's when our docket clerk came to me and said -- or sent me the e-mail and said, hey, I've got it now, what do I do?

Again, we're talking about human beings, human error, human conduct. And I submit to you, Your Honor, given the dates involved here, it wasn't as though this came in midweek in March or something, it came in on Christmas Eve, that under those circumstances what transpired could happen to reasonable people engaged in activities that constitute diligence. That's my only point, Your Honor.

THE COURT: Thank you.

To the degree or extent that this is meaningful to the parties and relevant to their particular arguments and

positions, let me add the following from the Court's perspective. Okay.

The December 18th order, which was, as I said, file stamped on December 19th and unsigned, that was erroneously taken by my clerk down and file stamped. The reason I say that is because it's unsigned. I never signed it. And I understand there is existing policy by the clerk not to enter unsigned orders, which makes some sense because of, frankly, issues like this. But for whatever reasons, human error did play a role in this. It got taken down inadvertently and unbeknownst to this Division. Because the signed order that we intended to be effective was the December 19th order. Why? Because I signed it.

Now, we took a two-week vacation over the holidays as well. But I came in on the 26th of December and saw this file stamped unsigned order. I, too, did not realize at this point, in other words, two different orders down there, because I had thought I had signed the order I intended to be effective. You'll note that the two orders are different. There are minor changes. Substantively, they're the same in that they find lack of jurisdiction and grant the request to dismiss.

When the unsigned order was returned with a file stamp of December 19th, I mean I guess I could have done several things, including check to see whether there was a

signed order in place. But to be candid with you, it's highly unlikely the December 19th order would have been on docketing. I can't recall whether I actually looked or not. I don't believe I did. But as you know with the element of human error, I, too, signed the order thinking I must have forgot to sign it. That's where, I think, a lot of this all came down. The problem that I see in this and still remains is that this wasn't uncovered until somehow or another our staff, looking at the Agave file, observed there were two signed orders. At that point, I think it was the 12th is the date -- is the 13th or 12th?

MR. WILLIS: I thought it was the 13th, Your Honor.

THE COURT: It's file stamped the 13th, but I believe it's dated the 12th. That's the date wherein I issued the minute entry noting that through inadvertence that there are -- well, it reads as follows. I'm sorry. Excuse me. It's dated January 13th, file stamped the 14th, right. I have it in front of me. And it said: The Court having inadvertently signed two orders regarding defendant's motion to dismiss, it is ordered that the order dated December 18th, 2008, and signed on December 26th, 2008, is removed from the file and declared null and void.

That's kind of how this all happened, in my view, and contributed to some of the issues that I think are pending

before the Court. To the degree or extent that that plays a role in either of your arguments, does either party wish to respond? Mr. Willis.

MR. WILLIS: Well, Your Honor, we are naturally very hesitant to suggest that the Court contributed to the confusion, but I appreciate your acknowledgment that it did. I think that weighs even more heavily that this is covered by subsection one or subsection six of Rule 60 or simply cries out for some remedial action by the Court so that neither party is prejudiced.

THE COURT: How about you, Mr. Crowell?

MR. CROWELL: Your Honor, I appreciate the sharing because, frankly, I was curious as to how this came about. And, you know, I appreciate that if they had came in here with a record that showed that it was that error or that confusion that led to the untimely appeal, I don't even know if we would file an opposition. But the record that they show really provides no explanation.

What is clear is there was a December 19th order signed on December 19th and properly transmitted in what appears to be a slow boat. I would think that having a box that's across the street from the law firm would result in all these things to be faster, not slower, but even assuming -- even assuming that, they admit they received the December 19th signed order and they have no explanation of why that didn't

get docketed. They even admit that as of the December 18th unsigned order, you had a red flag saying, well, we know that this order is out there, but it's unsigned. We're going to have a docketing issue with it. And nothing done until the very last date where they say, well, let's argue to the Court that we relied on the December 26th order. Well, you know, they need -- that's misdirection. To get the relief granted, they have to show that they have some reasonable explanation of an extraordinary circumstance showing diligence on their part and still not being able to properly docket that December 19th signed order. It's not in the record. And, therefore, I believe that even given the fact that there was this confusion about a December 26th order, there's not the evidence necessary for the relief being requested.

THE COURT: All right, gentlemen. Let me do this. I'd like the opportunity to review the citations made by each party, and I'll take the matter under advisement. I'll be very -- it's a poor choice of words, but it comes to mind -- diligent in getting an order out as soon as I can, all right?

MR. WILLIS: Thank you, Your Honor.

THE COURT: Thank you all very much.

(Proceedings adjourned.)

C E R T I F I C A T E

I, TRACY K. JOHNSTON, Certified Reporter, No. 50221, do hereby certify that the foregoing pages constitute a full, true, and accurate record of my stenographic notes of the proceeding taken at said time and place, all done to the best of my skill and ability.

DATED this 29th day of January, 2009.

Tracy K. Johnston, Official
RPR, Certified Reporter 50221