

**HARRY FRITZ,
Appellant,**

v.

**KOROR STATE PUBLIC LANDS
AUTHORITY,
Appellee.**

CIVIL APPEAL NO. 10-012
LC/B 08-0582

Supreme Court, Appellate Division
Republic of Palau

Decided: September 21, 2010

[1] **Appeal and Error:** Filing Deadlines

Under ROP R. App. P. 26(c), when the Court requires something to be done within a specific time, such as the filing of an opening brief, it may enlarge that time in three specific situations, using three specific standards. If a litigant's *first* request to enlarge that time is made *before* the expiration of the specified time period, the court may enlarge the time for *good cause shown*. Any *successive* motions for enlargement will be granted only upon the showing of *extraordinary circumstances*. If a litigant makes a request *after* the expiration of the specified time period, the court may permit the filing only where the failure to file was the result of *excusable neglect*.

[2] **Appeal and Error:** Filing Deadlines

Good cause shall henceforth be treated as the most lenient of the three standards, requiring any legally satisfying and sufficient reason to show why a request should be granted. The leniency of this standard comports with its

application in instances, such as Rule 26(c), in which a litigant's *first* request for an extension is made before the expiration of the time period. It is common sense that a Court is more likely to grant a litigant's request if it is the litigant's first request, and it is made before a deadline has passed.

[3] **Appeal and Error: Filing Deadlines**

Once a litigant begins making successive requests for extensions of time prior to the deadline, however, the Court will begin assessing such requests under the *extraordinary circumstances* standard. The Court declines to set out a more specific definition here, but, suffice it to say, it requires something more than that which satisfies the good cause standard. The Court will assess each successive request, provided that the request occurs prior to the expiration of the deadline, with the underlying intent of Rule 26(c) in mind, that is, to prevent parties from the dilatory practice of requesting continuance after continuance and extension after extension.

[4] **Appeal and Error: Filing Deadlines**

Where a litigant requests an extension *after* the expiration of the time period or, even worse, where the Court is required to issue a show cause order to track down the party after the deadline has passed, the Court will apply the *excusable neglect* standard. For *excusable neglect*, we adopt the standard definition under prior decisional law, that is, counsel must establish something more than the normal (or even reasonably foreseeable but abnormal) vicissitudes inherent in the practice of law.

Counsel for Appellant: Moses Uludong

Counsel for Appellee: J. Uduch Sengebau Senior

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, presiding.

PER CURIAM:

Before the Court is Appellant's motion for reconsideration, in which Appellant's counsel asks the Court to reconsider its August 17, 2010 dismissal of the above-styled appeal. In support of this motion, Appellant's counsel states that he mistakenly believed the final deadline to be August 13, 2010, and that, in any case, counsel had been "seriously ill and bedridden" during the first two weeks of August.

The Court has taken this opportunity to review the file in this matter, and in doing so, has uncovered the following. The Notice of Appeal was filed on April 2, 2010. The Court issued its first show cause order on July 5, 2010, because Appellant's counsel had failed to file the opening brief on time. On July 15, 2010, Appellant's counsel responded to the show cause order, in which he claimed that he was confused about the filing deadlines. He had inadvertently *not* filed two separate orders for written transcripts of the audio recordings and wrongly believed he had more time in which to file. Attached to his response were the unfiled orders, as well as the written transcript. The attached transcript failed to

meet a single one of the Court's specifications for written transcripts, even though the Court sent the specifications to Appellant's counsel on April 28, 2010. The transcript failed to include the name of the transcriber. It was neither numbered in the left-hand margin, nor properly double-spaced, nor composed in the correct font, nor even certified and notarized as a true and correct transcription of the proceedings in the Land Court below.

In its order of July 20, 2010, the Court specifically noted that Appellant's response was

dangerously close to insufficient for permitting this appeal to proceed. This Court should not have to remind attorneys of their obligations for pending cases or appeals. It is the attorney's duty to his or her client to remain apprised of all deadlines and to ensure that they are met. By issuing an order to show cause, the Court effectively provided Appellant—who had already missed the deadline for filing his brief—a second chance to demonstrate why the brief was late and proceed with the appeal. Instead Appellant cited only to "inadvertence," which would typically fall well short of just cause to revive his appeal. Nevertheless, the Court prefers to adjudicate disputes on their merits, and it does not wish to punish Appellant for the

dilatory or negligent conduct of his counsel.

