IN THE COURT OF APPEALS
FOR THE STATE OF ARIZONA
DIVISION TWO

MM&A Productions, LLC, a 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 CASINO BOARD OF DIRECTORS, Defendants-Appellees.	No. 2 CA-CV 2012-0040 (Pima County Superior Court Cause No. C20085949)

APPELLEE'S RESPONSE BRIEF

Scott Crowell (ASB #009654)
Crowell Law Offices
10 N. Post, Ste. 445
Spokane, WA 99201
Telephone: (509) 474-1265
Facsimile: (509) 290-6953
scottcrowell@hotmail.com

William Foreman (ASB # 010617)
7272 E. Indian School Road, Suite 203
Scottsdale, AZ 85251
Telephone: (480) 941-2700
Facsimile: (480) 481-9021
williamforemanpc@me.com
Attorneys for Defendants-Appellees

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I. STATEMENT OF THE CASE

¶1 To ensure consistency with the duty of parties to perfect their appeal rights, and to accord a proper respect for the finality of judgments, a Rule 60 motion to allow for a delayed appeal based on "excusable neglect" may only be granted if the movant shows exceptional circumstances *and* diligent attempts to determine the appeal deadline. In denying MM&A's motion, the trial court issued a detailed decision setting forth the factual and legal bases for its determination that MM&A failed to make either showing.

¶2 In its opening brief, MM&A argues that the trial court could have reached a different determination given the applicable law and the facts and circumstances of the case. However, trial court determinations to grant or deny delayed appeals are reviewed under the abuse of discretion standard. Thus, to prevail in this appeal, MM&A must demonstrate that the trial court's decision lacks a reasonable basis in law or fact. Showing that the trial court could have reasonably reached a different decision falls short of this high mark. The trial court's denial of MM&A's Rule 60 motion accordingly should be affirmed.

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II. STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

¶3 On December 8, 2008, after extensive briefing, the trial court heard oral argument on defendant's motion to dismiss this case for lack of subject matter jurisdiction.[1] R.86, p. 1. Mr. Jeffery Willis, of Snell Wilmer's Tucson office, appeared and argued for MM&A. (Transcripts, passim, Appendix B to Opening Brief, Transcript of Hearing January 28, 2009, hereinafter "TR"). Also present for MM&A was Mr. Jason Vanacour, who is located out of the Snell Wilmer's Phoenix office. TR, p. 1. At the end of the hearing, the trial court advised counsel that it would take the matter under advisement. TR, p. 38.

¶4 On December 19, 2008, the trial court signed its order dismissing this case. R.86 p.1. The Court Clerk filed stamped and entered the order on that same day. R.86 p.3. Also on December 19, 2008 the Court Clerk entered, in error, a nearly identical order that was dated December 18, 2008 but *not* signed by the trial court.

¶5 On December 26, 2012, the trial court received a copy of the erroneously entered, unsigned order. R. 86, p.3. Acting under the mistaken belief that he had yet to sign a dismissal order, the trial court judge signed and dated the order and returned it to the Court Clerk. *Id*.

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[1]While not relevant to this appeal, Appellees dispute MM&A's portrayal of the relevant facts and law underlying the trial court's dismissal of MM&A's claims. Op. Br. at ¶ 7.

¶6 On January 13, 2009, the trial court discovered that it had inadvertently signed two dismissal orders in the case. R.86, p.4. On that same day, the trial court issued a *sua sponte* order declaring the errantly entered and now signed order null and void, and directing its removal from the file. R.86, p.4.

¶7 Counsel for MM&A received copies of all these orders. According to Willis, who testified at the Rule 60 hearing,[2] Snell Wilmer has its own box in the Office of the Pima County Superior Court Clerk for matters involving the firm. TR, p. 8. A messenger service checks the Snell Wilmer box daily and delivers any filings to Snell Wilmer's Tucson office, where personnel 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." TR, p. 8.

