

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

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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)