

ARGUMENT

When Plaintiff filed its motion requesting that the Court execute by signature the Order of July 13, 2012 in compliance with the Colorado Rules of Civil Procedure it understood that the Order remained unsigned and had not been informed or notified to the contrary by the court or by Defendants. Mysteriously, between the time Plaintiff's counsel conferred with all opposing counsel representing Defendants about the content and the filing of its Motion the Denver District Court Clerk ("Court Clerk") mailed a "signed" copy of the Order to counsel for the MLRB, but not to Plaintiff and to Plaintiff's knowledge not to Defendant-Intervenors.

The argument by Defendants that the Order could not have been signed at any time other than on July 13, 2012, because of Judge Habas' retirement on the same day, is disingenuous and not supported by the facts. A signed Order did not exist on July 13, 2012. Sometime between August 6 and 12, 2012, Plaintiff inquired with the Court Clerk about the existence of a signed Order. (See Affidavit of Rebecca Zisch, attached as Exhibit A.) Ms. Zisch contacted the Court Clerk and the courtroom clerk of Judge Habas' former courtroom 215. (See Exhibit A.) The Court Clerk informed Ms. Zisch that the case file did not contain a signed Order and that the unsigned Order that was uploaded to Lexis/Nexis is the same Order that was in the court's file. (See Exhibit A.) Unless the Court Clerk missed seeing the signed Order, Defendants' contention that the Order *must* have been signed on July 13, 2012 is incorrect and unsubstantiated.

The Order being presented to the Court by Defendants as a "signed" Order appears to bear the *stamp* of Judge Habas' signature and is not an original signature of Judge Habas affixed by her hand to the Order. Plaintiff believes that the "signature" now relied upon by Defendants is really a stamp that could have been placed on the Order at any time by anyone. Furthermore, there is now an issue of when the stamp was affixed to the Order to determine the trigger date for filing a notice of appeal. The appearance of this "signed" Order when none previously existed has created an unexpected, and albeit unusual, complication that is being used by Defendants to prejudice Plaintiff's right to appeal. This effort by Defendants must not be countenanced by the court.

As argued in its Motion, Plaintiff contends that an Order is not valid until it is signed by the court. Furthermore, C.R.C.P. Rule 58 requires that "[w]henver the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed or e-served by the court, pursuant to C.R.C.P. 5, to each absent party who has previously appeared." C.R.C.P. 58. Plaintiff never received the "signed" order from the court clerk, and to date still has not received a "signed" order as required by Rule 58. It is unclear at this point if the court accepts the stamp of Judge Habas as a valid signature, and if it does, the question remains when the stamp was affixed to the Order and when the period to file a notice of appeal began to run, if indeed it has started at all. The first time Plaintiff was alerted to a "signed" Order was on October 1, 2012, in an e-mail attachment from the Colorado Attorney General's Office as counsel for Defendant Mined Land Reclamation Board. As stated herein, the Court has not notified all of the parties of the "signed" Order and only sent it to counsel for Defendant

MLRB.¹ Counsel for Defendant MLRB neither advised Plaintiff's counsel of the "signed" order when it was received in the Attorney General's Office nor inquired if the "signed" order had been served on all parties. Plaintiff still has not received a "signed" order from the court or the court clerk's office either electronically or by regular mail. (See Affidavit of Kimberly L. Wise, attached as Exhibit B.)

Counsel for the Mined Land Reclamation Board argues that Plaintiff failed to timely seek post-trial relief to request a signed Order. C.R.C.P. Rule 59 provides that "[w]ithin 14 days of entry of judgment as provided in C.R.C.P. 58 . . . a party may move for post-trial relief." C.R.C.P. 59(a) (emphasis added). However, Rule 58 states that "[t]he effective date of entry of judgment shall be the actual date of the signing the written judgment." C.R.C.P. 58(a). At the time Defendant MLRB asserts that Plaintiff should have applied for post-trial relief there was no "entry of judgment" upon which to seek relief, and it is Plaintiff's contention that there still is not an "entry of judgment" due to the Court's failure to sign the Order and its failure to provide all parties with the "signed" Order that is now circulating.

The Defendants will likely argue that the Order should be entered *nunc pro tunc*. However, the Colorado Court of Appeals in *Joslin Dry Goods Co. v. Villa Italia, LTD*, 539 P.2d 137 held that "a nunc pro tunc order cannot be used to reduce the time nor to defeat the right to take an appeal." *Id.* at 139. The *Joslin* court further held that although "the entry of judgment is a purely ministerial act . . . an appellate [sic] 'must see that the actual judgment has been pronounced by the court and than [sic] entered by the clerk and that it appears in the record, otherwise no reviewable judgment is presented.'" *Id.* In the present case an order *nunc pro tunc* will have the direct and improper effect of defeating Plaintiff's appellate rights against the better reasoning of the *Joslin* court.

CONCLUSION

Defendants' position that a signed Order has existed the entire time is disingenuous and not supported by the facts because Plaintiff's inquiries in July and August, as set forth above, revealed that no signed Order existed at that time. Given the developments since Plaintiff filed its Motion, Plaintiff respectfully requests that this Court affix a signature on the Order that renders the Order effective as of the date of this Court's signature pursuant to Rule 58 as the proper resolution of the matter.

Respectfully submitted this 29th day of October 2012.

FOGNANI & FAUGHT, PLLC

s/ Paul G. Buchmann

John D. Fognani, Esq.

Michael T. Hegarty, Esq.

¹ Although counsel for the MLRB assures Plaintiff's counsel that he did not request the unsigned order to be signed, it is entirely plausible that his inquiry triggered someone in the clerk's office to affix Judge Habas' stamp to the Order. Ironically, Plaintiff's inquiry in July of 2012, did not trigger the same response or a signed order from the clerk's office.

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**ATTORNEYS FOR PLAINTIFF/APPELLANT
POWERTECH (USA) INC.**

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October 2012, a true and correct copy of the foregoing **Plaintiff/Appellant's Reply in Support of Its Motion for Entry of Judgment** was filed with the Court and served via LexisNexis File & Serve™ upon the following:

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s/ Kimberly L. Wise

In accordance with C.R.C.P. 121 §1-26(7), a printed or printable copy of this document with original or scanned signatures is maintained by the filing party and will be made available for inspection by the other parties or the Court upon request.