

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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JASON LANAKILA CABRAL; the Estate of JOSEPH PU KAIKALA;
LYNDA EVADNA KAIKALA, individually, as Special
Administratrix of the Estate of Shawn Kaikala, and
as Guardian Ad Litem for minors: SHANTEL KAIUOLA
CABRAL, MARK KALE CABRAL, and IOKEPA JOHN KAIKALA;
JOHN E. KRAUSE, individually and as Guardian Ad
Litem for minors: KAHEKILI JOHN KRAUSE, KEANU
KAIKALA KRAUSE, KAWENA KAIKALA KRAUSE, Plaintiffs-
Appellants, v. STATE OF HAWAII, Defendant/Cross-
Claim Plaintiff/Cross-Claim Defendant/Appellee,
JONI MARIE SCOTT, Defendant/Cross-Claim
Defendant/Cross-Claim Plaintiff, and JOHN DOES 1-
20, Defendants

NO. 28669

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
HILO DIVISION
(CIVIL NO. 01-1-0449)

JULY 28, 2011

FUJISE AND LEONARD, JJ., WITH NAKAMURA, C.J. DISSENTING

OPINION OF THE COURT BY FUJISE, J.

Plaintiffs-Appellants Jason Lanakila Cabral, the Estate
of Joseph Pu Kaikala, Lynda Evadna Kaikala, Shantel Kaiuola
Cabral, Mark Kale Cabral, Iokepa John Kaikala, John E. Krause,
Kahekili John Krause, Keanu Kaikala Krause, and Kawena Kaikala

Krause (Plaintiffs) appeal from the judgment entered by the Circuit Court of the Third Circuit, Hilo Division (circuit court)¹ in favor of Defendant/Cross-Claim Plaintiff/Cross-Claim Defendant/Appellee State of Hawai'i (State).

I.

This appeal stems from a July 20, 2000 fatal car accident, resulting in the death of Shawn Kaikala (Decedent) on Highway 11 in the County of Hawai'i. Plaintiffs are Decedent's boyfriend and family members. The accident occurred when the vehicle Decedent was operating was struck by another vehicle driven by Joni Marie Scott, Defendant/Cross-Claim Defendant/Cross-Claim Plaintiff (Scott). The cause of the accident was allegedly the speed and condition of Scott's vehicle, oversteering by Scott, and wet road conditions.

Plaintiffs filed a civil complaint against Scott and the State on October 16, 2001. Plaintiffs' complaint asserted claims against the State and Scott for negligence and wrongful death. Plaintiffs settled their claims with Scott before trial, however, Scott remained a nominal defendant for purposes of apportioning fault.

A seven-day bench trial began on July 10, 2006, and on November 1, 2006, the circuit court entered its Findings of Fact and Conclusions of Law, ruling that Plaintiffs failed to prove the State was negligent in designing or maintaining Highway 11. The circuit court entered judgment in favor of the State and against Plaintiffs on April 20, 2007, and expressly dismissed all other claims. Ten days later, on April 30, 2007, Plaintiffs filed a motion for reconsideration pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 59 and 60(e). The circuit court denied Plaintiffs' motion on June 7, 2007.

On July 6, 2007, the parties submitted a "Stipulation to Extend Time to File Notice of Appeal" (July 6 Stipulation) prepared by counsel for Plaintiffs. On the same day, the circuit

¹ The Honorable Glenn S. Hara presided.

court approved the parties' stipulation, which purported to extend the time for Plaintiffs to file a notice of appeal by two weeks. The stipulation did not assert grounds nor include findings regarding the grounds for the extension of time.²

By way of a motion dated July 18, 2007, but not filed until September 7, 2007, Plaintiffs presented their Ex-Parte Motion to Extend Time to File Notice of Appeal (July 18 Ex-Parte Motion).³ Grounds for the extension were contained in the attached declaration of counsel: The parties were involved in settlement negotiations and a "motion to withdraw" was scheduled to be heard on September 5, 2007.⁴

On July 23, 2007, the due date of the purported two-week extension deadline, Plaintiffs filed a notice of appeal

² The stipulation read, in its entirety:

STIPULATION TO EXTEND TIME TO FILE NOTICE OF APPEAL

Plaintiffs, above-named, by and through their attorney, JOY A. SAN BUENAVENTURA; and the State of Hawaii, by and through its attorney, Deputy Attorney General ROBIN KISHI hereby stipulate to the extension of time to file a notice of appeal of two weeks.

