

No. \_\_\_\_\_

In The Supreme Court of The United States

Javier Bautista-Scheuber, Petitioner,

v.

Alia Day Floren, Respondent.

**APPLICATION TO JUSTICE ELENA KAGAN  
FOR AN EXTENSION OF TIME  
TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF MONTANA**

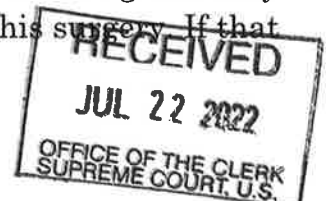
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Pursuant to Rule 13.5, I, Javier Bautista-Scheuber (Petitioner), kindly apply to the Court for an extension of 60 days to file my Petition for Writ of Certiorari. The Montana Supreme Court entered its Opinion denying my appeal on April 26, 2022, in case DA 21-0181. My Petition for Writ of Certiorari is thus due on July 25, 2022. This application is being filed more than 10 days prior to the aforementioned due date as required by Rule 13.5.

A copy of the Montana Supreme Court's opinion is attached to this application.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

1. I needed to undergo important eye-surgery overseas a few weeks ago and I am still recovering (see exhibit 2). This is advanced (still at research level), mesenchymal (non-embryonic) stem-cell surgery, which I could not have access to in the United States (see exhibit 3). For this reason I am still overseas. I could not have postponed my surgery, in order to avoid further deterioration of my eye. I also needed to avoid the expiration of the authorization "for compassionate reasons" (emergency) I had been granted by the Spanish Agency of Medicine, allowing me to undergo this surgery. If that




would not be enough, by the time the Montana Supreme Court issued its opinion, the cultivation of the mesenchymal stem-cells had already started and, consequently, the scheduled surgery could not be cancelled or postponed anymore.

2. I have not yet been able to find any legal representation to assist me preparing my petition for writ of certiorari. Although I qualified and was approved for the Montana State Bar's Modest-Means Attorney-Referral Program, my request for any such attorney referral has been declined without any explanation. Moreover, in New York legal-aid services "do not provide assistance with this kind of cases", there is no low-income attorney program, and the regular fees charged by private attorneys are completely out of my means, (since I have not been able to work nor generate any income, since I became blind right after my spouse left me six years ago).

3. For all these reasons (given that I am blind and are not able to read, I am still recovering from some important surgery overseas, and I could not receive assistance from a legal counsel); I have not and will not be able to properly prepare my petition for writ of certiorari for the current due date of July 25, 2022, and therefore kindly ask for the maximum 60-days extension.

Respectfully submitted on July 15, 2022

/s/ Javier Bautista-Scheuber 

Javier Bautista-Scheuber (Applicant)

Phone: 213-863-4830

E-mail: [jbscheuber@gmail.com](mailto:jbscheuber@gmail.com)

1441 Edward L. Grant Hwy. Apt. 2A. Bronx NY 10452

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

Javier Bautista-Scheuber, Petitioner,

v.

Alia Day Floren, Respondent.

**PROOF OF SERVICE**

I, Javier Bautista-Scheuber, do swear or declare that on this date, July 15, 2022, as required by Supreme Court Rule 29 I have served the enclosed application FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by emailing (if so consented) and or depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

William J. Paul

(Attorney for Respondent Alia Day Floren)

*bcpaullaw@gmail.com*

Paul Law Office, PLLC

210 East Pine St., Ste. 200 Missoula, MT 59802

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 15, 2022

/s/ Javier Bautista-Scheuber

JB

Javier Bautista-Scheuber (Applicant)

Phone: 213-863-4830

E-mail: [jbscheuber@gmail.com](mailto:jbscheuber@gmail.com)

1441 Edward L. Grant Hwy. Apt. 2A. Bronx NY 10452

FILED

04/26/2022

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 21-0181

DA 21-0181

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 84N

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IN RE THE MARRIAGE OF:

ALIA DAY FLOREN,

Petitioner and Appellee,

v.

JAVIER BAUTISTA-SCHEUBER,

Respondent and Appellant.

