NO. 22878

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

DOROTHY SUSAN HALL, Plaintiff-Appellee/
Cross-Appellant, v. BRADLEY ROSS HALL,
Defendant-Appellant/Cross-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 96-1143)

ORDER DENYING MOTION FOR RECONSIDERATION
(By Burns, C.J., Watanabe and Lim, JJ.)

The January 29, 2001 Motion for Reconsideration filed by Defendant-Appellant Bradley Ross Hall (Bradley) is hereby denied for the reasons stated herein.

Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 4(a)(5) (1999) states, in relevant part, that "[t]he court . . . appealed from, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion actually filed not later than 30 days after the expiration of the time prescribed[.]"[1]

In essence, Bradley argues that it was within the family court's discretion to decide that his counsel's

[1] Effective January 1, 2000, Hawaiʻi Rules of Appellate Procedure Rule 4(a)(4) has been amended such that paragraph "(A)" permits requests for extensions filed before expiration of the prescribed time to be granted upon a showing of good cause and paragraph "(B)" permits requests for extensions filed after the expiration of the prescribed time to be granted upon a showing of excusable neglect.

understanding, based on counsel's prior experience, that the word "may" in HRAP Rule 4(a)(5) quoted above meant "will" or "shall," was "excusable neglect."

Alternatively, Bradley argues that his counsel's understanding, based on his counsel's prior experience, that the word "may" in HRAP Rule 4(a)(5) quoted above meant "will" or "shall" was a "plausible misconstruction."

In our January 19, 2001 opinion, we concluded that "because there can be only one right answer to the question of whether counsel's 'neglect' was 'excusable neglect,' it is a question of law. Therefore, the standard of appellate review is the right/wrong standard." Bradley argues that this court adopted and applied the wrong standard of review and cites the following federal precedent:

> Rule 4(a) gives the district court the authority to extend the thirty-day time limit for the filing of a notice of appeal upon a showing of excusable neglect or good cause. Fed.R.App.P. 4(a). We will not disturb a district court's determination of excusable neglect or good cause unless we find a clear abuse of discretion. Redfield v. Continental Casualty Casualty Corp., 818 F.2d 596, 602 (7th Cir. 1987). Such an abuse exits if no reasonable person could agree with the district court decision. United States v. U.S. Currency in the Amount of $103,387.27, 863 F.2d 555, 561 (7th Cir. 1988).

Ooley v. Schwitzer Division, Household Manufacturing Incorporated, 961 F.2d 1293, 1306 (7th Cir.) *cert. denied*, 506 U.S. 872 (1992).

Our first response is that the "reasonable person" standard used in Ooley is closer to the right/wrong standard than to Hawai‘i's "abuse of discretion" standard. In Hawai‘i, "[a]n

abuse of discretion occurs when the decision maker "exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party. Bank of Hawaii v. Kunimoto, 91 Hawai'i 372, 387, 984 P.2d 1198, 1213 (1999)." In Re Water Use Permit Applications, 94 Hawai'i 97, 183, 9 P.3d 409, 495 (2000).

Our second response is that even if we applied the Seventh Circuit's "reasonable person" standard of review, we would conclude that no reasonable person could conclude that the word "may" in HRAP Rule 4(a)(5) (1999) quoted above meant "will" or "shall" or that such interpretation by Bradley's counsel, based on his prior experience, was his "excusable neglect" or "plausible misconstruction."

Our third response is that HRAP Rule 4(a)(5) (1999) clearly states that "excusable neglect" is a condition precedent to the family court's exercise of its discretion.