Dated: Hilo, Hawaii, July 6, 2007.

[Signature]
JOY A. SAN BUENAVENTURA
Attorney for Plaintiffs

[Signature]
ROBIN KISHI
Deputy Attorney General
Attorney for the State of Hawaii

APPROVED AND SO ORDERED:
[Signature]
JUDGE OF THE ABOVE-ENTITLED COURT

³ The July 18 Ex-Parte Motion was also stamped as received on July 18, 2007.

⁴ The declaration of counsel read, in pertinent part,

3. The Plaintiffs are considering accepting the State's offer and not appeal.
4. We are awaiting State's draft of the Stipulation.
5. There is a pending hearing on a Motion to Withdraw scheduled on September 5, 2007.

from the April 20, 2007 judgment.⁵ On September 7, 2007, having found "[g]ood cause appearing from the motion," the circuit court signed and filed the Order Granting Ex-Parte Motion, extending the time to file the notice of appeal until August 8, 2007.⁶

II.

Although the State has not challenged this court's jurisdiction, "[i]t is axiomatic that we are 'under an obligation to ensure that [we have] jurisdiction to hear and determine each case and to dismiss an appeal on [our] own motion where [we] conclude [we] lack[] jurisdiction.'" Brooks v. Dana Nance & Co., 113 Hawai'i 406, 412, 153 P.3d 1091, 1097 (2007) (quoting BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 73, 549 P.2d 1147, 1148 (1976)). An untimely appeal is one such defect requiring dismissal for lack of jurisdiction "that can neither be waived by the parties nor disregarded by the court in the exercise of judicial discretion." Wong v. Wong, 79 Hawai'i 26, 29, 897 P.2d 953, 956 (1995) (quoting Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986)); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP]").

Hawaii Revised Statutes (HRS) § 641-1(c) (1993), provides that in civil matters, "[a]n appeal shall be taken in the manner and within the time provided by the rules of court." Rule 4(a)(1), HRAP, requires civil litigants to file a notice of appeal within thirty days after entry of an appealable final judgment.

⁵ On July 19, 2007, Joy A. San Buenaventura, attorney for Plaintiffs, filed a Motion to Withdraw as Counsel for Plaintiff with regard to her representation of Mark Kale Cabral. She filed a Second Amended Motion to Withdraw as Counsel for Plaintiff Mark Kale Cabral which was granted on November 23, 2007. Ms. San Buenaventura remains counsel of record for the remaining plaintiffs.

⁶ The new deadline set in the proposed order was September 19, 2007 but was amended by hand to August 8, 2007. However, a trial court is authorized to extend the time for a notice of appeal for a maximum of thirty days. Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(a)(4). The extension to August 8, 2007 would have been a thirty-two day extension.

However, prior to expiration of the thirty-day prescribed time period, appellants may request an extension of time under the following terms:

The court or agency appealed from, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed within the time prescribed by subsections (a)(1) through (a)(3) of this rule. However, no such extension shall exceed 30 days past such prescribed time. An extension motion that is filed before the expiration of the prescribed time may be ex parte unless the court or agency otherwise requires.

HRAP Rule 4(a)(4)(A) (emphasis added).

In the instant case, the circuit court's April 20, 2007 judgment in favor of the State and expressly dismissing all other claims, constituted an appealable final judgment under HRCP Rule 58. See Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119-20, 869 P.2d 1334, 1338-39 (1994) (holding that a final judgment in a case involving multiple claims "must, on its face, show finality as to all claims against all parties"). Plaintiffs timely filed their April 30, 2007 Motion for Reconsideration pursuant to HRCP Rule 59(e), and effectively extended the initial thirty-day period for filing their notice of appeal, until this motion was decided or 90 days elapsed, whichever came first. HRAP Rule 4(a)(3). When the circuit court denied this motion on June 7, 2007, it triggered a new thirty-day deadline, making Plaintiffs' notice of appeal due on July 7, 2007.

On July 6, 2007, one day prior the expiration of this new deadline, the parties attempted to extend the deadline via their submitted stipulation, which the circuit court approved. Plaintiffs filed their notice of appeal on July 23, 2007, forty-six days after the denial of their motion for reconsideration, and on the due date of the purported two-week extension.

In furtherance of our obligation to ensure jurisdiction for this appeal exists, this court ordered the parties to file supplemental briefs on the subject of jurisdiction. In their supplemental brief, Plaintiffs argue that, although no reasons

appear on the July 6 Stipulation, the reasons stated in their July 18 Ex-Parte Motion, note 4 *supra*, support their position that good cause supported the approval of the July 6 Stipulation. The State argues that consideration of the State's settlement offer was not beyond Plaintiffs' control and thus does not constitute good cause.