¶8 On December 22, 2008 the Snell Wilmer Tucson office received a copy of the erroneously entered, unsigned order. *Id.* Willis testified: "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 its 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." TR, p 8.

[2] While Mr. Willis offered to be placed under oath, he was not sworn in.

¶9 Willis next testified that on December 24, 2008 the Tucson office received a copy of the December 19, 2008 signed order. *Id*. According to Willis: "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 don't' recall seeing that minute entry. I'm not saying I didn't, but I don't recall seeing it." TR, pp. 8-9. The trial court inquired whether Mr. Vanacour would have received a copy of the December 19, 2008 signed order. Willis responded: "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."[3] *Id*., p. 20.

¶10 On December 29, 2008, the Tucson office received a copy of the erroneously entered signed order. According to Wills: "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." TR, p. 9.

¶11 On Friday January 16, 2009, the Snell Wilmer Tucson office received the *sua sponte* order. Willis testified that he reviewed a copy of the *sua sponte* order on January 16, 2009, placed it in his outbox, and left on Saturday morning "for a

[3] Later in his testimony, Willis advised the trial court that, although Mr. Vanacour is listed as counsel of record in the case, the "administration of the case is done here [in the Tucson office]." TR 26. Willis explained, however, that "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." *Id*.

family trip to the Grand Canyon where I was incommunicado for roughly five days." *Id.,* p. 9.

¶12 Upon return from his vacation on January 21, 2009, Willis testified that he "reread" the *sua sponte* order. *Id.,* p. 10. Next, Willis "went back to the file, discovered that we had received the December 19th order, but it hadn't been docketed" and then "immediately filed" MM&A's Rule 60 motion and requested an "emergency hearing." *Id.*, p. 10.

¶13 The trial court heard oral argument on MM&A's Rule 60 motion on January 28, 2009. At the conclusion of the hearing, the trial court took the matter under advisement. *Id.,* p. 32.

¶14 While the trial court issued its order denying MM&A's Rule 60 motion on February 4, 2009, it failed to sign it. MM&A appealed, and this Court stayed the appeal to allow MM&A to secure Judge Tang's signature. MM&A chose instead to re-litigate the merits of its Rule 60 motion *and* the merits of the dismissal. *See* August 28, 2009 Renewed Motion for Nunc Pro Tunc Relief. R. 51. This Court responded by dismissing MM&A's appeal on September 19, 2009. MM&A then sought review by the Arizona Supreme Court, which was denied on April 7, 2010.

¶15 On January 20, 2011, MM&A filed a complaint in Pima County Superior Court against Snell Wilmer, alleging liability for "negligence in investigating facts, conducting legal research, preparing pleadings and presenting arguments to oppose

a motion by the Yavapai-Apache Nation to dismiss Plaintiff's complaint in the civil action." *See*, January 20, 2011, Petition and Complaint, MM&A v. Snell & Wilmer, L.L.P., Pima County Superior Court Cause No. C20110478, Exhibit A to Motion for Judicial Notice, Crowell Decl. MM&A also alleged that Snell Wilmer was negligent in failing to timely appeal the December 19, 2008 signed order. *Id*.

¶16 Snell Wilmer moved to dismiss, arguing that the availability of appellate remedies to MM&A in its litigation against the Tribe precluded any liability. February 22, 2011 Motion to Dismiss for Failure to State a Claim, Exhibit B to Motion for Judicial Notice, Crowell Decl. On the eve of Snell & Wilmer's motion to dismiss, the parties stipulated to an extension of time to allow MM&A to pursue an appeal in its litigation against the Tribe. May 19, 2011 Stipulation to Extend Time, Exhibit C, Crowell Decl.; May 20, 2011 Order Extending Time, Exhibit D, Crowell, Decl.; June 16, 2011 Notice of Intent to Pursue Appellate Remedies, Exhibit E, Crowell Decl.

