

1996

N.A.R., L.C. Plaintiff and Appellee v.  
DOUGLARSEN Defendant and Appellant: Brief  
in Opposition to Certiorari

Utah Court of Appeals

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Mark T. Olson; Attorney for Appellee.

Douglas E. Larsen; Appellant Pro Se.

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IN THE UTAH COURT OF APPEALS

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N.A.R., L.C.	)	
	)	
Plaintiff/Appellee	)	Case No. 950584-CV
	)	
v.	)	Civil No. 940013590
	)	
DOUG LARSEN	)	Priority 15
	)	
Defendant/Appellant	)	

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BRIEF OF APPELLEE IN OPPOSITION TO WRIT OF CERTIORARI

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APPEAL FROM THE DECISION OF THE UTAH COURT  
OF APPEALS AFFIRMING AN ORDER OF DEFAULT  
JUDGMENT OF THE THIRD CIRCUIT COURT OF  
SALT LAKE COUTNY, STATE OF UTAH  
THE HONORABLE PHILIP K. PALMER, PRESIDING

---

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**PARTIES TO THIS PROCEEDING**

The parties to this proceeding are N.A.R., LC and Douglas E. Larsen.

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## STATEMENT OF THE CASE

This case was brought by the plaintiff, N A R , LC, as assignee of a debt owed to Dr James W Williamson. The defendant offered to settle the account for substantially less than what was owed. The plaintiff turned down the settlement offer. Sometime later, the defendant mailed a check in an amount less than what was owed, with a restrictive endorsement purporting to satisfy the debt in full. Because it had rejected the defendant's settlement offer, the plaintiff crossed out the restrictive language and cashed the check.

The plaintiff brought suit against the defendant for the remaining balance on the account and was awarded a default judgment. The defendant moved to set aside the default judgment on two grounds: that judgment had been satisfied and that the plaintiff had failed to give notice of the default.

Upon appeal, the defendant has raised numerous new issues, including insufficiency of process, which should not be considered.

## SUMMARY OF ARGUMENT

**Certiorari should be denied because the court did not abuse its discretion in denying the Defendant's Motion for Relief of Judgment because the defendant failed to allege any grounds under which relief could be granted**

Rule 60(b) of the Utah Rules of Civil Procedure enumerates specific grounds for which the court may grant relief from the judgment. In his Motion for Relief of Judgment, the defendant sought relief under two of the enumerated reasons: first, that the judgment has been satisfied and, second, any other reason justifying relief from the operation of law. However, the defendant never alleged that he satisfied the judgment, only that he satisfied the underlying debt prior to commencement of this case. Such an allegation is required to be raised as an affirmative defense, a step the defendant failed to take. As for his second prayer for relief under the catch all "any other reason," the only grounds which the defendant raised was an allegation that the plaintiff failed to give him notice of the default judgment pursuant to Rule 58A. Even if the allegation was true, failure to give notice of the default would only constitute grounds for tolling the time restrictions on filing Rule 60(b) motions, not grounds for granting the motion itself.

## ARGUMENT

**Certiorari should be denied because the court did not abuse its discretion in denying the Defendant's Motion for Relief of Judgment because the defendant failed to allege any grounds under which relief could be granted**

Although the defendant has attempted to raise numerous new issues on appeal, in his original motion and supporting memorandum (See Plaintiffs Exhibit A) , requested

relief only under two subsections of Rule 60(b), Utah Rules of Civil Procedure.

Specifically, he moved pursuant to Rule 60(b)(6), that the judgment had been satisfied, and Rule 60(b)(7), any other reason justifying relief from the operation of law.

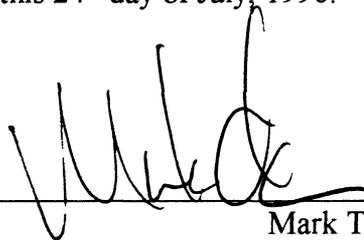
As grounds under Rule 60 (b)(6), the defendant alleged in his Memorandum that he satisfied the underlying debt by way of accord and satisfaction prior to commencement of the case, not that he satisfied the judgment as required by Rule 60(b)(6). Under Rule 8, accord and satisfaction is an affirmative defense which the defendant should have pleaded in his answer. Because he did not raise the defense (or any other defense), he is barred from raising it at this late date. See Hintze v. Seach, 437 P.2d 202 (1968).

The remainder of the defendant's original memorandum repeatedly made the same allegation as grounds for his Rule 60(b)(7) argument: that the plaintiff did not give the defendant notice of the judgment under Rule 58A. Failure to give notice pursuant to Rule 58A does not void the judgment; judgment is entered when it is signed and filed, and not when notice is received by the parties. See In re Bundy's Estate, 241 P.2d 462 (1952). Even if the plaintiff had not met the statutory requirement of Rule 58A, that fact would only go toward extending the time limits on filing a Rule 60B motion. See Workman v. Nagle Construction, Inc., 802 P.2d 749 (Utah Ct. App. 1990). If the defendant's motion was made timely, he still must have grounds for the Rule 60B motion over and above the fact that notice of default was not given. In this case, the defendant failed to allege any grounds whatsoever in his original filings.