At the close of this strongly-worded order, the Court set a clear deadline, **in bold print**, of Monday, August 9, 2010, and stated that Appellant's failure to file an opening brief by that date would result in dismissal, absent a showing of extraordinary circumstances. Despite the unequivocal wording of that order, August 9, 2010 came and went with no opening brief from Appellant, but, while this Court was in the process of assigning a panel to dismiss the case, Appellant filed the opening brief on August 12, 2010. Unsurprisingly, his opening brief made no mention of the late filing, nor attempted to show any extraordinary circumstances preventing him from filing on the clearly-designated due date. As a result of this total failure to follow the prior order, the Court dismissed the appeal and sanctioned Appellant's counsel for his failure to abide by the Court's previous orders.

On August 26, 2010, after the Court dismissed the appeal, Appellant's counsel filed a motion for extension of time to file a motion for reconsideration, citing illness as the reason for needing the extension. The Court granted the motion and gave Appellant's counsel until September 6, 2010, to file the motion for reconsideration. Amazingly, on September 7, 2010, Appellant's counsel filed yet another motion for extension of time to file his motion for reconsideration, citing illness and inability to work once again. The Court granted this motion and gave Appellant's counsel until September 15, 2010, to file. Finally, on September 15, 2010, Appellant's counsel filed his motion for reconsideration.

In this brief, two-page motion, Appellant's counsel simply states that he mistakenly believed the final deadline to be August 13, 2010, instead of August 9, 2010, and that, in any case, counsel had been "seriously ill and bedridden" during the first two weeks of August. To cite yet *another* instance of inadvertence, especially after the Court's strongly-worded order on July 20, 2010, in which the Court not only indicated that inadvertence would be insufficient in the future, but also clearly stated the deadline of August 9, 2010, simply strains credulity. Although the Court is sensitive to counsel's illness, it hesitates to consider illness, which does not require lengthy hospitalization or off-island treatment, as rising to the level of extraordinary circumstances. In any event, counsel did not attempt to argue that his illness caused him to calendar the due date incorrectly, nor did he argue that some other extraordinary circumstance caused the outright pattern of delay and inadvertence that has been Appellant's counsel's *modus operandi* since the Notice of Appeal was filed in April 2010. Instead, Appellant's counsel simply pleads for another chance for the case to be decided on its merits. This is sorely insufficient to satisfy the extraordinary circumstances standard that this Court uses to assess successive motions for enlargement of time under the rules. The Court acknowledges that the standards of good cause, excusable neglect, and extraordinary circumstances have been tossed around quite a bit in the motions in this case, and in prior cases. Suffice it to say, Appellant's repeated inadvertence fails to satisfy even the most lenient of these. Appellant's motion for reconsideration is hereby denied.

[1] Since now is as good a time as any to address this growing problem, the Court would like to clarify the various standards it imposes on late filings. Under ROP R. App. P. 26(c), when the Court requires something to be done within a specific time, such as the filing of an opening brief, it may enlarge that time in three specific situations, using three specific standards. If a litigant's *first* request to enlarge that time is made *before* the expiration of the specified time period, the court may enlarge the time for *good cause shown*. Any *successive* motions for enlargement will be granted only upon the showing of *extraordinary circumstances*. If a litigant makes a request *after* the expiration of the specified time period, the court may permit the filing only where the failure to file was the result of *excusable neglect*. See ROP R. App. P. 26(c).

This seems clear enough; however, many provisions in the Rules of Appellate and Civil Procedure—and interpretations of those rules in decisional law—treat good cause, excusable neglect, and extraordinary circumstances synonymously, or, at the very least, haphazardly. For example, under ROP R. App. P. 4(c), the trial court may extend the time for filing a notice of appeal for a period not to exceed thirty days, upon "a showing of excusable neglect or good cause." ROP R. App. P. 4(c). Since either one will apparently suffice, and since no definitions are given in Rule 4(c), subsequent court decisions interpreting this rule have apparently treated them as requiring the same showing. See *Masang v. Ngerkesouaol Hamlet*, 13 ROP 51 (2006) (interpreting Rule 4(c) and treating good cause and excusable neglect synonymously). Compare *Techekii Clan v. Paulus*, 1 ROP 514 (1988) ("[G]ood cause

shall not be deemed to exist unless the movant avers something more than the normal (or even the reasonably foreseeable but abnormal) vicissitudes inherent in the practice of law.” (quoting *United States v. Raimondi*, 760 F.2d 460, 462 (2d Cir. 1985)), with *Tellei v. Ngirasechedui*, 5 ROP Intrm. 148, 150 (1995) (“In order to constitute *good cause or excusable neglect*, counsel must establish something ‘more than the normal (or even reasonably foreseeable but abnormal) vicissitudes inherent in the practice of law.’” (emphasis added)). Still other cases equate excusable neglect, not with good cause, but with extraordinary circumstances. See *Ngirmang v. Oderiong*, 14 ROP 181, 182 (2007) (“To prove excusable neglect, a party must make a clear showing that the circumstances causing the delay were unique or extraordinary.”).