¶17 Next, MM&A attempted to obtain a signature from the court, which the trial court denied due to the passage of 16 months between the entry of the unsigned order and MM&A's request for the Judge's signature. June 13, 2011 Notice of Lodging Form of Order, R.73; August 1, 2011 Minute Entry Order, R.81.

¶18 MM&A then filed a special action petition seeking an order compelling the trial court to sign its order denying Rule 60 relief.

¶19 This Court determined that an order denying Rule 60 relief is appealable pursuant to § 12-2101(A)(2), and that Rule 58(a) requirements required the trial court to sign the order as a strictly ministerial act. *MM&A Productions v. The Honorable Paul E. Tang, and Yavapai-Apache Nation, et al,* Nov. 10, 2011 Memorandum Decision, 2 CA-SA 2011-0078, p. 9. The Panel accordingly instructed the trial court to sign its February 4, 2009 decision.

¶20 On January 20, 2012, the trial court signed an order identical to the February 4, 2009 order. MM&A then timely filed this appeal.

III. STATEMENT OF ISSUES

¶21 1. Whether the trial court abused its discretion when denying MM&A's Rule 60 motion for a delayed appeal.

¶22 2. If the Court determines the Trial Court abused its discretion in denying MM&A's Rule 60 motion, whether appellate jurisdiction lies to review the merits of the dismissal.

IV. ARGUMENT

A. The Extraordinary Relief of a Delayed Appeal must be Viewed Against the Affirmative Obligations of Parties and their Counsel.

¶23 Ariz. R. Civ. P. 58(e) provides that "lack of notice of the entry [of judgment] by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as provided in

Rule 9(a)."[4] As such, Rule 58(e) "clearly implies that a party has a duty to take legal steps to protect his or her interests and cannot simply rely on the court to give notice." *Park v. Strick,* 137 Ariz. 100, 104, 669 P.2d 78, 82 (1983). Consequently, the time periods for filing post-trial motions or prosecuting an appeal run from the date of entry of judgment, even when notice of entry is not actually received. *Id.,* 137 Ariz. at 102-3, 669 P.2d at 80-1. Arizona law also imposes a more general, yet similar duty upon attorneys to "insure that matters subject to prescribed time limits are acted upon within those limits, or that other appropriate action is taken to preserve a client's rights." *Id.* 137 Ariz. at 104, 669 P.2d at 82. Additionally, the purpose of rules setting strict time limits for filing appeals and forbidding courts from extending these time periods is to ensure the finality of judgments. *Id.*

¶24 Rule 60 relief to allow for a delayed appeal based on a party's "excusable neglect" threatens the repose secured by final judgments and is inconsistent with the duties of parties, and thus may only be granted it the movant shows exceptional circumstances in addition to his diligent attempts to determine the appeal period. Nor should a delayed appeal be granted if its effect would be to "relieve a party

[4] The limited relief allowed under Rule 9(a) does not apply in this case because MM&A admittedly received Rule 58(e)-compliant notice.

from the free, calculated and deliberate choices he or she has made." *Id.,* 137 Ariz. at 104, 669 P.2d at 82.

B. The Trial Court's Denial of MM&A's Rule 60 Motion is Reviewed Under the Abuse of Discretion Standard.

¶25 Trial court rulings on Rule 60 motions designed to allow for a delayed appeal are reviewed under the abuse of discretion standard in which appellate courts will "affirm where any reasonable view of the facts and law might support the judgment of the trial court." *City of Phoenix v. Geyler,* 144 Ariz. 323, 329-30, 697 P.2d 1073, 1079-80 (1985). MM&A incorrectly claims that *Geyler* gives this Court "more latitude to substitute its own judgment for that of the trial court … because the facts and issues involved in this case do not depend on disputed testimony, debatable policy issues, or the credibility of witnesses." Op Br. at ¶29. At the time the trial court in *Geyler* denied Rule 60 relief, Arizona law held that trial courts had no authority to vacate and re-enter judgments to allow for a delayed appeal. *Compare Geyler,* 144 Ariz. at 330, 697 P.2d at 1080, *with Vital v. Johnson,* 128 Ariz. 129, 132, 624 P.2d 326, 329 (App. 1980). Because the trial court failed to indicate whether it exercised discretion, the Supreme Court determined it likely that the "trial court denied relief because it thought it had no power to grant the motion." *Id.* 144 Ariz. at 330, 697 P.2d at 1080.