In his appeal, the defendant appears to raise a new reason why his motion should have been granted: that the defendant was never properly served. No where in his original motion and memorandum did the defendant raise this issue as grounds for his Rule 60B

motion. Had he raised it, the allegation could conceivably been reason for setting aside the judgment under Rule 60(b)(4) which states that relief may be granted, "when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." However, the defendant failed to move the court under this rule and is barred from raising the issue on appeal. Even had the defendant raised the argument he would have failed, because personal service was made on the defendant pursuant to Rule 4(e)(1) and Rule 4(j) despite the defendant's attempt to evade service. (See Plaintiff's Exhibit B)

DATED this 24<sup>th</sup> day of July, 1996.



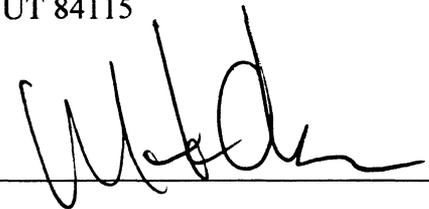
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Mark T. Olson  
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that on the 26<sup>th</sup> day of July, 1996, I caused to be mailed a true and correct copy of the foregoing to the address listed below by depositing a copy in the United States Mail, postage prepaid:

Douglas E. Larsen  
1817 South Main St #8  
Salt Lake City, UT 84115



---

**PLAINTIFF'S EXHIBIT A**

DOUGLAS E. LARSEN  
Defendant Pro-Se  
1817 South Main Street, Suite 8  
Salt Lake City, Utah 84115  
Telephone: (801) 484-1344

---

IN THE THIRD CIRCUIT COURT, STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

---

N.A.R., LC.,	)	
	)	
Plaintiff,	)	<b>MOTION FOR</b>
	)	<b>RELIEF FROM JUDGMENT</b>
vs.	)	
	)	
DOUG LARSEN,	)	Civil No. 940013590CV
	)	
Defendant.	)	Judge Phillip K. Palmer
	)	

---

Defendant Douglas E. Larsen hereby submits the following motion for relief from judgment, pursuant to Rules 58A and 60, Utah Rules of Civil Procedure. Defendant further provides his memorandum of points and authorities in support of this motion.

DATED this 24 day of May, 1995.

  
\_\_\_\_\_  
DOUGLAS E. LARSEN  
Defendant Pro Se

HAND DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing MOTION FOR RELIEF FROM JUDGMENT was hand-delivered to Mark T. Olson, Attorney for Plaintiff, 10 West Broadway, Suite 500, Salt Lake City, Utah 84101, this \_\_\_\_\_ day of May, 1995.

DOUGLAS E. LARSEN  
Defendant Pro-Se  
1817 South Main Street, Suite 8  
Salt Lake City, Utah 84115  
Telephone: (801) 484-1344

---

IN THE THIRD CIRCUIT COURT, STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

---

N.A.R., LC.,	)	
	)	
Plaintiff,	)	<b>MEMORANDUM IN SUPPORT</b>
	)	<b>OF MOTION FOR RELIEF</b>
vs.	)	<b>OF JUDGMENT</b>
	)	
DOUG LARSEN,	)	Civil No. 940013590CV
	)	
Defendant.	)	Judge Phillip K. Palmer
	)	

---

Defendant Douglas E. Larsen hereby submits the following memorandum of points and authorities in support of the motion for relief from judgment.

**MATERIAL FACTS**

The following facts are material to defendant's motion for relief from judgment:

1. That defendant incurred certain debt to Dr. James M. Williamson for dental work performed prior to April, 1994.

2. That defendant received a billing in April, 1994, from plaintiff in the total amount of \$567.30 which was unsupported and contested by Mr. Larsen.

3. That plaintiff subsequently turned this bill over to N.A.R., LC. for collection.

4. That N.A.R. filed suit under case number 940013590CV in the Third Circuit Court, Salt Lake City Department.

5. That resolution of this claim was subsequently negotiated between Douglas E. Larsen and N.A.R. with Mr. Larsen agreeing to forward payment of \$353.00 to satisfy final amount due and owing. (Exhibit "A".)

6. That Douglas E. Larsen forwarded money order #60404459275 on October 20, 1994, in the amount of \$353.00, in full and final payment of this debt. (Exhibit "B".)

7. That this money order, which denominates "UPON CASHING PAYMENT PAID IN FULL" was accepted and cashed by N.A.R., LC. upon receipt with the acknowledgement that this payment constituted satisfaction of this debt. (Exhibit "B".)