Our fourth response is that the Ninth Circuit case of Marx v. Loral Corp., 87 F.3d 1049 (9th Cir. 1996), is more relevant. It states, in relevant part, as follows:

> We have previously established a strict standard for demonstrating excusable neglect. . . . "Thus, we require *both* extraordinary circumstances preventing a timely filing *and* injustice resulting from denying the appeal." Inadvertence or mistake of counsel does not constitute excusable neglect.
>
> Acknowledging this stringent standard, the district court nevertheless found that the plaintiffs' actions constituted "excusable neglect," as that term

> was defined by the Supreme Court in Pioneer Inv.[Servs. Co. v. Brunswick Assocs. Ltd], 507 U.S. [380,] at 380, 113 S.Ct. [1489] at 1490 [(1993)]. In Pioneer Inv., the Supreme Court held that, under Bankruptcy Rule 9006(b)(1), neglect "encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." Thus, excusable neglect includes "situations in which the failure to comply with a filing deadline is attributable to negligence."
>
> The Supreme Court concluded in Pioneer Inv. that the determination of whether neglect is "excusable" is ultimately an equitable one, taking into account all the relevant circumstances surrounding the party's omission. These circumstances include the danger of prejudice to the non-movant, the length of the delay and its potential impact upon judicial proceedings, the reason for the delay and whether it was in the reasonable control of the movant, and whether the movant acted in good faith.
>
> Although Pioneer Inv. arose in the context of the Bankruptcy Rules, its rationale would seem to apply equally to the Federal Rules of Appellate Procedure.

Marx v. Loral Corp., at 1053-54 (citations omitted).

> The Pioneer Inv. case is a bankruptcy case where the Respondents failed to file any proofs of claim by the August 3, 1989, bar date. On August 23, 1989, respondents filed their proofs, along with a motion that the court permit the late filing under Rule 9006(b)(1). In particular, respondents' counsel explained that the bar date, of which he was unaware, came at a time when he was experiencing "a major and significant disruption" in his professional life caused by his withdrawal from his former law firm on July 31, 1989. Because of this disruption, counsel did not have access to his copy of the case file in this matter until mid-August.

Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership at 1492-93. The Pioneer Inv. opinion is a five to four decision authored by Justice White. Whatever may be the

merit of Justice White's majority opinion in a bankruptcy context, we disagree with the Ninth Circuit's application of it in the civil/family court context. In the civil/family court context, we agree with Justice O'Connor's dissenting opinion. Moreover, there is Hawai‘i precedent filed post-Pioneer Inv. Services Co. that the Ninth Circuit's pre-Marx v. Loral Corp. strict standard for demonstrating excusable neglect is Hawai‘i's standard. That Hawai‘i precedent is Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai‘i 345, 910 P.2d 116 (1996), which was filed five months before the Ninth Circuit's opinion in Marx v. Loral Corp.

In Enos, the judgment was filed on April 8, 1994. The Notice of Entry of Judgment was filed on May 4, 1994. On June 1, 1994, Pacific Transfer filed its motion to extend time to file a notice of appeal. It argued that "counsel's honest belief that the 'triggering' date for purposes of deadlines was [May 4] rather than [April 8] . . . constitutes excusable neglect." On June 3, 1994, Pacific Transfer filed its notice of appeal. On July 1, 1994, the circuit court entered its order granting Pacific Transfer's motion to extend the time in which to file its notice of appeal. On appeal, the Hawai‘i Supreme Court reversed and stated, in relevant part, the following:

> Thus, when considering a motion brought pursuant to HEAP Rule 4(a)(5), the trial court must first determine the cause of the delay in filing the notice of appeal. If that cause is beyond the movant's control, the

motion may be granted upon a showing of "good cause." If the cause of the delay is some mistake or inadvertence within the control of the movant, the motion may be granted only upon a showing of "excusable neglect."

. . . .

. . . [T]he issue before us is whether the trial court abused its discretion in finding that [counsel's] neglect in failing to timely file a notice of appeal was "excusable."

. . . .

. . . [O]nly "plausible misconstruction, but not mere ignorance, of the law or rules" rises to the level of excusable negect. . . .

. . . .

. . . 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. The Court, in Pioneer Investment, specifically remarked that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect[.]"

. . . .