¶26 Under these unique circumstances, the Supreme Court examined the record "to determine whether tenable grounds might exist for denial of relief" under Rule 60. *Id.* The Supreme Court reviewed the record and commented "if we were the finders of fact, we would find the mistake excusable … and relief appropriate." *Id.* at 333, 607 P.2d at 1083. However, given the deferential abuse of discretion standard of review, the Supreme Court remanded to the trial court to make those factual determinations. *Id.*

¶27 The unique circumstances in *Geyler* are not present in this case. Unlike the trial court in *Geyler,* the trial court in this case clearly exercised its discretion, as evidenced by the trial court's detailed written decision setting forth the applicable legal standards along with its factual determinations. Thus, this Court must "affirm where any reasonable view of the facts and law might support the judgment of the trial court." *Id.,* 144 Ariz. at 330.

¶28 Additionally, MM&A's assertion that this case does not involve determinations of credibility is not supported by the record. During the January 28, 2009 hearing, Judge Tang asked Mr. Willis to explain or provide evidence of excusable neglect as to why co-counsel did not perfect the appeal, as to why the docket system was in error, as to why testimony or evidence was not being provided by co-counsel and the docketing clerk, as to why Willis did not arrange to have the matter covered while on his long-planned vacation, and finally as to why

Willis did not perfect the appeal when he received the *sua sponte* order. Mr.Willis' demeanor in answering these questions are relevant in the court's factual conclusions regarding diligence and excusable neglect. Indeed, MM&A concedes that Judge Tang "faulted" Snell & Wilmer for failing to thoroughly review the *sua sponte* order on January 16, 2009 to determine the actual appeal deadline. Op. Br. ¶ 43. Accordingly, by MM&A's own analysis of the trial court's credibility determinations, the traditional abuse of discretion governs this appeal.

C. Whether the Trial Court Abused its Discretion when Determining that MM&A failed to Show Exceptional Circumstances or the Exercise of Diligence.

¶29 In *City of Phoenix v Geyler,* the Arizona Supreme Court adopted the following four factors for a court to consider when deciding whether to grant Rule 60 relief to allow for a delayed appeal: (1) absence of Rule 58(e) notice; (2) lack of prejudice to the respondent; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for lack thereof, by counsel in attempting to be informed of the date of the decision. *City of Phoenix v. Geyler,* 144 Ariz. 323, 328 (1985). When the claimed cause of delay is inadvertence, mistake or neglect, the trial court should consider counsel's exercise of diligence as "the final arbiter of whether mistake or neglect is excusable." *Id.* at 332. Finally, Rule 60 relief may only be granted upon a showing of "extraordinary," "unique" or "compelling"

circumstances *in addition to* a favorable trial court determination under these four factors. *City of Phoenix v Geyler*, 144 Ariz 323 at 328 (1985).

¶30 In this case, the trial court determined that MM&A's counsel received notice of the December 19, 2008 signed order by December 24, 2008.[5] R.86 p.3. The trial court also found that MM&A's counsel received notice of the errantly entered, signed order by December 29, 2008. *Id.* at 4. Finally, the trial court found that MM&A's counsel received notice of the January 14, 2009 *sua sponte* order by January 16, 2009. *Id*. MM&A does not dispute these findings. Instead, MM&A argues that, as a result of excusable neglect, its attorneys failed to actually review the notices until the appeal deadline had expired. Op. Br. ¶¶37-39.

