JACKSON M. HENRY
Appellant,

v.

MUTOU SHIZUSHI,
Appellee.

CIVIL APPEAL NO. 14-004
Civil Action No. 09-072

Supreme Court, Appellate Division
Republic of Palau

Decided: July 25, 2014

[1] **Appeal and Error:** Writs and Petitions

Petitions must state with particularly each point of law or fact that the petitioner believes the court has overlooked or misapprehended.

[2] **Appeal and Error:** Reconsideration of Appellate Opinions

Petitions for rehearsing should be granted exceedingly sparingly, and only in those cases where this Court's original decision obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal.

[3] **Appeal and Error:** Notice of Appeal
The Rules of Appellate Procedure control the time limits in which to file a notice of appeal.

Counsel for Henry: Tamara D. Hutzler
Counsel for Mr. Shizushi: Elyze McDonald Irairte

BEFORE: LOURDES F. MATERNE, Associate Justice; R. ASHBY PATE, Associate Justice; and KATHERINE A. MARAMAN.

PER CURIAM:

Before the Court is Appellant Jackson Henry's timely filed Petition for Rehearing. For the reasons outlined below, it is denied.

APPLICABLE LAW

[1, 2] Petitions for rehearing are governed by ROP R. of App. P. 40. Petitions "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." *Id.* We have previously stated that "[p]etitions for rehearing should be granted exceedingly sparingly, and only in those cases where this Court's original decision obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal [.]" *Espangel and Ucheliou Clan v. Tirso, et al*., 3 ROP Intrm. 282, 283 (1993); *see also Western Caroline Trading Co. v. Philip*, 13 ROP 89 (2006); *Melaitau v. Lakobong*, 9 ROP 192 (2002); *Lulk Clan v. Estate of Tubeito*, 7 ROP Intrm. 63 (1998).

DISCUSSION

Henry's fifteen-page petition argues that this Court misapprehended or overlooked numerous facts and points of law. We will briefly comment on his claims below.[1]

[1]Although this Order addresses this merits of Henry's arguments, Henry's petition could be dismissed summarily. *See Western Caroline Trading Co.* at 89 (limiting its analysis to "[w]e have carefully reviewed the Petition and the authorities cited therein and find

I. Jurisdiction and Procedural Rules

Henry begins by contending that (1) we failed to recognize the difference between a strict procedural rule (a rule that, however stringently enforced, could allow an exception), and a jurisdictional bar (a standard prohibiting adjudication), and (2) we further failed to consider his late filing as violating a procedural rule rather than a jurisdictional bar.[2] Henry is mistaken. In fact, it is our clear understanding of this difference that led to our Opinion clarifying the term "jurisdiction." Furthermore, had we simply determined that we were without jurisdiction, in the proper sense of the word, it would have ended our inquiry. Instead, our inquiry continued. Though we determined that the time limits of ROP R. App. P. 4 were "clear" and "inflexible," we nevertheless considered whether we should grant an exception in this matter.[3]

Henry also claims that consideration of our past jurisprudence on untimely filed notices of appeal was in error because of our determination that there is no jurisdictional bar in this matter. We disagree. First, we do not consider our Opinion in this matter to be such a departure from our past jurisprudence that factually similar cases are immaterial. Second, our past jurisprudence interpreted our Rules of Appellate Procedure, which are material in this case. Third, Henry presumes that, previously, the Appellate Division was not merely imprecise with its use of the word "jurisdiction," but that it also applied a strict jurisdictional bar that precluded the possibility of review. This is not necessarily correct. In *Pamintuan, v. ROP*, 14 ROP 189 (2007), the Appellate Division began by noting that a late filing of a notice of appeal is a fatal jurisdictional defect, but then went on to excuse the late filing. *Id.* at 190. Although one reading of this contradiction is that the Appellate Division erred in excusing the filing as it lacked jurisdiction, an alternative reading is that the Court believed it had jurisdiction (in the proper use of the word), used the word jurisdiction imprecisely, and then consciously moved to consider the merits. In any event, we did not err in considering our prior case law.

II. Adoption of the Unique Circumstances Doctrine

Next, Henry argues that we are obligated to adopt the unique circumstances doctrine to excuse his late filing. Again, we disagree. First, we are not bound by U.S. case law. *Yano et al. v. Kadoi*, 3 ROP Intrm. 174, 184 (1992). Second, we note that the United States Supreme Court has called into question

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that it does not meet the standard for granting a rehearing"). The petition is comprised almost entirely of arguments that he failed to make in his briefing; so, they do not form a proper basis for a petition for rehearing. *Nakatani v. Nishizono*, 2 ROP Intrm. 52 (1990) (stating "[t]his new and novel argument was neither made in appellant's brief nor offered at oral argument and, therefore, it cannot now be raised."); *Lulk Clan v. Estate of Tubeito*, 7 ROP Intrm. 63, 64 (1998) (Even a plausible argument that is "first made in a petition for rehearing . . . is not a proper basis to reverse . . .").