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APPEAL FROM: District Court of the Fourth Judicial District,  
In and For the County of Missoula, Cause No. DR-18-796  
Honorable Jason Marks, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Javier Bautista-Scheuber, Self-represented, Bronx, New York

For Appellee:

William J. Paul, III, The Paul Law Office, PLLC, Missoula, Montana

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Submitted on Briefs: March 23, 2022

Decided: April 26, 2022

Filed:

  
Clerk

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Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Respondent and Appellant Javier Bautista-Scheuber (Javier) appeals from the March 11, 2021 Order issued by the Fourth Judicial District Court, Missoula County. This Order denied Javier's March 9, 2021 Motion, which sought to set aside the District Court's March 2, 2020 Findings of Fact[,] Conclusions of Law[,] and Decree of Dissolution of Marriage. We affirm.

¶3 Javier and Petitioner and Appellee Alia Day Floren (Alia) were married in 2010. On November 2, 2018, Alia filed a Verified Petition for Dissolution of Marriage in the District Court. That same day, she also filed the Petitioner's Proposed Marital Property Settlement, which included, among other things, Alia's proposal that Javier be awarded their 1971 Land Rover and that Javier shall pay her €2,500 for her interest in that vehicle. Javier filed his Response to Petition for Dissolution on December 21, 2018. On January 29, 2019, Javier filed a motion which requested the District Court extend deadlines in the case because he needed to receive urgent medical care in Europe. No further action occurred in the case until Alia filed a Motion for Status Conference to Set Scheduling Order for Final

Hearing on December 17, 2019. The District Court set a status conference for December 31, 2019.

¶4 At the December 31, 2019 status conference, Javier appeared by telephone. The District Court ordered Alia to resend her financial disclosures to Javier, to update her financial disclosures by January 31, 2020, and for Javier to provide his financial disclosures to Alia's counsel by January 31, 2020. The court set a contested hearing on the petition for dissolution for 9:00 a.m. on February 28, 2020. Javier requested mediation, which the District Court denied. Additionally, Alia's counsel informed the court that, while the order of protection Alia obtained against Javier in a different cause number had expired, Alia did not want Javier to personally contact her. On January 31, 2020, Alia served her updated financial disclosures on Javier. Though he had been ordered to serve them by the District Court, Javier did not serve any financial disclosures. On February 26, 2020, Alia filed a Motion for Order Barring Certain Evidence at Final Hearing, seeking an order from the court barring Javier from presenting evidence at the final hearing which should have been provided in his declaration of disclosure.

¶5 On February 28, 2020, the District Court held the final hearing. The court began the hearing, but Javier was not present. The court noted it traditionally gave participants a 15-minute grace period in case they had trouble finding parking downtown. Alia's counsel agreed such a grace period was reasonable. While the District Court was waiting for Javier to appear, Javier emailed the Clerk of Court at 9:06 a.m., stating he wished for a one-day extension to file a motion for mediation he had drafted, to be allowed time to find an

attorney to represent him, that he was not in the state, and could only appear over the phone. The Clerk of Court informed the District Court of Javier's email, which the court construed as asking for both a continuance and to appear by phone. The court denied Javier's motion for a continuance and then asked Alia's counsel if there were any other matters in Javier's email which needed to be addressed. Alia's counsel responded by objecting to Javier's motion for mediation, which the court had previously denied during the status conference, and to Javier's appearance by phone as the motion was not timely made. The District Court denied Javier's motion to appear by phone as it was "not timely as it came in after the time set for the hearing to start and it was just a stroke of luck that the clerk happened to see it here in court." The District Court then went forward with the final hearing, where Alia testified regarding the marriage, her proposed marital property settlement, and requested a permanent order of protection. At the end of the hearing, the District Court found the marriage was irretrievably broken and ordered it dissolved, that Alia's proposed marital property settlement was fair and equitable and adopted it as an appropriate division of marital assets and debts, and granted Alia's request for a permanent order of protection from Javier.

¶6 On March 2, 2020, the District Court issued its written Findings of Fact[,] Conclusions of Law[,] and Decree of Dissolution of Marriage. On March 9, 2020, the District Court issued the Permanent Order of Protection. On March 10, 2020, Alia's counsel filed a Notice of Entry of Judgment and served copies of both the decree and the order of protection on Javier. Javier did not appeal either order. On March 9, 2021, Javier



filed a Motion—consisting of 48 single-spaced pages, with an additional 168 pages of attachments—which sought relief from the decree of dissolution. Though it did not directly cite to M. R. Civ. P. 60(b), Javier’s motion did list quotations from subsections (1) to (6) of that rule on page 7 of his motion when arguing he was entitled to relief. On March 11, 2021, the District Court issued an Order denying Javier’s motion, finding the motion both “untimely” and “facially without merit.”

