

1972

Raymond Stewart v. John L. Sullivan And Richard Monk Allen : Brief of Appellant Richard Monk Allen

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RAYMOND STEWART,

Plaintiff and Respondent,

vs.

JOHN L. SULLIVAN and
RICHARD MONK ALLEN,

Defendants and Appellants.

Case No.
12958

JOHN L. SULLIVAN,

Plaintiff,

vs.

RICHARD MONK ALLEN,

Defendant.

BRIEF OF APPELLANT RICHARD MONK ALLEN

Appeal from the District Court of Salt Lake County, Utah
The Honorable Stewart M. Hanson, Judge

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FILED

NOV 8 1972

Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT RICHARD MONK ALLEN

NATURE OF THE CASE

This was a personal injury action by plaintiff-respondent Raymond Stewart against defendants-appellants John L. Sullivan and Richard Monk Allen resulting from an automobile accident. By reason of plaintiff-respondent Stewart's failure to answer written interrogatories, his action was ordered dismissed as against both defendants-appellants on April 2, 1971. On May 25, 1972 and after a series of proceedings before the District Court that commenced on March 16, 1972, an order was entered designating that the original dismissal was without prejudice.

(It should be noted that the heading of this case includes another lawsuit in which John L. Sullivan is plaintiff against Richard Monk Allen as defendant. This was also a personal injury action relating to the same accident as involved in the case on appeal and these cases were ordered consolidated in the District Court. However, there is nothing before this court on appeal relating to this second case, and it was dismissed by order of the District Court dated April 19, 1971. The record on appeal from the District Court is somewhat confusing. It consists of two volumes with one supposedly relating to each of these two cases. Some of the pleadings in the Stewart v. Sullivan and Allen case are in the Sullivan v. Allen volume and visa versa. Hereafter in this brief, page citations to the Record (or R.) shall refer to the larger volume containing a total of 108 pages. Any reference to a page in the other volume shall be preceded by Sullivan Record (or S.R.). Also, the parties shall be referred to by their surnames or as plaintiff or defendant.)

DISPOSITION IN LOWER COURT

Originally, the District Court ordered dismissed the plaintiff's complaint as against both defendants. No mention was made in the order as to whether the dismissal was with or without prejudice. That ruling remained undisturbed from its entry on April 2, 1971 until March 16, 1972 when the first of a series of orders was entered purporting to alter the effect of the one entered April 2, 1971. The last of these was entered May 25, 1972 and purports to amend the effect of the one entered April 2, 1971 to make it "without prejudice." All proceedings in the District Court commencing with the

April 2, 1971 order and ending with the last order of May 25, 1972 were before the Honorable Stewart M. Hanson, District Court Judge.

RELIEF SOUGHT ON APPEAL

Defendant and appellant Richard Monk Allen seeks to have set aside the order of May 25, 1972 and to have reinstated the original order of dismissal entered April 2, 1971.

STATEMENT OF FACTS

The accident giving rise to this lawsuit occurred on November 22, 1968 at approximately 4:00 p.m. a short distance south of Lagoon on U.S. Highway 91 which then consisted of a divided highway with two lanes going each way. The facts of the accident are in sharp dispute and are wholly immaterial to the issues before the court on this appeal, as are the nature and extent of the plaintiff Stewart's injuries, although Stewart's attorney has succeeded in placing his version of the facts and the plaintiff's injuries before this court by means of attaching a so-called "Exhibit A" to an affidavit which he filed in support of one of his motions in connection with this matter. (R. pp. 72 through 79)

It is the contention of Allen that he was in no way responsible for the accident and that any dispute or controversy as between him in his vehicle and Sullivan in his had ceased a substantial distance north on the highway from where the accident occurred. Allen's contention is that as he was traveling south in the inside southbound lane with Sullivan also traveling south in the outside southbound lane and just slightly

in front of him, that Sullivan suddenly and without any warning made a lane change immediately in front of him that caused the rear bumper of the Sullivan vehicle to come in contact with the front bumper of the Allen vehicle and which propelled the Sullivan vehicle into the median strip where it overturned. At the time, Stewart was a passenger of Sullivan's under a car pool arrangement and was returning home from work at Hill Air Force Base.

