

SUPREME COURT OF ARIZONA

American Asphalt & Grading Co. v. CMX, L.L.C., 227 Ariz. 117

253 P.3d 1240 (2011) · No. CV-10-0324-PR · Decided July 1, 2011

SUMMARY

The Supreme Court of Arizona held that Arizona Rule of Civil Procedure 38.1(e) requires contemporaneous or nearly contemporaneous written notice when a case is placed on the Inactive Calendar. Advance notice of a future placement does not satisfy the rule, although the resulting judgment is not void for lack of such notice. The court vacated the court of appeals' decision and remanded for the superior court to consider the notice deficiency in ruling on the plaintiff's Rule 60(c) motion.

CASE DETAILS

COURT	Supreme Court of Arizona
WRITING FOR THE COURT	W. Scott Brutinel, Justice; Rebecca White Berch, Chief Justice; Andrew D. Hurwitz, Vice Chief Justice; W. Scott Bales, Justice; A. John Pelander, Justice
JURISDICTION	Arizona
DECIDED	July 1, 2011
DOCKET	CV-10-0324-PR
DISPOSITION	vacated
PROCEDURAL POSTURE	The Arizona Supreme Court granted review of the court of appeals' affirmance of the superior court's denial of American Asphalt's motion under Arizona Rule of Civil Procedure 60(c)(1) and (6) to set aside a dismissal for lack of prosecution.
STANDARD OF REVIEW	The court interpreted Arizona Rule of Civil Procedure 38.1 using principles of statutory construction and reviewed the Rule 60(c) issue in light of the applicable abuse-of-discretion framework.
PRECEDENTIAL VALUE	Published, precedential Arizona Supreme Court opinion decided en banc.
PARTIES	American Asphalt & Grading Company v. CMX, L.L.C., CMX Group, Inc.

TOPICS

civil procedure

appellate procedure

statutory interpretation

standard of review

PRACTICE AREAS

civil procedure

appellate procedure

commercial litigation

QUESTIONS PRESENTED

1. Whether Arizona Rule of Civil Procedure 38.1(e) requires notice to counsel contemporaneously or nearly contemporaneously with placement of a case on the Inactive Calendar.
2. Whether a 150-Day Order providing advance notice of a possible future placement on the Inactive Calendar satisfied Rule 38.1(e).
3. Whether noncompliance with Rule 38.1(e) rendered the dismissal void ab initio or instead constituted a factor for consideration on a Rule 60(c) motion.
4. Whether the case should be remanded for the superior court to determine the effect of the deficient notice on counsel's conduct.

HOLDINGS

1. Arizona Rule of Civil Procedure 38.1(e) requires contemporaneous or nearly contemporaneous written notice when a case is placed on the Inactive Calendar.
2. The 150-Day Order did not comply with Rule 38.1(e) because it gave only advance notice of the court's intention to place the case on the Inactive Calendar rather than notice when the case was actually placed there.
3. Failure to provide Rule 38.1(e)-compliant notice does not make the dismissal void ab initio; instead, the absence or deficiency of notice is one factor among many for the superior court to consider in ruling on a Rule 60(c) motion.

KEY QUOTATIONS

"We hold that a notice issued several months prior to placing the case on the Inactive Calendar does not comply with this rule." (253 P.3d at 1240)

"Based on the rule's directive that the court shall 'promptly' notify counsel of the placement of cases on the Inactive Calendar, however, we conclude that Rule 38.1(e) requires contemporaneous (or nearly contemporaneous) notice when a case is placed on the Inactive Calendar." (253 P.3d at 1241)

"We reject American Asphalt's argument that the superior court's judgment was void ab initio." (253 P.3d at 1242)

FACTUAL BACKGROUND

American Asphalt filed an action against CMX for professional negligence and breach of implied warranty. The superior court issued a 150-Day Order warning that failure to file a Motion to Set and Certificate of Readiness would result in placement on the Inactive Calendar and eventual dismissal without further notice. American

Asphalt did not file the required motion, and the case was dismissed without prejudice after the stated deadlines. Although American Asphalt had received advance notice of the consequences, it had not received contemporaneous notice when the case was actually placed on the Inactive Calendar.

PROCEDURAL HISTORY

American Asphalt sued CMX for professional negligence and breach of implied warranty. After American Asphalt failed to file a required Motion to Set and Certificate of Readiness, the Maricopa County Superior Court dismissed the action without prejudice. The superior court denied relief under Rule 60(c), and the court of appeals affirmed, reasoning in part that a prior 150-Day Order supplied the notice required by Rule 38.1(e). The Arizona Supreme Court vacated the court of appeals' decision and remanded to the superior court for further consideration of the effect of the deficient notice.

