1982

Prowswood Inc. v. Mountain Fuel Supply Company : Reply Brief of Mountain Fuel Supply Company

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IN THE SUPREME COURT OF THE STATE OF UTAH

PROWSWOOD, INC., et al.,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 18404
MOUNTAIN FUEL SUPPLY COMPANY,	:	
Defendant-Respondent.	:	

PROWSWOOD, INC., et al.,	:	
Plaintiff-Respondent	:	
vs.	:	Case No. 18511
MOUNTAIN FUEL SUPPLY COMPANY,	:	
Defendant-Appellant.	:	

REPLY BRIEF OF MOUNTAIN FUEL SUPPLY COMPANY IN APPEAL NO. 18511

This Brief is submitted by the Appellant, Mountain Fuel Supply Company (Mountain Fuel) pursuant to Rule 75(p)(1), U.R. Civ.P. in Reply to the Answering Brief of Prowswood, Inc. (Prowswood) dated October 7, 1982.

POSITIONS TAKEN BY PROWSWOOD IN THIS APPEAL

The argument of Prowswood in this matter is not difficult to grasp. When all is said, the Prowswood position boils itself down to three contentions:

1. that it was the oversight and mistake of a deputy clerk of the district court and not the error of Prowswood that resulted in its failure to pay the docketing fee to the Clerk at the time Prowswood's notice of appeal was presented for filing;[1/]

2. that the failure to pay the docketing fee to the Clerk of the Court at the time the notice of appeal was filed is not a jurisdictional deficiency affecting the appellate jurisdiction of this Court to hear the Prowswood appeal;

3. that even if the payment of the docketing fee is a jurisdictional prerequisite to the taking of an appeal under Rule 73(a), the conduct of Prowswood constituted

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1/ From the opening stanza on page 1, the Prowswood Brief is virtually laced with the refrain that the lower court clerk was the defaulting and negligent party in the failure of a docketing fee to be paid when the notice of appeal was presented for filing by the runner service . . . . . ."The court clerk only realized no fee had been collected *** after the thirty (30) day period had passed . . . . . ."The court clerk having notified Plaintiff's counsel of the missing check only after the thirty (30) day filing period had passed /p.1/ . . . . . ."If the clerk had insisted on collecting the fee in advance of /simultaneous with/ filing the notice, as it is required to do by law, counsel /Prowswood/ would have caught the problem *** with plenty of time to cure the oversight and achieve a timely filing" /p.4/ . . . . . ."By law the County Clerk should assure collection of the fees before filing the notice. Had it been done here, the fees would undoubtedly have been transmitted timely" /p.9/. . . . . ."Had the absent fees been noted by the clerk at the time of the filing of the notice, counsel /Prowswood/ would have been able to cure the situation in a timely manner"). /p.18/

The foregoing roster of citations as to the clerk's alleged negligence is by no means all-inclusive in the Prowswood Brief. Yet with all of this, nowhere is there to be found any citation that would lead to the conclusion that the district court clerk is the appointed guardian ad litem of legal counsel who practice before this Court.

"excusable neglect", since Prowswood counsel, in overcoming the errors and misrepresentations of the district court Clerk, "went the extra mile" and "did everything within its power to assure timely perfection of the appeal".[2/]

The argument of Prowswood misconceives the controlling law of the case, including the plain construction of Rule 73(a) with regard to the docketing fee being jurisdictional, erroneously equates the term "excusable neglect" with "oversight" or "inadvertence" and abuses the ordinary dictates of commonsense and the legal process in its effort to palm-off its failings on an unknown deputy court clerk. Such arguments are not only fatally flawed but they make the conclusion unmistakable that appellate jurisdiction is fundamentally lacking in this Case and that a dismissal is mandated.

ARGUMENT

POINT I

CONTRARY TO THE CLAIM OF PROWSWOOD, THE NEGLIGENCE IN FAILING TO PAY THE JURISDICTIONAL DOCKETING FEE MAY NOT BE PINNED UPON THE CLERK OF THE DISTRICT COURT.

1. The Negligence Involved is That of Prowswood.

In an attempt to escape responsibility for what is acknowledged to be a clear failure to pay a jurisdictional docketing

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2/ Resp. Br. pp. 18, 21.

fee at the time that the notice of appeal was filed, Prowswood suggests that the district court clerk was the negligent culprit and that had it not been for the Clerk's carelessness, the docketing fee would have been properly tendered at the time the notice of appeal was filed. In addition to the litany of statements to that effect running throughout the Prowswood brief,[3/] perhaps the epic statement in that regard is found on page 20:

> "Late payment of fees due to the clerk's oversight is the only basis upon which this appeal rests." (First emphasis added.)