Stewart's complaint was filed on March 20, 1969. (R. p. 1) His attorney then and at all times through April 2, 1969 was J. Lambert Gibson. Following certain discovery, Mr. Gibson filed a notice of readiness for trial on July 27, 1970. (R. p. 38) On September 24, 1970, written interrogatories were mailed to Mr. Gibson by Sullivan's attorney, Robert E. Schoenhals, since deceased. Shortly thereafter, the clerk of Salt Lake County assigned the case a trial date of February 16, 1971. (R. p. 39) Commencing in November of 1970 and continuing in to early January of 1971, attempts were made by the attorneys for Allen and Sullivan to have Mr. Gibson answer the written interrogatories mailed to him on September 24, 1970. (S.R. pp. 17, 18) With the trial approaching, the requested information was essential for any possible evaluation that might have resulted in settlement of the claim. Finally, and on January 11, 1971 and after no response was had from Mr. Gibson to informal requests that the interrogatories be answered, a formal motion was filed to compel the answers and to strike the February 16, 1971 trial date. (S.R. pp. 17, 18) The hearing on this motion was scheduled for January 19, 1971 and Mr. Gibson was mailed a copy of both the motion and the notice of hearing thereon. (S.R. pp. 17 through 20)

The hearing on January 19, 1971 on this motion was heard before Judge Aldon J. Anderson. Attorneys for Sullivan and Allen were present but no one appeared for Stewart. (R. p. 42) Based on this hearing, an order was entered ordering plaintiff to answer the September 24, 1970 interrogatories within 15 days and also striking the February 16, 1971 trial date. A copy of this order was mailed to Mr. Gibson on January 22, 1971. (R. pp. 42, 43) Thereafter and since there was still no compliance with the order that the interrogatories be answered, motions to dismiss were filed on behalf of Sullivan on March 4, 1971 and Allen on March 6, 1971 with copies being mailed to Mr. Gibson on those respective dates. (R. pp. 44 through 47)

In order to give Mr. Gibson a further chance to comply and answer the interrogatories without the necessity of further court appearances, these motions to dismiss were not called on for hearing immediately. Also, and during all of this period that is being referred to, the attorneys for Sullivan and Allen attempted on several occasions to reach Mr. Gibson by telephone to discuss these problems with him but were never successful in contacting him. Since nothing further was heard from Mr. Gibson and on March 23, 1971 a notice of a hearing to be heard on April 2, 1971 was mailed to him. (R. pp. 48, 49)

The April 2, 1971 hearing was scheduled to be heard before Judge Aldon J. Anderson but the law and motion calendar on that date was transferred to Judge Stewart M. Hanson. It appears from the affidavits of both Allen's and Sullivan's attorneys that they were present in Judge Hanson's court at this hearing although not at the same time. (R. pp.

60, 61 and 80, 81) In any event, Mr. Gibson was not present and the court signed an order on that date dismissing Stewart's complaint as against both Sullivan and Allen. The order stated only that the complaint was dismissed and did not specify its being either with or without prejudice. On this same date of April 2, 1971, a copy of the order was mailed to Mr. Gibson. (R. p. 51)

The next court proceeding in this case did not occur for almost one year and until March 16, 1972. On that date the court through Judge Hanson signed an order, supposedly "on its own initiative" in which the court stated as follows:

A clerical error having been made in the drafting of the Order of Dismissal herein in that said order omitted the words 'without prejudice' as directed by the Court, and said error having come to the attention of the Court,

NOW, THEREFORE, pursuant to Rule 60(a), Utah Rules of Civil Procedure, the Court on its own initiative corrects said error by amending the Order of Dismissal to read as follows:

It is hereby ordered that plaintiff, Raymond Stewart's Complaint as against both defendants, John L. Sullivan and Richard Monk Allen, be and it is hereby dismissed without prejudice. (R. p. 55)

As soon as this order came to the attention of Allen and Sullivan's attorneys, motions to set it aside were filed. (R. pp. 58, 59 and 63, 64) Also, both of defendants' attorneys filed affidavits. (R. pp. 80, 81 and 60, 61) In these it was recited that neither attorney had ever been "directed" by Judge Hanson that the order be entered "without prejudice" and that the only directive from the court at the hearing was that the mo-

tion was granted and the complaint as against both defendants was dismissed. Likewise, the minute entry in the docket book for the hearing of April 2, 1971 indicates only that the motion to dismiss was granted and says nothing about its being "without prejudice." (R. p. 61) The record in this case is unmistakably clear that if the court, in fact, intended that the dismissal be "without prejudice" that this was never in any way communicated to defendants' counsel until March of 1972 and nearly one year after the hearing itself.