¶7 Javier appeals, raising several issues related to the dissolution proceedings; however, we need only address the following dispositive issue: whether the District Court abused its discretion when it denied Javier’s M. R. Civ. P. 60(b) motion for relief.

¶8 “Our standard of review of a district court’s ruling on a motion pursuant to M. R. Civ. P. 60(b) depends on the nature of the final judgment, order, or proceeding from which relief is sought and the specific basis of the Rule 60(b) motion.” *Essex Ins. Co. v. Moose’s Saloon, Inc.*, 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451. As a general rule, we review rulings on Rule 60(b) motions for an abuse of discretion. *Essex Ins. Co.*, ¶ 16. Exceptions to the general rule include motions made under Rule 60(b)(2), Rule 60(b)(4), or when a party seeks relief from a default or default judgment. *Essex Ins. Co.*, ¶¶ 16-17. Under the facts of this case, the abuse of discretion standard applies. “A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice.” *In re Marriage of Orcutt*, 2011 MT 107, ¶ 6, 360 Mont. 353, 253 P.3d 884 (citing *Essex Ins. Co.*, ¶ 19).

¶9 “There must be some point at which litigation ends and the respective rights between the parties are forever established. Under ordinary circumstances, once this point is reached a party will not be allowed to disturb that judgment.” *In re Marriage of Waters*, 223 Mont. 183, 186, 724 P.2d 726, 729 (1986). M. R. Civ. P. 60(b), however, provides an exception to the finality of judgments doctrine. Rule 60(b) provides:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

“A motion under Rule 60(b) must be made within a reasonable time -- and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.” M. R. Civ. P. 60(c)(1).

¶10 In the present case, the District Court denied Javier’s motion for relief from the dissolution decree, finding it both “untimely” and “facially without merit.” Javier’s motion quoted from each subsection of Rule 60(b), with additional commentary under subsections

60(b)(2), (3), (5), and (6) asserting why those subsections applied to his case. The order Javier sought relief from, the District Court's Findings of Fact[,] Conclusions of Law[,] and Decree of Dissolution of Marriage, was issued on March 2, 2020. Javier's motion to set aside that order was not filed until March 9, 2021, which is more than a year after the order and therefore, to the extent Javier sought relief pursuant to Rule 60(b)(2) and/or (3), untimely pursuant to M. R. Civ. P. 60(c)(1).

¶11 This leaves only Javier's request for relief under either Rule 60(b)(5) or Rule 60(b)(6). We have long reiterated relief is only "available under M. R. Civ. P. 60(b)(6) 'for situations other than those enumerated in the first five subsections of the rule.'" *Mont. Prof'l Sports, LLC v. Nat'l Indoor Football League, LLC*, 2008 MT 98, ¶ 54, 342 Mont. 292, 180 P.3d 1142 (quoting *Matthews v. Don K Chevrolet*, 2005 MT 164, ¶ 17, 327 Mont. 456, 115 P.3d 201). "It is generally held that if a party seeks relief under any other subsection of Rule 60(b), it cannot also claim relief under 60(b)(6)." *Detienne v. Sandrock*, 2017 MT 181, ¶ 41, 388 Mont. 179, 400 P.3d 682 (quoting *Koch v. Billings Sch. Dist. No. 2*, 253 Mont. 261, 265, 833 P.2d 181, 183 (1992)). As such, we need only address whether the District Court abused its discretion by not granting Javier's motion for relief under M. R. Civ. P. 60(b)(5) because by moving for relief under Rule 60(b)(5) (as well as Rule 60(b)(2) and (3)), "[r]elief under Rule 60(b)(6) is not and was not available to him." *Detienne*, ¶ 41.

¶12 A motion under Rule 60(b)(5) does not have the same one-year time bar that motions made pursuant to Rule 60(b)(1), (2), and (3) do, but must be made within a "reasonable

time[.]” M. R. Civ. P. 60(c)(1). “What is a reasonable time will depend on the particular facts of the individual case. Questions of timeliness under the rule are addressed to the sound discretion of the court, and the court’s judgment will be overturned only upon a showing of abuse of discretion.” *In re Marriage of Waters*, 223 Mont. at 189, 724 P.2d at 730.