The argument of Prowswood is, at best, specious. Nothing in the appellate rules of this Court or in the controlling case law makes the lower court clerk the nursemaid of parties who attempt to bring litigation to this Court. The Clerk has no responsibility under Rule 73(a) to ensure that an appeal is properly perfected. He is not required to give advice, notice, or information regarding the simple but rudimentary steps to be undertaken in commencing an appeal. Nor does the Clerk serve as some sort of proxy or agent for a party to guaranty that a valid appeal, invoking the jurisdiction of this Court, is taken.

The plain fact which Prowswood appears to be unwilling to accept is that it, and it, alone, was responsible for the failure of the jurisdictional docketing fee to be paid. If

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3/ C.f., f.n. 1.

Prowswood had followed the straightforward and widely understood provisions of Rule 73(a) "by filing with the district court a notice of appeal *** and depositing therewith the [docketing] fee", the appeal would have been fully perfected and valid.[4/] But Prowswood did not do that. It not only failed to tender the docketing fee with the notice of appeal, it failed to tender any fees at all to the district court. So far as Prowswood was concerned, the taking of an appeal and invoking the appellate jurisdiction of this Court was no different than filing any other interlocutory motion or notice with the district court. All that was needed under the Prowswood view was to have a runner service present a notice of appeal to the clerk of the Court. The trouble with that concept is that it does not square with the law of the case.

It is disingenuous, to say the least, for Prowswood to urge that the Clerk only notified Prowswood counsel of the "missing" check after "the thirty (30) day filing period had passed". The so-called "missing" check had not been misplaced or lost as Prowswood implies, and it was not the responsibility of the court clerk to notify Prowswood of anything before the expiration of the one month (not 30 days) appeal period under 73(a).

4/ Rule 73(a) 2d para. is explicit that the payment of the docketing fee and the filing of the notice of appeal are the only two steps that need be taken within the one month period to effect a valid appeal.

2. The District Court Clerk Did Not Mislead Prowswood.

Prowswood does not end its "scapegoat" argument with regard to the district court clerk until it alleges, in addition, that the clerk, upon telephone inquiry by counsel, misled Prowswood by advising that the appeal "had been properly filed".[5/] Nothing in this record will permit the conclusion that some deputy county clerk gave Prowswood counsel legal advice that its appeal had been "properly" filed. At the outside, there exists only the unsupported statement of Prowswood counsel that it telephoned an undesignated deputy county clerk to determine if the notice of appeal had been received from the runner service. No discussion is claimed to have taken place with regard to the payment of fees, specifically the docketing fee. How some deputy clerk could have given Prowswood counsel a legal opinion on whether the appeal was "properly" filed, is not readily explained.

The essential question in this Appeal is not complicated -- whether the extant facts present a case of excusable neglect on the part of Prowswood under Rule 73(a). That deliberation is hardly assisted by the mask and rouge of argument that not only did a deputy court clerk negligently fail to timely advise Prowswood that the docketing fee should be paid, but that the Clerk actually misled Prowswood counsel into believing that the appeal had been properly filed. The art of advocacy deserves better.

5/ Resp. Br. p. 15; See virtual string of such claims -- Resp. Br. pp. 3, 11, 14-15, 18.

POINT II

CONTRARY TO PROWSWOOD'S CLAIM, FAILURE TO TIMELY PAY THE DOCKETING FEE IS A DEFECT OF JURISDICTIONAL MAGNITUDE.

1. Prowswood's Conduct Belies its Assertion That Payment of Docketing Fees is not Jurisdictional.

Prowswood maintains in its Answering Brief that "timely payment of the necessary fees are (sic) not required to perfect an appeal." Resp. Br. p. 12. Under that theory as now espoused, the docketing and filing fees could be paid at any time during the course of an appeal without endangering its validity.

If Prowswood is correct in its claim, several questions are immediately presented. Why did Prowswood, upon learning of its failure to pay the docketing fee, suddenly rush to the district court Clerk to pay the fees and contact Judge Dee ex parte to obtain an extension of time? (R. 695) Why did Prowswood immediately file its "Motion for Extension of Time for filing a Notice of Appeal" (R. 641-42) if it did not believe that the docketing fee was jurisdictional? And why did Prowswood concede at oral argument on its Motion for Extension, and also in its Brief herein that even though it had failed to timely perfect the appeal, that failure constituted excusable neglect?