¶31 The trial court carefully considered and ultimately rejected MM&A's proffered justifications for failing to convert multiple notices of judgment into actual knowledge of the appeal deadline. At the core of the trial court's determination was the failure by MM&A's counsel to establish a record of diligence. *Geyler,* 144 Ariz. at 328, 697 P.2d at 1078 (the burden is on the party seeking a delayed appeal to make a showing generally required under Rule 60 as well as the more stringent standards applicable for a delayed appeal). For instance,

[5] The delay between the entry of trial court orders and their receipt by MM&A's counsel is a product of Snell Wilmer's cumbersome manner of shuttling documents from its "box" at the Court Clerk's office to Snell Wilmer's Tucson office. *Infra.* at 3-6. However, MM&A's counsel failed to establish the particulars behind these delays.

the trial court was troubled that intake clerk at the Tucson office "processed" the December 19, 2008 signed order, but "for some reason" the order was not placed in the docket system: even though a copy of the order was distributed "in the office" and, apparently, to co-counsel on the matter. R.86, p.3 fn1. MM&A failed to: 1) offer evidence concerning the particulars of the internal docketing error to determine whether it was itself reasonable under the circumstances; 2) explain how a signed, stamped order of dismissal can be distributed throughout the Tucson office and beyond without prompting questions concerning the proper docketing of the appeal deadline (particularly since the firm received the mistakenly entered unsigned order only a few days prior and determined not to docket that order); and 3) provide any "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." R. 86, p. 3.

¶32 The trial court was particularly troubled by Willis' admission that he actually reviewed the January 13, 2009 *sua sponte* order on January 16, 2009 (four days before the expiration of the appeal deadline), placed it in his outbox, and left for the Grand Canyon where he was "incommunicado" for five days without making any arrangements for counsel within the same firm to monitor the case. R. 86, p.4; TR, p. 10.

¶33 The trial court also considered the procedural posture of this case when engaging in its diligence review. The trial court distinguished *Coconino Pulp & Paper v. Marvin*, 83 Ariz. 117, 317 P.2d 550 (1957), where a default judgment was at issue, from the circumstances in this case, in which MM&A's counsel had partaken in "thoroughly briefing and arguing a motion to dismiss" and thus was necessarily aware that a ruling was forthcoming. Op. Br.¶42 at fn. 4.

¶34 Finally, the trial court placed counsels' receipt of actual notice, and his actual knowledge of an imminent ruling, within the context of his affirmative obligation to become aware of appeal deadlines, and was "unable to find" that MM&A's counsel exhibited the level of diligence necessary to find MM&A's neglect to be excusable under Rule 60(c). R. 86, p.5.

¶35 Next, the trial court determined that MM&A failed to demonstrate "extraordinary," "unique" or "compelling" circumstances exist to warrant the extraordinary relief of a delayed appeal. *City of Phoenix v Geyler,* 144 Ariz. at 328, 697 P.2d at 1078. MM&A argues that the trial court should have found the existence of exceptional circumstances due to the occurrence of a Christmas holiday, a law firm clerical error, a long-planned family vacation, and the Court Clerk's erroneous entry of the December 19, 2008 unsigned order. However, MM&A fails to provide any authority to support the trial court's determination that annual holidays and family vacations are not "unique." R. 86, p.5.