¶13 Here, the District Court found Javier’s motion for relief was untimely, and we agree. Javier contended, in his motion, that Rule 60(b)(5) was applicable because:

The Decree of Dissolution is not equitable nor reasonable[.] Respondent could not participate at the final hearing and the court elaborated the Decree of Dissolution with incomplete and or incorrect information[.]

To begin, we would note all the information regarding his finances, circumstances, and contentions regarding the marriage Javier claims the District Court did not have when it issued the dissolution decree could have been provided in his financial disclosures, which he was ordered by the court to serve on Alia but never did, or by appearing at the final hearing. This information was all known to him the day the District Court issued its dissolution decree as well, yet he waited over a year to file his motion for relief. Javier also claims he “could not” participate in the final hearing, but this contention is unavailing in light of the record in this case. Javier found time to email Alia personally the day before the final hearing, even though he had been told in open court she did not want to be contacted by him, but did not manage to get around to letting the District Court know he would not be personally appearing at the hearing until after the hearing had started. Javier was allowed to appear by phone at the status conference, and could have moved at any time

before the final hearing to appear by phone, but did not. Javier clearly knew he was not going to make it from New York to Missoula for the final hearing, but made no attempt to inform the District Court of that fact until after the final hearing had already started, which the court correctly rejected as untimely. In light of these facts, the District Court did not abuse its discretion by determining Javier's motion for relief, to the extent it was made under Rule 60(b)(5), was not made within a "reasonable time" or by denying the motion as untimely.

¶14 As this issue is dispositive, it is unnecessary to address Javier's other appealed issues, because Javier did not directly appeal the District Court's Findings of Fact[,] Conclusions of Law[,] and Decree of Dissolution of Marriage, and "a Rule 60(b) motion may not be used as a substitute for appeal." *Donovan v. Graff*, 248 Mont. 21, 25, 808 P.2d 491, 494 (1991) (citations omitted); *see also Koch*, 253 Mont. at 271, 833 P.2d at 187 ("Generally, failure to appeal for almost any reason is fatal to a motion to reopen judgment under Rule 60(b).").<sup>1</sup>

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the

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<sup>1</sup>In addition, on February 10, 2022, Javier filed a Motion for Clarification on Reasonable Disability, asserting his reply brief should be exempted from certain formatting requirements of M. R. App. P. 11 and 12 due to his disability. Javier's Reply Brief was filed on February 14, 2022, so his Motion for Clarification on Reasonable Disability is moot.

Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶16 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH  
/S/ JAMES JEREMIAH SHEA  
/S/ BETH BAKER  
/S/ DIRK M. SANDEFUR



**Universidad de Valladolid**



D/a **JAVIER BAUTISTA SCHEUBER** ha sido intervenido quirúrgicamente en el IOBA-Instituto Universitario de Oftalmobiología Aplicada, el día, **06/06/2022**, precisando acompañante.

Y para que conste a los efectos oportunos se emite el presente justificante.

En Valladolid a 11 de Julio de 2022



Atención al paciente IOBA.



Una vez entregado el presente justificante, el IOBA queda exonerado de cualquier responsabilidad por la pérdida o deterioro del mismo, siendo el paciente responsable de la custodia de los datos médicos que se incluyen en el mismo



October 20, 2021

HealthFirst PHSP  
P: 1-888-394-4327  
F: 646-313-4603

RE: Bautista, Javier  
Subscriber Number: KD01608T  
DOB: 12/13/1970

To Whom It May Concern:

Javier Bautista has been under my care at Mass. Eye and Ear since 2019. Javier has a history of aniridia and an implanted artificial cornea device in his left eye. He is legally blind and only has light perception in both eyes. His vision continues to be obscured by corneal opacification and cornea neovascularization despite several treatments.

I had discussed stem cell research with Javier and those conducting research are international. Dr. Jorge Alio of Alicante, Spain is one such researcher who is conducting autologous MST therapy through a corneal pocket. It is my professional recommendation that Javier consult with Dr. Alio to be evaluated for a possible limbal stem cell procedure or regenerative procedure. Please authorize a referral for Javier to have this consult.

Respectfully,



Roberto Pineda, MD  
Thomas Y and Clara W Butler Chair in Ophthalmology  
Massachusetts Eye and Ear  
Associate Professor of Ophthalmology  
Harvard Medical School