We need not grope for the answers; they are clear. Upon ascertaining that the docketing fee or filing fee had not been

paid to the clerk, Prowswood quickly tried to correct its carelessness by making a tender of the fee and seeking an ex parte order after the original time for appeal had expired. Had Prowswood concluded that the docketing fee was not jurisdictional, it would have simply paid the fee without seeking an "Extension of Time for Filing a Notice of Appeal". Prowswood's action concedes that timely payment of the docketing fee is jurisdictional under 73(a).

2. Prowswood's Interpretation of Utah Law is in Error.

Prowswood makes the fallacious claim that "this Court has never held that timely payment of fees is necessary to perfection of an appeal". (Resp. Br. p. 7) To the contrary, a careful reading of In re Estate of Ratliff, 19 U.2d 346, 431 P.2d 571 (1967) and Jacobsen v. Jeffries, 86 Utah 587, 47 P.2d 892 (1935)[6/] cited in Mountain Fuel's opening Brief, will admit no other conclusion. In Jacobsen, particularly, the Court made it abundantly clear that "leaving a paper with a filing officer, a fee for the filing of which is by the statute required to be paid in advance, is not a filing." 47 P.2d at 893. (Emphasis added.)

6/ Prowswood strives to distinguish the Jacobsen and Ratliff cases by observing that, in those cases, the clerk did not stamp and file the Notice until the fees were paid. Unfortunately for Prowswood, the determination of whether this Court's appellate jurisdiction has been triggered turns not upon whether a clerk happens to stamp a notice of appeal, but upon whether Prowswood has complied with the simple dictates of Rule 73(a).

One simply cannot read the language of Rule 73(a) without arriving at the obvious conclusion that two things, and only two things, must be done in order to perfect an appeal---the notice of appeal must be filed and the docketing fee paid within the one month appeal period. After setting forth these two conditions, Rule 73(a) continues:

> "Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not effect the validity of the appeal. . ." (Emphasis added.)

Accord: Anderson v. Anderson, 3 U.2d 277, 282 P.2d 845 847 (1955). The manifest intent of the underscored language is to make jurisdictional not only a failure to timely file the notice, but a failure to timely remit the docketing fee, while leaving to the discretion of the Supreme Court any other failure to comply with the appellate rules. In view of the explicit language of the Utah Rule, cases from other jurisdictions using other jurisdictional benchmarks, are of little assistance in answering the jurisdictional question. 7/

7/ Prowswood cites Gould v. Members of New Jersey Division of Water Policy & Supply, 555 F.2d 340 (3rd Cir. 1977) as supporting its contention that "late payment of fees . . . does not affect the appeal's perfection." (Resp. Br. p. 11) Prowswood ignores the fact that the Third Circuit was interpreting the Federal Rules of Appellate Procedure. The language of Rule 3(a), F.R.App.P. differs from the Utah Rule in one important regard. Rule 3(a) provides that the "failure . . . to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . ." whereas, Utah Rule 73(a) very explicitly provides that a failure to take any further steps other than the filing of the notice and payment of the docketing fee, shall not invalidate the appeal. Gould is inapposite.

3. Contrary to Prowswood's Assertion, Other Jurisdictions Have Held that Timely Payment of the Docketing Fee is Jurisdictional.

Prowswood asserts that "the only case found which holds payment of fees to be necessary to perfection of an appeal is Myers v. Harris, 82 Wash. 2d 152, 509 P.2d 656 (1973)." (Resp. Br. p.14) The statement is patently incorrect. True enough, Myers did hold that timely filing of a proper notice and timely payment of the required filing fee are jurisdictional. But other courts have arrived at parallel conclusions. For example, in State v. Brookshire, 400 S.W.2d 61 (Mo. 1966) appellant filed a notice of appeal with the Clerk within the appeal period, but did not deposit the docket fee until after the time for appeal had run. The Missouri Supreme Court dismissed the appeal with this observation:

> "This notice of appeal was not timely filed because the docket fee, without which the notice of appeal is ineffective, was not deposited . . .; therefore we do not have jurisdiction of the appeal. Id. at 63 (Emphasis in original.)[8/]

In American Legion Leo Brinda Post No. 90 v. Nebraska Liquor Control Comm'n., 199 Neb. 429, 259 N.W.2d 36 (1977), interpreting a statute almost identical to Rule 73(a), the

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8/ See also, Kattering v. Franz, 231 S.W.2d 148 (Mo. 1950) (The Court determined, on facts similar to Brookshire, that "there was no notice of appeal legally filed within the required time in this case," Id. at 150, and dismissed the appeal); Keeney v. State, 556 S.W.2d 514 (Mo. App. 1977). (The clerk "improvidently accepted" a notice not accompanied by the docket fee, and the filing of the notice was therefore "invalid and ineffective".) Id. at 515.