[2] Henry focuses on our use of the term "semantic clarification." Henry equates "semantic" with "meaningless," but he misunderstands our use. We used the term to highlight the fact that the word "jurisdiction" has been used to mean different things.

[3] We direct Henry to our consideration of creating an exception to the procedural rule ("Even assuming that the suspension of Rule 4's time requirements is permissible under own rules, we determine that it is inappropriate in this case for the following three reasons."). After reviewing our past jurisprudence, we determined that the facts did not warrant a departure ("We decline, under the circumstances here, to depart now.").

the continued validity of this doctrine in the United States federal court. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) ("Given that this Court has applied *Harris Truck Lines* only once in the last half century, several courts have rightly questioned its continuing validity.") (internal citations omitted). Third, Henry's argument, presented for the first time in Henry's Petition for Rehearing, does not obviously and demonstrably show an error of fact or law that draws into question the result of the appeal. *Espangel and Ucheliou Clan v. Tirso, et al*., 3 ROP Intrm. 282, 283 (1993). Thus, it is beyond the scope of his Petition for Rehearing. Fourth, as illustrated above, we need not adopt the unique circumstances doctrine in order to use our discretion to consider Henry's late notice of appeal—the unique circumstances doctrine is merely one vehicle for the exercise of discretion with respect to untimely filings.

Finally, we are not convinced that Henry would be entitled to relief even if the unique circumstances doctrine were to apply. As illustrated by Henry, some state courts have continued to sparingly apply the unique circumstances doctrine post *Bowles*. Henry cites to *Cabral v. State*, 127 Hawai'i 175 (2012), but in that case the Supreme Court of Hawaii reviewed the United States Supreme Court law on unique circumstances and listed three elements necessary to apply the doctrine:

> Like [the United States Supreme Court cases] *Harris* and *Thompson*, this case involves the reliance on a trial court's order [that impermissibly extended a filing deadline] that: (1) was issued *prior* to the expiration of an original deadline; (2) extended the time to file a notice of appeal; and (3) was later deemed invalid.

Cabral at 183 (emphasis in original). These elements are not present in Henry's case. No order impermissibly extended the December 18, 2013 deadline *prior* to its expiration. Rather, Henry allowed the deadline to expire without filing a notice of appeal. He alleges only that, after this expiration, he was orally granted relief through an ex-parte, third-party conversation. These facts, as alleged, would preclude relief under Hawaii's unique circumstances doctrine.

In relying on *Mangus v. Stump*, 45 Kan.App.2d 987, 988 (2011), Henry focuses on the Kansas Appellate Court's following statement: "[T]his case presents a situation where Mangus relied in good faith on the district court's order extending the time for service of process, and this reliance played a substantial role in causing [him] to miss the statute of limitations." *Id*. at 1218. Significantly, like the *Cabral* court, the *Mangus* court performed a but-for analysis when considering whether to grant a unique circumstances exception. Specifically, the trial court in *Mangus* found that, when it issued the improper order extending time, Mangus still had two days to effect service on the defendants and that there was "substantial reason to believe" that Mangus could have met the deadline but for the court order. *Id.* at 990. The appellate court agreed. *Id.* at 1000. Again, this contrasts with the facts of the present case. Because Henry did not rely on an order that improperly extended the December 18, 2013 deadline, and instead let the deadline expire in the absence of any order extending it, adopting the unique circumstances doctrine in this matter would not change the result.

III. The ROP Rules that Govern Appeals

[3] Next, Henry suggests that we overlooked 14 PNC § 602, which allows for the filing of the notice of appeal with the presiding judge *or* the Clerk of Courts. Thus, because the delivery of the filing allows for filing with the presiding judge, Henry suggests it is reasonable to conclude that the ROP Rules of Civil Procedure should apply and that the time limits of ROP R. Civ. P. 6 could allow for a longer time in which to file a notice of appeal. The argument is deeply flawed. First, our previous opinion cited 14 PNC § 602 in full. It was clearly not overlooked. Second, where a notice or motion is delivered does not determine the applicable rules.[4] Third, the applicable sections of both the ROP Rules of Civil Procedure and the Rules of Appellate Procedure indicate that appeals are governed by the Rules of Appellate Procedure.[5] Fourth, and finally, the cross-reference at the bottom of 14 PNCA § 602, directs readers to the applicable rules: "For rules of appellate procedure promulgated by the Supreme Court pursuant to ROP Const. art. X, § 14 and Title 4, § 101, see Courts of Republic of Palau Rules of Appellate Procedure." That the Rules of Appellate Procedure control the time limits in which to file a notice of appeal is unquestionable.

IV. Requirements to File a Notice of Appeal

Henry also contends that we failed to appreciate the time required for his counsel to fulfill her ethical obligations prior to filing a notice of appeal. Henry claims that we suggested that he simply file a notice of appeal and decide later if any facts support it. We neither stated, nor suggested, any such thing. Rather we noted that a notice of appeal itself is a short and formulaic document that does not require extensive time to draft and we determined that Henry's counsel had more than adequate time to review the applicable issues and the trial court's orders, and then file a timely notice of appeal. We find it telling that Henry's counsel never claimed she was incapable of meeting the filing deadline.[6]

V. Suspension of the Rules of Appellate Procedure

Next, Henry takes issue with our statement that the Appellate Division has only suspended the Rules of Appellate Procedure once before. Henry cites to three past cases in which he claims parties were afforded relief from filing deadlines based upon official conduct that is "much less egregious than the facts of this case." We begin by noting that none of the cases cited by Henry involve an

[4] Further, we note that all filings, even filings for the presiding judge, are filed with the Clerk of Court.

