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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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RUTH A. WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

JOAQUIN OLVERA NAVARRO and JORGE ) 1 CA-CV 12-0136  
NAVARRO OLVERA, )  
) DEPARTMENT E  
Plaintiffs/Appellees, )  
) **MEMORANDUM DECISION**  
v. )  
) (Not for Publication -  
MICHAEL KLOPP and JANE DOE KLOPP, ) Rule 28, Arizona Rules of  
husband and wife, ) Civil Appellate Procedure)  
)  
Defendants/Appellants. )

Appeal from the Superior Court of Maricopa County

Cause No. CV2006-012363

The Honorable Mark H. Brain, Judge

**AFFIRMED**

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**T H O M P S O N, Judge**

¶1 Michael and Diana Klopp (the Klopps) appeal the superior court's denial of their motion to vacate and re-enter a judgment against them so that they may take a "delayed appeal" from that judgment. For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 This lawsuit involves a lengthy battle by the Navarro brothers (Navarros) to reclaim their family home from the Klopps, who were assignees of a company that allegedly ran a "foreclosure rescue" scam. At the end of a nine-day trial, the jury found in favor of the Navarros and against the Klopps, and the superior court awarded the Navarros title to and possession of their home, and compensatory and punitive damages and attorneys' fees of over \$1,000,000.

¶3 The court entered judgment in favor of the Navarros in July of 2010. The parties stipulated to extending the time for the Klopps to file a motion for new trial. In reliance on the superior court's order approving the stipulation, the Klopps filed their motion for new trial more than fifteen days after entry of the judgment. After the superior court denied the motion on the merits, the Klopps appealed.

¶4 The Navarros successfully moved to dismiss the appeal for lack of jurisdiction because the superior court had no authority to extend the time to file a motion for new trial.

Thus, the motion was untimely and it did not extend the time for appeal, making the notice of appeal untimely as well. See *Navarro v. Klopp*, 1 CA-CV 10-0798 (Ariz. App. Jan. 11, 2011) (order dismissing appeal). Upon dismissal by this court, the Klopps petitioned for review to the Arizona Supreme Court. After the supreme court denied review, the Klopps moved to vacate and re-enter the judgment in the superior court under Arizona Rule of Civil Procedure 60(c)(1) and (c)(6).

¶5 The superior court denied the motion to vacate and re-enter the judgment. The Klopps unsuccessfully moved to reconsider, then filed the instant appeal.

¶6 We have jurisdiction to review the order denying the Rule 60(c) motion to vacate pursuant to Arizona Revised Statutes (A.R.S.) § 12-2101(A)(2) as a "special order made after final judgment." See *M & M Auto Storage Pool, Inc. v. Chem. Waste Mgmt., Inc.*, 164 Ariz. 139, 141, 791 P.2d 665, 667 (App. 1990).

#### **DISCUSSION**

¶7 The standard of review of a superior court's order "granting or denying relief under Rule 60(c) is whether the court abused its discretion." *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). Under the abuse of discretion standard this court will "affirm where any reasonable view of the facts and law might support the judgment of the trial court." *Id.* at 330, 697 P.2d at 1080.

¶8 A party seeking to vacate a judgment and have it re-entered for the purpose of taking a delayed appeal under Rule 60(c) must not only make the showing required for relief under that rule, but also must meet the more stringent standards of *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983) (en banc). *Geyler* at 328, 697 P.2d at 1078.

¶9 We need not reach the "more stringent standards" set forth in *Geyler*, however, because the superior court did not abuse its discretion in determining that relief under Rule 60(c) was not available here because the basis for the Klopps' motion was legal error, not mistake or excusable neglect.

¶10 Under Rule 60(c)(1), a party may be entitled to relief when there has been "mistake, inadvertence, surprise or excusable neglect[.]" *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 298-99, ¶ 40, 93 P.3d 486, 498-99 (2004). The "test of excusable neglect by a lawyer is whether the neglect might befall a reasonably prudent lawyer under similar circumstances." *Ellman Land Corp. v. Maricopa County*, 180 Ariz. 331, 339, 884 P.2d 217, 225 (App. 1994).

¶11 The Klopps' motion to vacate argued that pursuant to Rule 60(c)(1), their counsel's reliance on a stipulation of the parties and order signed by the superior court extending the deadline to file a motion for new trial more than fifteen days

after the entry of judgment constituted "mistake, surprise and excusable neglect."