Nebraska Supreme Court declared that filing the notice and payment of the docketing fee are jurisdictional conditions. In dismissing the appeal, said the Court:

> "The Supreme Court has no power to exercise appellate jurisdiction. . . unless the appellant shall have filed a notice of appeal and deposited a docket fee. . . within the time fixed. . . Id. at 37 (Emphasis added.)9/

Prowswood is wrong in its assertion that a docketing fee is not jurisdictional and wrong for the wrong reason, viz., that no courts other than Washington have held deposit of the docketing fee is not jurisdictional. Prowswood knew in April that it was wrong when it immediately tried to obtain an extension of time within which to appeal after discovering that a docketing fee should have been paid.

POINT III

CONTRARY TO PROWSWOOD'S DECLARATION, THE RECORD DOES NOT ESTABLISH ESCUSABLE NEGLECT.

This entire appeal comes down to the fundamental question of whether Prowswood's conduct under the circumstances constituted excusable neglect. Prowswood contends that its oversight in paying the docket fee was an excusable inadvertence and that the lower Court ruling of Judge Dee requires affirmance. Since this issue directly affects appellate jurisdiction of

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9/ See also, Jefferson Maintenance Co. v. Detroit Electrotype Co., 7 Mich. App. 619, 152 N.W.2d 699 (1967) (Citing G.C.R. 802.1, the Court stated that defendants filed their claim of appeal . . . and paid their filing fee, thereby giving the Court of Appeals jurisdiction." 152 N.W.2d at 700).

this Court and there are no contested issues of fact, the trial Court ruling is not at all dispositive. Sprout v. Farmers Insurance Exchange, 681 F.2d 587 (9th Cir. 1982).

1. Inadvertence, Oversight, and the Press of Business Do Not Constitute Excusable Neglect.

The only reason given by Prowswood for the failure to pay the docketing fee was that Prowswood counsel was involved with "another matter" on the day of the attempted filing (R. 698), and "inadvertently" failed to ensure that the check for the fees accompanied the notice. (R. 693)

The law is clear that neither preoccupation with another legal matter, nor the general press of business constitute excusable neglect. Were it otherwise, the rule would be meaningless, always overcome by the exception. In Pinero Schroeder v. Fed. Nat'l. Mtg. Ass'n., 574 F.2d 1117 (1st Cir. 1978), counsel failed to timely perfect the appeal, and alleged that his involvement for two months negotiating a collective bargaining agreement manifested excusable neglect. The First Circuit disagreed:

> "We do not consider the fact that an attorney is busy on other matters to fall within the definition of excusable neglect. Most attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences. [citation omitted] Filing a notice of appeal does not require much time or deliberation. Id. at 1118.

The Court in Pinero Schroeder reversed the lower court's finding of excusable neglect and dismissed the appeal.

Prowswood argues that the failure to pay the docketing fee was the result of "oversight".[10/] The overwhelming weight of authority is that inadvertence and oversight of counsel or staff do not establish excusable neglect. 9 Moore's Federal Practice ¶204.13 [1.-3] at 4-97 to 4-98; State of Oregon v. Champion International Corp., 680 F.2d 1300 (9th Cir. 1982) (mailing a notice of appeal to state court clerk rather than federal clerk held not excusable under Rule 4(a)(5) F.R.App.P.). Crossan v. Irrigation Dev. Corp., 598 P.2d 812 (Wyo. 1979) (oversight or ignorance of the Wyoming appellate rules is not excusable neglect as a matter of law).

Excusable neglect is designed to take care of genuine emergency conditions such as death, sickness, unavoidable hindrance or accident and not to provide a safety net for simple carelessness. Farmers Insurance Group v. Dist. Court of Second Jud. Dist., 507 P.2d 865 (Colo. 1973).