[5] ROP R. Civ. P. Rule 1, entitled Scope of Rules, states in part, "Applicability. These rules govern procedure in all suits of a civil nature whether cognizable as cases at law or in equity in the Republic of Palau Supreme Court Trial Division . . . ." In contrast, ROP R. App. P. Rule 1, also entitled Scope of Rules, states in part, "Applicability. These rules govern procedure in appeals to the Appellate Division of the Supreme Court of the Republic of Palau from . . . the Trial Division of the Supreme Court."

[6] Rather, in his Petition for Rehearing Henry acknowledges that he was capable of meeting the filing deadline ("Had the [trial court] acted properly and promptly . . . Henry would have had the opportunity to timely file this notice of appeal").

As we have quoted Henry's claim that the trial court acted improperly in failing to promptly rule on Henry's 45 day extension, we note that the trial court's order on the motion was issued within the suggested 14 day time period of ROP R. Civ. P. 7(b)(4).

untimely filed notice of appeal, nor do they cite ROP R. App. P. 2. *See Remeliik v. Luii*, 1 ROP Intrm. 592 (1989) (involving a motion to dismiss for lack of prosecution with a lost transcript of a deceased witness); *Echerang Lineage v, Tkel*, 1 ROP Intrm. 547V (1988) (addressing delay resulting, in part, from an incomplete transcript because tape-recorded testimony of two witnesses was indiscernible); *Estate of Olkeriil v. Ulechong v. Akiwo*, 3 ROP Intrm. 83 (1992) (involving a delay resulting from the Clerk of Court failing to timely certify the record). In contrast to the cases cited in our Opinion that specifically address untimely notices of appeal, the cases upon which Henry relies are factually dissimilar to the situation at hand. Moreover, the results of Henry's cited cases appear to depend at least in part on whether the responsibility and resulting errors were the party's or the Clerk of Court's.[7] In the matter at hand, although perhaps not all errors were Henry's, the responsibility and failure to timely file a notice of appeal falls squarely on Henry's shoulders. The time limit to file a notice of appeal pursuant to ROP R. App. P. 4 is clear. While we considered the fact that Henry's counsel was unfamiliar with the appellate process, and that this unfamiliarity contributed to Henry's error, we ultimately determined that granting an exception in this matter was inappropriate.

Henry also claims that we misapprehended or overlooked relevant law in our so-called holding that ROP R. App. P. 2 prohibits relief in this matter. Henry misapprehends our Opinion. We did not hold that ROP R. App. P. 2 prohibits relief. Rather, we stated, "it is not entirely clear that Rule 2 suspension can or should be used to enlarge the time for filing a notice of appeal." We ultimately did not reach that question, concluding instead that "[e]ven assuming that the suspension of Rule 4's time requirements is permissible under our own [Rule 2], we determine that it is inappropriate in this case."

VI. Review of Trial Court Errors

Finally, Henry claims that we failed to understand one of our most basic functions: to review and correct trial orders. In support of his position, Henry selectively quotes from our Opinion, claiming that we concluded that to correct "clear legal errors made by the trial court . . . runs afoul of the very purpose of appellate review." Henry misconstrues the Opinion. We concluded just the opposite: "As alleged, Henry asks us to give him the benefit of clear legal errors made by the trial court. This runs afoul of the very purpose of appellate review." In essence, Henry implies that we are somehow bound by an alleged oral, ex parte, trial court error, which impermissibly attempted to extend a fixed deadline and which, even taking Henry's allegations as true, occurred only after the deadline had already passed. We do not agree.

VII. Warning to Counsel

We must comment on the language and tone used by counsel in the Petition for Rehearing. It is, more often than not, disrespectful and sarcastic. Althoughcounsel does not have to agree with our Opinion, she

[7] *Compare Echerang Lineage v, Tkel*, 1 ROP Intrm. 547V (1988) (granting the Motion to Dismiss where Appellant was responsible for the delay)*; with Estate of Olkeriil v. Ulechong v. Akiwo*, 3 ROP Intrm. 83 (1992) (concluding that "[s]ince the error was administrative in nature, we cannot penalize Appellant"); *and Remeliik v. Luii*, 1 ROP Intrm. 592, 593 (1989) ("[p]lainly, it would not be appropriate to punish the appellants for these administrative problems").

must treat the Court with dignity and respect.[8] Similar disrespect in the future may result in a finding of contempt.

CONCLUSION

Henry's Petition for Rehearing is **DENIED**.

[8] "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process." Preamble of the ABA Model Rules of Professional Conduct and incorporated into the ROP Disciplinary Rules and Procedures by Disciplinary Rule 2(h).