DISPOSITION

vacated

REMAND INSTRUCTIONS

The superior court must follow the analysis in *Copeland* and determine what effect, if any, the absence of Rule 38.1(e)-compliant notice had on counsel's conduct when deciding the Rule 60(c) motion.

CASES CITED

- *Preston v. Kindred Hosps. W., L.L.C.*, 226 Ariz. 391, 393 ¶ 8, 249 P.3d 771, 773 (2011)
- *State ex rel. Romley v. Ballinger*, 209 Ariz. 1, 2 ¶ 6, 97 P.3d 101, 102 (2004)
- *Cockerham v. Zikratch*, 127 Ariz. 230, 234, 619 P.2d 739, 743 (1980)
- *Copeland v. Ariz. Veterans Mem'l Coliseum & Exposition Ctr.*, 176 Ariz. 86, 89-90, 859 P.2d 196, 199-200 (App. 1993)
- *Jepson v. New*, 164 Ariz. 265, 792 P.2d 728 (1990)
- *American Asphalt & Grading Co. v. CMX, L.L.C.*, 1CA-CV 09-0634, 2010 WL 2889471, at *3 ¶¶ 13-15 (Ariz. App. July 22, 2010) (mem. decision)

OPINION

BRUTINEL, J.

253 P.3d 1240 (2011) AMERICAN ASPHALT & GRADING COMPANY, an Arizona corporation, Plaintiff/Appellant, v. CMX, L.L.C., an Arizona limited liability company; CMX Group, Inc., an Arizona corporation, Defendants/Appellees. No. CV-10-0324-PR. Supreme Court of Arizona, En Banc. July 1, 2011. Lang Baker & Klain PLC by Kent A. Lang, William G. Klain, Michael Walter Thal, Scottsdale, and Paul G. Ulrich P.C. by Paul G. Ulrich, Phoenix, Attorneys for American Asphalt & Grading Company.

Folk & Associates P.C. by P. Douglas Folk, Benjamin L. Hodgson, Christopher D.C. Hossack, Phoenix, Attorneys for CMX LLC and CMX Group Inc. Committee on Superior Court by Hon. James Soto, Chair, Amicus Curiae Committee on Superior Court. OPINION BRUTINEL, Justice. ¶ 1 Arizona Rule of Civil Procedure 38.1(e) requires the superior court to "promptly notify counsel in writing of the placing of cases on the Inactive Calendar."

We hold that a notice issued several months prior to placing the case on the Inactive Calendar does not comply with this rule. I. ¶ 2 In April 2008, American Asphalt and Grading Company ("American Asphalt") sued CMX, L.L.C., for professional negligence and breach of implied warranty.

On October 1, 2008, the Maricopa County Superior Court issued an order ("150-Day Order") informing American Asphalt that if it did not file a Motion to Set and Certificate of Readiness as required by Rule 38.1(a), the case would be placed on the Inactive Calendar after January 20, 2009, and dismissed without further notice on or after March 23, 2009. ¶ 3 American Asphalt did not file a Motion to Set and the case was dismissed without further notice on April 29, 2009.

American *1241 Asphalt then promptly moved under Arizona Rules of Civil Procedure 60(c)(1) and (6) to set aside the dismissal. American Asphalt contended that its failure to comply with Rule 38.1(a) was excusable because it had substituted counsel around the time of the Rule 38.1(d) filing deadline.

The superior court denied the motion. The court of appeals affirmed, finding no excusable neglect partly because "the 150-Day Order provided the notice required in Rule 38.1(e)." American Asphalt & Grading Co. v. CMX, L.L.C., 1CA-CV 09-0634, 2010 WL 2889471, at *3 ¶¶ 13-15 (Ariz.App. July 22, 2010) (mem. decision). ¶ 4 We granted review to clarify the requirements of Rule 38.1(e).

We have jurisdiction under Article 6, Section 5(3) of the Arizona Constitution and A.R.S. § 12-120.24 (2003). II. ¶ 5 Arizona Rule of Civil Procedure 38.1(d) requires that "every case in which a Motion to Set and Certificate of Readiness has not been served within nine months after the commencement thereof" shall be placed on the "Inactive Calendar."