2. The Authorities Cited by Prowswood are not Controlling.

The decisions cited by Prowswood are no comfort to its position. In Booth v. Magee Carpet Co., 548 P.2d 1252 (Wyo. 1976), the Wyoming Supreme Court affirmed the denial of a motion to set aside a default judgment, having no bearing on the

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10/ Resp. Br. p. 4.

strict standards involving appellate jurisdiction. McCormick v. McCormick, 541 P.2d 765 (Mont. 1975) cited by Prowswood, actually stands for the proposition that an appellant who has decided not to appeal may not change his mind and seek an extension after the time for filing a notice of appeal has lapsed; by dictum, the Montana Court said that close calls should be deemed in favor of the appellant. In Bosler v. Morad, 555 P.2d 567 (Wyo. 1976) also cited, the Wyoming Court simply found (with good cause we might add) that excusable neglect had been shown where a notice of appeal and fees mailed by appellant to the clerk in what would have been ordinarily adequate time for the mails, arrived one day late. The facts in Bosler do not have a thing to do with oversight and inadvertence which are before this Court.

The fact is that Prowswood has not cited a single case 11/ wherein a Court has held, on similar or parallel facts, that "oversight" or other business constitutes excusable neglect.

11/ Prowswood also cites Stirling v. Chemical Bank, 511 F.2d 1030 (2nd Cir. 1975). However, contrary to Prowswood's representations, the Second Circuit did not find that excusable neglect had been shown. On the contrary, since the motion for extension had been mistakenly addressed to the Court of Appeals, the Court remanded the case to the district court to consider whether excusable neglect had been shown, and in so doing, chastised counsel for appellants:

> /W/e thoroughly disapprove of the careless procedure followed by appellants' counsel who demonstrated a singular disregard for or ignorance of the pertinent rules. . . Id. at 1032.

3. Lack of Prejudice to the Respondent has no Bearing On the Excusable Neglect Issue.

Prowswood repeatedly argues that Mountain Fuel was not prejudiced by the failure to timely perfect its appeal. (Resp. Br. pp. 4,13,15-16). The short answer is, of course, that in measuring excusable neglect for purposes of this Court's appellate jurisdiction, prejudice to the respondent is not relevant.[12/]

In United States v. Virginia, 508 F.Supp. 187 (E.D.Va. 1981), the appellant attempted (as does Prowswood here) to shift the focus from "excusable neglect" to "injustice." The district Court refused to be drawn in by the argument:

> "It is always just that one should have an appeal from a trial court and it would seem that it would always be an injustice to deny such an appeal merely because of the inadvertent missing of an arbitrarily drawn deadline. . . . Surely what is just on the 30th day does not become unjust on the 31st merely because the 31st day has come. Thus, if the justice or injustice of the question is to be the basis for granting or denying a motion for an extension, the Court should not look to the acts or omissions of appellant but, instead, to any prejudice that might accrue to appellee from a granting of the extension. This is clearly and explicitly not what the rule requires. The rule requires that the conduct of the appellant only be looked to and that only if excusable neglect be shown on appellant's part should an extension be granted." Id. at 192. (Emphasis added.)

12/ The appellant in Spound v. Mohasco Industries, Inc., 534 F.2d 404 (1st Cir. 1976), made the same argument advanced by Prowswood. It was summarily rejected, the court declaring that the "rule makes no provision for plaintiff's contention that the defendant was not prejudiced. Such an exception would be limitless." Id. at 411.

The special circumstances necessary to constitute "excusable neglect" is not, under the weight of authority, made out in this matter. Judge Dee erred in granting the extension, and this Case should be dismissed.

C O N C L U S I O N

There is no reasonable doubt as to what the outcome of this Case should be. Rule 73(a) is clear that the appellate jurisdiction of this Court is invoked only when a notice of appeal is filed and the docketing fee is deposited within the one month time frame. The filing and deposit are jurisdictional. Prowswood, itself, so interpreted the Rule when it sought an extension of time to file its appeal, upon discovering its carelessness.

A party may be relieved of its failure to properly perfect an appeal by a showing of excusable neglect under Rule 73(a). Under an almost unanimous body of authority, the oversight and neglect of Prowswood does not constitute excusable neglect. Prowswood treated its appeal to this Court as though it were engaged in making any other random trial court filing.

An affirmance of the lower Court that the conduct of Prowswood constituted excusable neglect would effectively eliminate the need to demonstrate any exceptional circumstances that preclude a party from perfecting a timely appeal to this Court. That, indeed, would be an injustice.

The appellate jurisdiction of this Court having not been properly invoked by Prowswood, its appeal in Case No. 18404 should be dismissed.

Respectfully submitted,

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