Doubtless, the Court has been semantically inconsistent to date. But common sense should prevail nonetheless. For future reference, however, the Court would submit the following as a judicial clarification of the standards it will impose going forward.

It is first important to note that good cause and excusable neglect are clearly different standards. Decisional law interpreting rules such as ROP R. Civ. P. 55(c) and ROP R. Civ. P. 60(b), suggests that the good cause standard is more lenient than the excusable neglect standard, and we are inclined to agree. See *Intercontinental Trading Corp. v. Johnsrud*, 1 ROP Intrm. 569 (1989). In *Johnsrud*, the Court stated:

The factors to be considered in determining whether a movant

has met the good cause standard of Rule 55(c) in setting aside a mere entry of default are similar, except that the standards are not as stringent as in a default judgment under Rule 60(b).

...

Appellants filed a motion to set aside under Rule 55(c) of the Republic of Palau Rules of Civil Procedure, asserting the default had been entered as a result of “mistake, inadvertence, and excusable neglect.” [Note: this is the standard under Rule 60(b)] The trial court applied the more lenient “good cause” standard of Rule 55(c) applicable to setting aside defaults, which gave appellants a better chance of prevailing.

Johnsrud, 1 ROP Intrm. at 572-73 (brackets added).

[2] Accordingly, *good cause* shall henceforth be treated as the most lenient of the three standards, requiring any legally satisfying and sufficient reason to show why a request should be granted. The leniency of this standard comports with its application in instances, such as Rule 26(c), in which a litigant’s *first* request for an extension is made before the expiration of the time period. It is common sense that a Court is more likely to grant a litigant’s request if it is the litigant’s first request, and it is made before a deadline has passed. Mere inadvertence, for example, may even sometimes satisfy good cause under

this definition, depending on the circumstances and the amount of time the request is made prior to the deadline. Other examples of good cause may include a conflicting trial setting or an unexpected sickness.

[3] Once a litigant begins making successive requests for extensions of time prior to the deadline, however, the Court will begin assessing such requests under the *extraordinary circumstances* standard. Black's Law Dictionary defines extraordinary circumstances as "a highly unusual set of facts that are not commonly associated with a particular thing or event." *Black's Law Dictionary* 260 (8th ed. 2004). The Court declines to set out a more specific definition here, but, suffice it to say, it requires something more than that which satisfies the good cause standard. The Court will assess each successive request, provided that the request occurs prior to the expiration of the deadline, with the underlying intent of Rule 26(c) in mind, that is, to prevent parties from the dilatory practice of requesting continuance after continuance and extension after extension.

[4] Finally, where a litigant requests an extension *after* the expiration of the time period or, even worse, where the Court is required to issue a show cause order to track down the party after the deadline has passed, the Court will apply the *excusable neglect* standard. As a side note, the Court recognizes that sometimes the wording of its orders indicates that, perhaps, it uses a good cause standard when it issues show cause orders to track down litigants. To the extent that the Court has done so in the past, let this order reflect the Court's intent for that confusing

language to stop. It is simply unfair—not to mention, in derogation of the rules—to subject a party, who has made a request for extension of time *within* the specified time period, to the same standard as a party who has simply done nothing and waited for the Court to issue a show cause order. This situation shall henceforth be uniformly scrutinized under the excusable neglect standard. For *excusable neglect*, we adopt the standard definition under prior decisional law, that is, counsel must establish something more than the normal (or even reasonably foreseeable but abnormal) vicissitudes inherent in the practice of law. Mere inadvertence will not carry the day, but it is always within the Court's discretion to examine the situation and the reasons cited, and make a judgment call. It is worth noting that even Black's Law Dictionary excludes inadvertence from the standard, defining excusable neglect as "[a] failure—which the law will excuse—to take some proper step at a proper time (esp. in neglecting to answer a lawsuit) *not because of the party's own carelessness, inattention, or willful disregard* of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party." *Black's Law Dictionary* 1061 (8th ed. 2004) (emphasis added). The Court prefers to think along the lines of acts of God, like fires, floods, inexplicably inconsistent judgments, hospitalizations, and other such force majeure. It is not excusable neglect that an attorney fails to mind his or her own calendar. If that calendar is washed away in a hundred-year flood, then the Court may be convinced.

Although seemingly draconian, these rules are designed to expedite judicial

decision-making, raise the standard of advocacy in the Republic, and increase access to justice for all. They are clearly outlined in the Rules of Appellate and Civil Procedure and the Bar has been on notice of them for quite some time. We hope that the above discussion, while superfluous to the order at hand, helps to clarify the confusion.