Under that rule, cases remaining on the Inactive Calendar for two months without either the filing of a Motion to Set or a court order allowing continuance on that Calendar "shall be dismissed without prejudice for lack of prosecution." Rule 38.1(e) states: The clerk of the court or court administrator, whoever is designated by the presiding judge, shall promptly notify counsel in writing of the placing of cases on the Inactive Calendar, and no further notice shall be required prior to dismissal. ¶ 6 American Asphalt argues that the 150-Day Order did not satisfy Rule 38.1(e) because the order did not issue when the case was placed on the Inactive Calendar.

We use rules of statutory construction to interpret court rules. See *Preston v. Kindred Hosps. W., L.L.C.*, 226 Ariz. 391, 393 ¶ 8, 249 P.3d 771, 773 (2011). And we do not look beyond a rule's language if it is clear and unambiguous. *Id.* ¶ 7 Read in isolation, the phrase "of the placing of cases on the Inactive Calendar," rather than "when a case is placed on the Inactive Calendar," could be read to mean that Rule 38.1(e) is satisfied if attorneys are notified at any time that cases will be placed on the Inactive Calendar on some specified future date.

Under that interpretation, Maricopa County's 150-Day Order would comply with the rule. ¶ 8 Based on the rule's directive that the court shall "promptly" notify counsel of the placement of cases on the Inactive Calendar, however, we conclude that Rule 38.1(e) requires contemporaneous (or nearly contemporaneous) notice when a case is placed on the Inactive Calendar.

As noted above, Rule 38.1(d) directs the court to "place on the Inactive Calendar every case in which a Motion to Set and Certificate of Readiness" are not served within nine months. Rule 38.1(e), by requiring the court to "promptly notify counsel in writing of the placing of cases on the inactive calendar," is most plausibly read to refer to notice when the action identified in Rule 38.1(d) occurs—that is, when the case is actually placed on the Inactive Calendar.

Any other interpretation would imply that the court's placing a case on the Inactive Calendar under Rule 38(d)(1) means something different than the "placing of cases on the Inactive Calendar" in Rule 38.1(e). ¶ 9 Construed most reasonably and in context, Rule 38.1(e) requires notification when a case is placed on the Inactive Calendar.

Because the 150-Day Order did not notify American Asphalt when the case was placed on the Inactive Calendar, but rather gave notice only of the court's intention to do so in the future, the order did not comply with Rule 38.1(e). ¶ 10 In so holding, we do not disapprove of Maricopa County's 150-Day Order, which provides useful advance notice to counsel. But local practices must comport with and cannot supplant the rules of civil procedure.

See *State ex. rel. Romley v. Ballinger*, 209 Ariz. 1, 2 ¶ 6, 97 P.3d 101, 102 (2004) (emphasizing that superior courts have no authority to abridge rules of civil procedure). ¶ 11 Having found that the notice provided did not comply with Rule 38.1(e), we next *1242 consider the consequences.

We reject American Asphalt's argument that the superior court's judgment was void ab initio. See *Cockerham v. Zikratch*, 127 Ariz. 230, 234, 619 P.2d 739, 743 (1980) (explaining that void judgments are those rendered by a court lacking jurisdiction over subject matter or parties whereas erroneous judgments are those issued by courts with jurisdiction, but subject to reversal on appeal).

Rather, we adopt the approach taken in *Copeland v. Arizona Veterans Memorial Coliseum & Exposition Center*, 176 Ariz. 86, 859 P.2d 196 (App.1993). There, the court of appeals applied our

decision in *Jepson v. New*, 164 Ariz. 265, 792 P.2d 728 (1990), to conclude that lack of notice is one factor, among many, that a court should consider in ruling on a Rule 60(c) motion.

See *Copeland*, 176 Ariz. at 89-90, 859 P.2d at 199-200. ¶ 12 Here, unlike *Copeland*, American Asphalt did receive notice, albeit not the notice required under Rule 38.1(e), of the consequences of failing to file a Motion to Set. Express notice was set forth in the 150-Day Order (printed on a pink sheet of paper) as well as in Rule 38.1(d). Nonetheless, in an excess of caution, we vacate the court of appeals' decision and remand the case to the superior court because the record does not make clear whether that court considered the 150-Day Order dispositive.

On remand, the superior court should follow the analysis in *Copeland* and determine what effect, if any, the absence of Rule 38.1(e)compliant notice had on the conduct of counsel. CONCURRING: REBECCA WHITE BERCH, Chief Justice, ANDREW D. HURWITZ, Vice Chief Justice, W. SCOTT BALES and A. JOHN PELANDER, Justices.