HRAP Rule 4(a)(4) clearly states that *the court* may extend the deadline for a notice of appeal *upon motion filed*. The rule does not authorize the parties to make this decision but requires a motion. This is sound procedure, if for no other reason than a motion requires that the grounds for the requested relief be stated. HRCP Rule 7(b). The parties thus utilized, and the circuit court approved, an unauthorized procedural device.

More importantly, the purported extension was substantively insufficient. HRAP 4(a)(4)(A) governs extensions of time to file a notice of appeal in a civil case. The rule requires that an appellant show, and the court find, "good cause" for granting a motion for extension of time to file a notice of appeal: "The court or agency appealed from, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed within the time prescribed[.]" HRAP Rule 4(a)(4)(A) (emphasis added). The Hawai'i Supreme Court has made clear that this good cause showing is a necessary prerequisite for the granting of an extension of time to file a notice of appeal. Enos v. Pac. Transfer & Warehouse, Inc., 80 Hawai'i 345, 352, 910 P.2d 116, 123 (1996) ("Thus, when considering a motion brought pursuant to HRAP Rule 4[], the trial court must first determine the cause of the delay in filing the notice of appeal . . . the motion may be granted upon a showing of 'good cause.'").

Moreover, the necessary good cause showing itself "requires a cause that is 'beyond the movant's control.'" Hall v. Hall, 96 Hawai'i 105, 110 n.3, 26 P.3d 594, 599 n.3 (App.),

aff'd in part, and vacated in part on other grounds, 95 Hawai'i 318, 319, 22 P.3d 965, 966 (2001); see Enos, 80 Hawai'i at 352, 910 P.2d at 123 ("If that cause is beyond the movant's control, the motion may be granted upon a showing of good cause.") (internal quotation marks omitted).⁷

In the instant case, the July 6 Stipulation does not mention any justification for the extension, let alone one demonstrating good cause. Enos, 80 Hawai'i at 352, 910 P.2d at 123. On its face, the Stipulation therefore fails to satisfy the good cause standard required for granting an extension of time. Plaintiffs maintain that the reasons supporting good cause are contained in their subsequent, ex-parte motion. However, there is nothing in the record that establishes the same reasons existed at the time the stipulation was proffered. Thus, the only justification for the July 6 Stipulation we can glean from the record is that the parties agreed to it. Mutual desire for an extension of time is insufficient, standing alone, to constitute the good cause showing required for granting an extension. See, e.g., Hall, 96 Hawai'i at 110 n.3, 26 P.3d at 599 n.3 (concluding that parties' desire to carry on ongoing settlement negotiations did not constitute good cause for an extension of time to file a notice of appeal). In any event, the appellate courts of this state have already held that time to

⁷ At the time of the Enos and Hall decisions, the governing procedural rule was HRAP Rule 4(a)(5), which differed from the current rule insofar as it provided two standards for the granting of extensions prior to the expiration of the initial time to file the notice of appeal, namely, excusable neglect and good cause. HRAP Rule 4(a)(5) (1985). In Enos, the Hawai'i Supreme Court held that whether the "good cause" standard or "excusable neglect" standard applied depended not on when the motion for extension was filed, but upon the reason for the delay. 80 Hawai'i at 352, 910 P.2d at 123.

The current HRAP Rule 4(a)(4) makes clear that the good cause standard applies to motions brought before the expiration of the initial thirty-day deadline and that the excusable neglect standard must be met where the motion is brought after the expiration of the time to bring an appeal. HRAP Rule 4(a)(4)(A) and 4(a)(4)(B). Despite the revised structure of the rules, the language and standards governing extension requests prior to expiration of the deadline for filing a notice of appeal -- requiring a good cause finding -- remains the same. Cases discussing the good cause standard under the previous rules are thus equally relevant under the current HRAP provisions.

complete settlement negotiations is not "good cause" to grant an extension of time. Hall, 96 Hawai'i at 110 n.3, 26 P.3d at 599 n.3 ("(1) a desire for more time to seek settlement before incurring the cost of filing an appeal is not 'good cause' for extending the time to file a notice of appeal; and (2) rarely will there be a situation where a motion based on that desire and presented within the first 30 days will be validly granted.").