8. That thereafter, Mr. Larsen did not receive anything further in regard to this matter until he was served Motion and Order in Supplemental Proceedings, dated April 8, 1995. (Exhibit "C".)

## ARGUMENT

### POINT I

#### **DEFENDANT HAD NO NOTICE OF FURTHER PROCEEDINGS.**

Not only was defendant advised that the payment made on October 20, 1994, was accepted as full and final payment of debt in regard to this matter, Mr. Larsen was never noticed of any further proceedings. Not only was he not apprised of request by plaintiff for any further action in this case, he was not timely notified of the judgment that was rendered in December, 1994, well after he forwarded the payment that resolved plaintiff's claims in their entirety. In fact, the first notice of any further action having been taken in the case occurred on May 8,

1995, when he received the Motion and Order in Supplemental Proceedings.

**POINT II**

**THIS MATTER HAS BEEN SETTLED.**

This matter was settled in October, 1994, upon payment by defendant of \$353.00, as agreed upon and accepted by plaintiff. As it was designated on money order #60404459275, "UPON CASHING PAYMENT PAID IN FULL." Plaintiff voluntarily took delivery of this specific payment and proceeded to cash it, acknowledging final resolution of the matter. It was totally improper for plaintiff to agree to a settlement, accept full and final payment pursuant to that settlement agreement and then to proceed with the legal action in order to exact some additional amount.

**POINT III**

**PLAINTIFF'S ACTIONS VIOLATE  
RULE 58A, U.R.C.P.**

Rule 58A(d), Utah Rules of Civil Procedure, requires that, "The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court." Defendant was not notified of a motion for summary disposition, a hearing in that regard, an order of the court, a copy of a proposed order or the signing of a judgment in this action.

**POINT IV**

**PLAINTIFF'S ACTIONS VIOLATE RULE 4-504,  
CODE OF JUDICIAL ADMINISTRATION.**

It is further noted that plaintiff's actions violate Rule 4-504(2), (4) and (8) of the Utah Code of Judicial Administra-

tion, in regard to the basic notice requirements involved under entry of written orders, judgments and decrees.

POINT V

**DEFENDANT IS ENTITLED TO RELIEF  
PURSUANT TO RULE 60, U.R.C.P.**

Rule 60(b), Utah Rules of Civil Procedure, provides for relief from judgment on motion and upon such terms as are just based upon the following reasons: (6) the judgment has been satisfied, released, or discharged, or the prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (7) any other reason justifying relief from the operation of the judgment.

The trial court has been afforded broad discretion in ruling upon a motion for relief from judgment under subdivision (b) Birch v. Birch, 771 P.2d 1114 (Utah Ct. App. 1989).

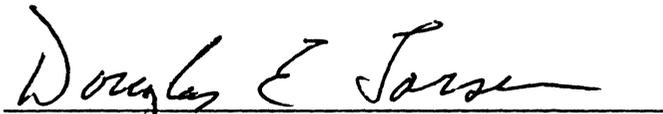
The fact of prior satisfaction of the judgment is an important consideration in determining whether a motion to modify the judgment is made within a reasonable time. Laub v. South Cent. Utah Tel. Ass'n, 657 P.2d 1304 (Utah 1982).

The failure of the prevailing party to provide notice pursuant to Rule 58A(d), U.R.C.P., justified the motion under 60(b). Workman v. Nagle Const., Inc., 802 P.2d 749 (Utah Ct. App. 1990).

CONCLUSION

Defendant Douglas E. Larsen respectfully requests the court to set aside the December, 1994, judgment entered against him based upon the foregoing facts, rules and case law and to issue a finding that plaintiff's claims were satisfied in October, 1994, upon the stipulated settlement of the parties.

DATED this 24 day of May, 1995.

  
\_\_\_\_\_  
DOUGLAS E. LARSEN  
Defendant Pro Se

HAND DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing MEMORNADUM IN SUPPORT OF MOTION FOR RELIEF OF JUDGMENT was hand-delivered to Mark T. Olson, Attorney for Plaintiff, 10 West Broadway, Suite 500, Salt Lake City, Utah 84101, this \_\_\_\_\_ day of May, 1995.

\_\_\_\_\_

**PLAINTIFF'S EXHIBIT B**



every minute or so.

4. After 10 minutes of this and finally talking to him through the mail slot, I put the papers in the mail slot. I explained to him that I was leaving them for Doug Larsen and I knew he was aware of the papers because he looked out and saw them.

5. I spoke to a cleaning lady who gave me the defendant's description: 6' tall, heavy build, short (1 1/2" long) gray/black hair and wearing glasses. The description matched the man I saw and with whom I spoke.

DATED this 6 day of JUNE, 1995.

Cary Draper  
Cary Draper

SALT LAKE COUNTY     )  
                                  ) ss.  
STATE OF UTAH         )

Subscribed and sworn this 6 day of June, 1995.

Julene Walton  
NOTARY PUBLIC