¶12 Arizona Rule of Civil Procedure 59(d) provides: "A motion for new trial *shall* be filed *not later than* 15 days after entry of the judgment." (emphasis added). Rule 6(b) allows the court to enlarge the time for the parties to act; however, Rule 6(b) expressly provides: the court "may not extend the time for taking any action under Rule[] . . . 59(d) . . ." except under certain circumstances that are inapplicable here. Arizona courts enforce this prohibition even though the result may appear harsh. As our supreme court explained in *Edwards v. Young*, 107 Ariz. 283, 284-85, 486 P.2d 181, 182-83 (1971):

We are convinced that where, as here, the Rules of Civil Procedure specifically recognize that the time for filing of a motion for a new trial may not be enlarged, the efficacy of the rule depends upon the willingness of the courts to enforce it. We hold that the time may not be extended by agreement of counsel nor is jurisdiction thereby conferred upon the trial court to rule upon the merits of the motion.

Although this holding may create some hardship as in the instant case, the rule is clear and we take it as we find it.

*Id.* at 285, 486 P.2d at 183; see also *Lopez-Hudson v. Schneider, D.D.S.*, 188 Ariz. 407, 408-09, 937 P.2d 329, 330-31 (App. 1996).

¶13 In *Lopez-Hudson*, the court dismissed the appeal for lack of jurisdiction, holding that it is well settled that "time limits for filing a motion for new trial are to be strictly

applied.” *Id.* at 409, 937 P.2d at 331 (quoting *Butler Products Co. Inc. v. Roush*, 145 Ariz. 32, 33, 699 P.2d 906, 907 (App. 1984)). “Rule 6(b) . . . provides that the time for filing the various ‘time-extending’ motions cannot be enlarged.” *Id.* See also *Welch v. McClure*, 123 Ariz. 161, 164, 598 P.2d 980, 983 (1979).

¶14 The Klopps’ failure to file their notice of appeal on time resulted from a legal error: They incorrectly assumed that the superior court had the authority to enlarge the time to file a motion for new trial. Such an error is not excusable under Rule 60(c) because ignorance of the rules of civil procedure is not the type of excuse contemplated in Rule 60(c) as grounds for vacating a judgment. See *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984) (citations omitted). See also *Jarostchuk v. Aricol Communications, Inc.*, 189 Ariz. 346, 349, 942 P.2d 1178, 1181 (App. 1997) (holding that a secretary’s failure to understand a timing rule did not amount to excusable neglect because the “error was neither inadvertent nor clerical; it was intentional action on a matter requiring some legal competence.”). The Klopps’ attempt to lay blame on the superior court’s approval of the stipulation, which the Klopps submitted to the court for entry, and on opposing counsel, is not persuasive.

¶15 The Klopps also assert that Rule 60 relief is available under subsection 6, "any other reason justifying relief from the operation of the judgment," based upon opposing counsel's failure to inform counsel of the untimeliness of the motion. In this regard, the Klopps insinuate that opposing counsel knew of the error and agreed to the extension to sandbag them. This fails for two reasons. First, it is well established that to justify relief under subsection 6, the reason for setting aside the judgment must not be one of the reasons set forth in the first five subsections of Rule 60(c). *Webb v. Erickson*, 134 Ariz. 182, 186, 655 P.2d 6, 10 (1982) ("Clause 6 and the first five clauses are mutually exclusive"). The Klopps' "sandbagging" allegation is an allegation that would fall within subsection 3, "fraud, . . . misrepresentation, or other misconduct of an adverse party." Second, there is no evidence in the record that opposing counsel sandbagged the Klopps in this manner.

¶16 Because the Klopps' failure to timely file their motion for new trial and a timely notice of appeal was not the result of a clerical error, but was based on their attorneys' failure to comply with Rules 59 and 6(b), and applicable case law, the superior court did not abuse its discretion in denying the Klopps' motion on this basis. Because of our resolution of

this issue, we decline to address appellees' argument that the Klopps' Rule 60(c) motion was untimely.

**CONCLUSION**

¶17 We affirm the superior court's denial of the Klopps' motion to vacate and re-enter the judgment.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

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PATRICIA K. NORRIS, Presiding Judge

/s/

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DIANE M. JOHNSEN, Judge