The circuit court erred⁸ in approving the July 6 Stipulation without requiring a showing of good cause.

Next, we turn to consideration of the circuit court's September 7, 2007 order granting Plaintiffs' July 18 Ex-Parte Motion. This motion was proffered to the court after the July 7, 2007 deadline for filing their notice of appeal had passed. The circuit court was authorized to grant an extension of up to 30 days upon a showing of excusable neglect. HRAP Rule 4(a)(4)(B).⁹ The Enos court noted that the excusable neglect standard is applicable "[i]f the cause of the delay is some mistake or inadvertence within the control of the movant." Enos, 80 Hawai'i at 352, 910 P.2d at 123. So far, Hawai'i cases construing excusable neglect have dealt with misconstruction or misapplication of the law. See Enos, id., (misinterpretation of the law governing the appealable event); Hall, 96 Hawai'i at 112,

⁸ While the determination of good cause is reviewed under an abuse of discretion standard, the evaluation of the trial court's interpretation of the law is reviewed *de novo*. Enos, 80 Hawai'i at 349, 910 P.2d at 120.

⁹ HRAP Rule 4(a)(4)(B) provides:

(B) Requests for extensions of time after expiration of the prescribed time. The court or agency appealed from, upon a showing of excusable neglect, may extend the time for filing the notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by subsections (a)(1) through (a)(3) of this rule. However, no such extension shall exceed 30 days past the prescribed time. Notice of an extension motion filed after the expiration of the prescribed time shall be given to the other parties in accordance with the rules of the court or agency appealed from.

We note that there was no certificate of service attached to the July 18 Ex-Parte Motion.

26 P.3d at 601 ("relying on the erroneous belief that the first motion would be granted").

Here, Plaintiffs' July 18 Ex-Parte Motion was based on the continued efforts at settlement and a pending motion to withdraw. The circuit court did not decide whether these reasons constituted excusable neglect but instead applied the good cause standard to these reasons. However, the nature of these reasons does not establish that mistake, inadvertence or neglect was involved. Rather, these reasons merely involve a request that the deadline be postponed while other events in the case are attended to.

Plaintiffs cite Local Union No. 12004, United Steelworkers of America v. Massachusetts, 377 F.3d 64 (1st Cir. 2004) in support of their argument that their reasons in this case constitute excusable neglect. There, the First Circuit found no abuse of discretion in the district court's grant of an extension based on excusable neglect where the attorney prepared but failed to timely file his client's notice of appeal because he was "preoccupied by the need to care for his infant son, who was severely ill." Id. at 72. However, that case is clearly distinguishable as not only did the district court apply the proper standard, the reason cited by counsel there did involve inadvertence or neglect.

Finally, Plaintiffs argue that in Enos, the Hawai'i Supreme Court has approved the more liberal interpretation of excusable neglect adopted by the United States Supreme Court in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993) and urges application of the four-part test constructed by Supreme Court. However, we do not read Enos to have gone so far, primarily because, as the Enos court observed, the concept of excusable neglect under the federal rules encompassed reasons that were in, and beyond, the movant's control. Enos, 80 Hawai'i at 352, 910 P.2d at 123 ("both intervening circumstances beyond the party's control and neglect on the part of the party are encompassed within the [Supreme]

Court's interpretation of 'excusable neglect'.") The Hawai'i Supreme Court in Enos cited to Pioneer Investment, not for its four-part test for evaluating excusable neglect, but to illustrate the Supreme Court implicitly rejected the view of the majority of federal appellate courts that the choice of standard--good cause or excusable neglect--was dependent on the timing of the extension request. Furthermore, the reasons for the extension under consideration in Enos involved a misconstruction of the rules that, as a matter of law, did not rise to the level of excusable neglect. See Enos, 80 Hawai'i at 354, 910 P.2d 125 ("Nor does the United States Supreme Court's decision in Pioneer Investment, which is regarded as having relaxed the 'excusable neglect' standard, . . . suggest that 'excusable neglect' now encompasses ignorance of the rules.") and Hall, 95 Hawai'i at 320, 22 P.3d at 967 ("we ruled in Enos that, as a matter of law, 'only plausible misconstruction, but not mere ignorance, of the law or rules rises to the level of excusable neglect.'").

III.

For the foregoing reasons, the appeal is dismissed for lack of jurisdiction.

On the briefs:

Joy A. San Buenaventura,
for Plaintiffs-Appellants.

Donna H. Kalama,
Deputy Attorney General,
for Defendant-Appellee.