¶36 The trial court also determined that its contribution to counsel's confusion did not rise to the level of a compelling circumstance when viewed against the facts and circumstances of this case. R. 86, p.5. Upon discovering its error, the trial court immediately entered a corrective order, which counsel admittedly received *and* reviewed prior to the expiration of the appeal period. TR, p. 8-10. Counsel chose not to delegate oversight of the case during his vacation. Counsel chose to await a close review of that corrective order until he returned from vacation. TR, p. 10. The trial court realized that its power to grant a delayed appeal "does not relieve a party from the free, calculated and deliberate choices he or she has made." *Park v. Strick,* 137 Ariz. at 104, 69 P.2d at 82. Mistakes of judicial staff, as with mistakes of law firm staff, must be viewed in light of counsel's "duty to ensure that matters subject to prescribed time limits are acted upon within those limits, or that other appropriate action is taken to preserve a client's rights." *Id.* Indeed, MM&A's proffered explanation of "confusion" to justify the untimely appeal is a non sequitur. Op. Br. at ¶¶ 43-43. If the orders at issue created led confusion, a diligent response by counsel would have been to look more closely to ensure that timelines were being properly determined, which Mr. Willis chose to put off until he returned from vacation.

¶37 The trial court did not abuse its discretion when determining that MM&A failed demonstrate compelling circumstances and diligence. To prevail, MM&A

must establish that no reasonable view of the facts and law supports the judgment of the trial court. *City of Phoenix v. Geyler,* 144 ARiz. 323, 329-30 (1985). MM&A does not argue that the trial court failed to consider evidence, improperly considered evidence or employed the wrong legal standard. Instead, MM&A argues that the trial court could have reached a different conclusion[6] on the same record and under the same legal standards. However, establishing that the trial court could have reached a different result is a far cry from demonstrating that no reasonable view of the facts and the law support the trial court's decision. *Quigley v. City Court of the City of Tucson,* 132 Ariz. 35, 37, 643 P.2d 738, 740 (1982).

D. If this Court Determines that the Trial Court Abused its Discretion, Appellate Jurisdiction does not Lie Over the Merits of the Dismissal.

¶38 If this Court determines the trial court abused its discretion, MM&A concedes that it would be inappropriate for this Court to proceed to a review of the merits of the dismissal order. Op. Br. at ¶55. The Defendants agree. For appellate jurisdiction over the merits of the dismissal to ever lie, the trial court must vacate the December 19, 2008 signed dismissal order and enter a new dismissal order, and MM&A must timely appeal. *See e.g., James v. State,* 215 Ariz. 182, ¶ 15 (App.

[6] MM&A's pending malpractice lawsuit against Snell & Wilmer is itself a representation by MM&A to this Court that Judge Tang reasonably concluded that there is no excusable neglect for the untimely appeal. *Supra* at ¶ 15.

2007); *Edwards v. Young,* 107 Ariz. 283, 284 (1971); *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, 551, ¶29 (App. 2008).

V. CONCLUSION

¶39 The balancing of multiple, often conflicting, factors when ruling upon a Rule 60 motion for a delayed appeal is properly entrusted to the sound discretion of trial courts. Shed in the most favorable light possible, MM&A's opening brief demonstrates that the trial court could have reasonably made different determinations under the same facts and law. However, to prevail in this appeal, MM&A must demonstrate that the trial court's decision lacks any reasonable factual or legal basis. Because MM&A has failed to meet this difficult burden, the trial court's decision should be affirmed.

Respectfully submitted this 25th day of June, 2012.

/s/ Scott Crowell
Scott D. Crowell
Crowell Law Offices-Tribal Advocacy Group, PLLC

/s/ William Foreman
William Foreman
William Foreman P.C.

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14(b), I certify that the attached Appellant's Response Brief uses proportionately spaced type of 14 points or more, is double spaced using a roman font, and contains 3,973 words.

Dated this 25th day of June, 2012

/s/ Scott Crowell

CERTIFICATE OF SERVICE

I certify that on June 25, 2012 I caused Appellee's Response Brief to be electronically filed with the Court of Appeals, State of Arizona, Division Two, State Office Building, 400 West Congress Tucson, Arizona, 85701, and caused a copy of the foregoing to be delivered via electronic mail to:

Michael Meehan
mmeehan.az@msn.com
Law Office of Michael Meehan
3938 E. Grant Road, No. 423
Tucson, Arizona 85712

Dated this 25th day of June, 2012

_____/s/ Scott Crowell_____