The circuit court's grant of a HRAP Rule 4(a)(5) motion will not be reversed absent an abuse of discretion, and, ordinarily, a finding of "excusable neglect" will not be disturbed. In this case, however, the circuit court's conclusion that there was "excusable neglect" is legally and factually insupportable. Nothing in the record indicates that the failure to file a timely notice of appeal was occasioned by anything other than [counsel's] purported confusion regarding the time that a judgment is deemed "entered," . . . . The character of the neglect, rather than the consequences, should be determinative of whether it is "excusable." . . . [A]ffirming the trial court's finding of "excusable neglect" in this case "would convert the 30-day period for appeal provided in [HRAP] Rule 4(a) into a 60-day one--a

result clearly not intended by the Rule's framers."

> We therefore hold that the trial court abused its discretion by granting the motion to extend time for filing a notice of appeal because the failure to timely file the appeal was caused by counsel's failure to read and comply with the plain language of the applicable procedural rules, which cannot constitute "excusable neglect."

Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai‘i 345, 352-55, 910 P.2d 116, 123, 126 (1996) (citations omitted).

Clearly, HRAP Rule 4(a)(5) requires Bradley to prove "neglect" and to show that the "neglect" is "excusable." The standard of review of the family court's answer to the question whether or not he complied with these requirements cannot be the abuse of discretion standard. After the "neglect" is factually determined, the question whether the "neglect" is "excusable" is a question of law to which there can be and is only one right answer. The finding of "neglect" and the conclusion that the "neglect" is "excusable" are conditions precedent to the court's authority to exercise its discretion.

Bradley argues that as opposed to favoring litigants who file appeals in bad faith to leverage a settlement, the courts should freely give litigants plenty of time to pursue a settlement before they file a notice of appeal. Our first response is that HRAP Rule 4(a)(5) expressly states otherwise and this argument should be directed to the people who make the rules. Our second response is that litigants have plenty of time

to pursue settlement after they file a notice of appeal.

Bradley's counsel argues that

> this court overlooks one of the very unique aspects of this case, namely, that undersigned counsel genuinely and honestly believed that the Mr. Smith who was tragically and seriously injured in a hit and run accident in Kailua, at a location very near his residence, was in fact the opposing counsel in this case. This belief proved to be incorrect, but, at the time, it clearly presented an obstacle to continuing settlement negotiations, and clearly constituted an event "beyond the control" of counsel.
>
> As was the case above, this court merely paid lip service to this part of the Record of this case, but simply chose to ignore the opportunity to fairly apply this fact in its review of this matter. Had this court done so, it could well have found that good cause did indeed exist for the request for an extension and the entire legal debate over the existence of excusable neglect could and should have been avoided.
>
> Indeed, the issuance of findings by Judge Warrington, who denied the *Ex Parte* motion for an extension, might shed great light on this matter, and this Court should consider remanding for such purpose.

This argument pertains to Judge Warrington's August 3, 1999 order denying Hall's first motion for extension. In defense of Judge Suemori's September 30, 1999 order granting Bradley's second motion for extension, Bradley's argument now is that counsel's belief that he had presented good cause and, therefore, that Judge Warrington would exercise her discretion in Bradley's favor and grant an extension was excusable neglect. Our first response is that Bradley did not appeal Judge Warrington's order. Our second response is that under HRAP Rule 4(a)(5) (1999) the proof of good cause is merely a condition precedent to the family

court's exercise of its discretion. Thus, even assuming Bradley proved good cause to Judge Warrington, it was within Judge Warrington's discretion to deny the request, and it was not within Judge Suemori's discretion to reverse Judge Warrington's discretionary decision on the ground that counsel expected and depended upon Judge Warrington to exercise her discretion in his favor by granting the request.

Bradley states that "all [Bradley] asks is that the same standards which have been applied to all other persons in his situation, not only in Hawaii, but all around the country, be fairly applied to him in this case." Our first response is that we are unaware of any similar case. Our second response is that we are interpreting and applying HRAP Rule 4(a)(5) (1999) in accordance with Hawai‘i's standards on the interpretation and application of the Hawai‘i Rules of Appellate Procedure.

DATED: Honolulu, Hawai‘i, February 8, 2001.

On the motion:

Paul A. Tomar and
Keith M. Yonamine
(Ashford & Wriston,
of counsel) for
defendant-appellant/
cross-appellee.

Chief Judge

Associate Judge

Associate Judge