

NOT FOR PUBLICATION

NO. 25274

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

WILLIAM J. COOKE, Plaintiff-Appellee, v.
THOMAS A. MARZEC, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(Civil No. 1RC01-6954)

ORDER DENYING MOTIONS FILED POST-ORDER OF DISMISSAL
(By: Burns, C.J., Lim and Foley, JJ.)

The relevant events occurred as follows:

April 27, 2004	This court filed its Memorandum Opinion deciding this appeal.
May 6, 2004	This court filed its order granting Marzec's motion for an extension of time, from May 7, 2004 to June 1, 2004, to file a motion for reconsideration of the Memorandum Opinion.
June 1, 2004	Marzec mailed his motion for reconsideration to the clerk's office.
June 2, 2004	Marzec's mailed motion for reconsideration was received by the clerk's office and filed.
June 2, 2004	Marzec filed a motion asking this court to take judicial notice of the facts in appeal nos. 24156, 25274 and 25098 and for consideration of supplemental records and authorities.
June 15, 2004	This court filed its order dismissing Marzec's untimely filed motion for reconsideration.
June 24, 2004	Marzec filed a motion to stay entry of a judgment/mandate in this case so that Marzec's impending requests for reconsideration and other relief can be heard.

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June 29, 2004 Marzec filed a motion for reconsideration of this court's June 15, 2004 order.

June 29, 2004 Marzec filed a motion for relief from default, for an extension of time to file a motion for reconsideration of the Memorandum Opinion, and for leave to file an amended motion for reconsideration of the Memorandum Opinion.

In his June 29, 2004 motion for reconsideration of the June 15, 2004 order, Marzec states, in relevant part, as follows:

The ICA June 15, 2004 Order treated the timeliness of a Motion for Reconsideration (of a Memorandum Opinion) as an unwaiverable and rigid jurisdictional requirement. Marzec does not concede that his Motion for Reconsideration mailed June 1, 2004, filed June 2, 2004, was untimely, as will be argued in this motion, but for arguments sake, even if it was untimely, the ICA could have waived its supposed untimely filing and considered the motion on its merits. A Motion for Reconsideration of a final judgment, which affects the jurisdictional requirements (timeliness and tolling issues) of a notice of appeal pursuant to HRAP 4, is rigid and unwaiverable Therefore, Marzec contends that the ICA could have accepted his Motion for Reconsideration filed June 2, 2004, considered it timely and reviewed its merits.

Marzec is first pursuing this requested relief, because the granting of this relief will moot the issue of asking, in an abundance of caution, for an extension of time/relief from default to file a writ of certiorari with the Supreme Court regarding the Memorandum Opinion. A writ of certiorari for review of the June 15, 2004 Order, and any subsequent ICA orders, is another course of action that would be mooted by granting this relief. These points are made only as statements of fact, of Marzec's legal rights, as they relate to the appellate court's powers to expedite a decision in a case and promote justice.

Rules 2, 25, and 40 of the Hawaii Rules of Appellate Procedure (HRAP) (Supp. 2004) state, in relevant part, as follows:

Rule 2. SUSPENSION OF RULES.

In the interest of expediting a decision, or for other good cause shown, either Hawai'i appellate court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

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Rule 25. FILING AND SERVICE.

(a) Filing. Papers shall be filed with the appellate clerk or with an ex officio clerk, as provided by statute. Filing may be accomplished by mail addressed to the appellate clerk, but filing shall not be considered timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if mailed by First Class Mail or other class of mail that is at least as expeditious, postage prepaid. If a motion requests relief that may be granted by a single judge or justice, the judge or justice may permit the motion to be filed and shall note thereon the date of filing and shall thereafter transmit it to the appellate clerk.

Rule 40. MOTION FOR RECONSIDERATION.

(a) Time. A motion for reconsideration may be filed by a party only within 10 days after the filing of the opinion, dispositional order, or ruling unless by special leave additional time is granted during such period by a judge or justice of the appellate court involved.

In his memorandum in support of his motion, Marzec states, in relevant part, as follows:

See Black's Law Dictionary 576 (7th ed. 1999) for the following definitions:

Brief - "a written statement setting out the legal contentions of a party in litigation, esp. on appeal; a document prepared by counsel as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support in support of them." page 186

Appendix - "A supplementary document attached to the end of a writing <the brief includes an appendix of exhibits>" page 96

Motion - "A written or oral application requesting a court to make a specified ruling or order." page 1031

. . . Marzec's Motion for Reconsideration (especially when taken in conjunction with the Motion for Judicial Notice of Facts in Hawaii S.C. 24156, 25274 and 25098 Files and for Consideration of Supplemental Records and Authorities, both filed June 2, 2004), clearly is a brief with an appendix of exhibits, according to Blacks [Law Dictionary 576 (7th ed. 1999)]. It is perfectly reasonable to conclude, that as a brief/appendix defined by the most authoritative existing guidance, filing would be effective on the day of mailing per HRAP Rule 25.

Procedural motions are explained in the HRAP Rule 26, and by defining procedural motions, the distinction between non-procedural motions and briefs is essentially eliminated. What

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exactly is the difference between a brief with an appendix and a non-procedural motion with exhibits? Filings which request relief and address points of law and fact related to the appealed issues are either motions that are not procedural -- or briefs. Motions for reconsideration and writs of certiorari, which can include appendices, argue points of law and fact related to the appealed issues and ask for relief, and they should be defined as briefs for filing/mailling purposes.

. . . The end sought to be achieved can be either: disposition on the merits, disposition due to undefined technicalities, or disposition due to clearly defined requirements. This reraises the quota versus access to the appellate courts issue and the fact that as the drafters, the appellate courts can decide based on their intent.

In summary, on April 27, 2004, this court filed its Memorandum Opinion. On May 6, 2004, this court filed its order granting Marzec's motion for an extension of time, from May 7, 2004 to June 1, 2004, to file a motion for reconsideration. Because he mailed it on June 1, 2004, Marzec's motion was not filed until June 2, 2004. On June 15, 2004, this court filed its order dismissing Marzec's untimely filed motion for reconsideration. On June 29, 2004, Marzec filed a motion for relief from default, for an extension of time to file a motion for reconsideration of the Memorandum Opinion, and for leave to file an amended motion for reconsideration of the Memorandum Opinion. In other words, Marzec, after-the-fact, requests this court to suspend the requirements of the relevant rules and consider and decide his untimely filed motion for reconsideration or his not-yet-filed amended motion for reconsideration.

Marzec recognizes that if this court denies his request for a suspension of the rules, he is past the time authorized for

an application for a writ of certiorari and will have to ask the Hawai'i Supreme Court for an after-the-fact extension of time to apply for a writ of certiorari.

Assuming we are authorized to do so, we will not suspend the application of Hawaii Rules of Appellate Procedure Rule 40(a), absent a set of circumstances clearly compelling such action. No such circumstances exist in this case. In light of the record, we deny Marzec's (1) June 24, 2004, motion to stay entry of a judgment/mandate in this case to authorize this court to hear and decide Marzec's impending requests for reconsideration and other relief, (2) June 29, 2004, motion for reconsideration of the June 15, 2004 order dismissing Marzec's untimely filed motion for reconsideration, and (3) June 29, 2004, motion for relief from default, for an extension of time to file a motion for reconsideration of the Memorandum Opinion, and for leave to file an amended motion for reconsideration of the Memorandum Opinion.

DATED: Honolulu, Hawai'i, July 14, 2004.

On the motions:

Thomas Adam Marzec
Defendant-Appellant.

Chief Judge

Associate Judge

Associate Judge