After the filing of motions and affidavits by attorneys for the defendants, plaintiffs' attorney filed a "Motion To Amend The Order On Additional Grounds." (R. pp. 65, 66) By this he requested that the court reaffirm its earlier ex parte ruling (i.e. that there was a clerical mistake) and he asked that the court also grant the same relief on the additional ground of 60(b)(7) U.R.C.P. (i.e. that the April 2, 1971 order be set aside for "any other reason" justifying relief). The hearing on the motions just referred to was then heard and the motions fully argued by all counsel before Judge Hanson on April 13, 1972. Thereafter, the court ruled and the minute entry reflects "***the court now being fully advised in the premises, hereby orders plaintiff's motion be denied and defendants' motion granted." (R. p. 84) This was followed up by a formal written order to the same effect dated May 3, 1972. (R. pp. 97, 98) In other words, and at this point, the court had ruled that the original order of April 2, 1971 would stand as entered, and Judge Hanson declined to grant relief for "any other reason" and under 60(b)(7) U.R.C.P.

Of course, this ruling didn't satisfy plaintiff's able counsel and so on April 21, 1972 he filed a further motion entitled "Motion For Further Hearing Before Ruling Of The Court." (R. pp. 88 through 90) The only ground stated in this motion and the affidavits accompanying it was that Mr. Gibson had been suspended from the practice of law in Utah on May 14, 1971 and that this constituted some basis for reversing the court's ruling of April 13, 1971. In fact, it was discussed among Judge Hanson and counsel at the hearing of April 13, 1971 that Mr. Gibson had been suspended from practice some time in May of 1971 by reason of non-payment of his Bar fees. Furthermore, Judge Hanson was the one who made counsel aware of this fact.

On May 16, 1972, this further motion was heard before the court. This time plaintiff prevailed and the court on May 25, 1972 signed an order which in substance stated:

That plaintiff's complaint as against both defendants be and is hereby dismissed 'without prejudice.'
(R. p. 103)

Thereafter, both defendants filed their appeal to this court.

Another matter is mentioned in the affidavits of Messrs. Gibson and Schaerrer which involves telephone conversations they have had with Allen's attorney and the writer of this brief and about which some comment should be made herein. In essence, Plaintiff's attorneys seem to be claiming that since this writer at a time *after* April 2, 1971 assumed in his discussions with them that the order of April 2, 1971 had been entered without prejudice, that this should be the interpretation given that order and even though Rule 41(b) U.R.C.P. expressly provides otherwise. The apparent attempt by plain-

tiff now is to ignore Gibson's total inactivity in this case from November, 1970 to May, 1971 and to somehow contend that in May of 1971 Gibson was ready to do something on the case but was dissuaded from doing so by this one casual conversation with Allen's attorney.

Frankly, at the time this writer had his contacts with plaintiff's attorneys after the April 2, 1971 order had been signed and up until he had researched the matter in March of 1972, he was under the mistaken assumption that the law provided the reverse of what Rule 41(b), in fact, does provide. It was believed that a dismissal where it was unspecified either that it was with or without prejudice, resulted in a dismissal without prejudice, whereas Rule 41(b) provides that such a dismissal is with prejudice. Until March, 1972 there had been no reason to research the question and this writer had simply prepared the April 2, 1971 order in the language asked in his motion and in the language directed by the court at the hearing. The motion requested dismissal of plaintiff's complaint and when the court stated that the motion was granted to dismiss the complaint, this was the language used in the order. No attempt was made by counsel to make the order more or less binding than as asked for in the motion and as granted by the court.

It is difficult to understand how a conversation between opposing counsel about the effect of the order and *after* it was entered could have any bearing on the effect to be given that order. This writer in no way requested or suggested to Mr. Gibson in their May, 1971 telephone conversation that Gibson withhold taking action to set aside whatever may have been the legal effect of the April 2, 1971 order. As an ex-

perienced lawyer representing his own client, Gibson was perfectly free to research and arrive at his own conclusion as to the legal effect of the order. This writer was not, of course, in any type of fiduciary or advisory capacity with Gibson. There is no contention by plaintiff that Gibson failed to receive the letters, motions, orders, etc., up through April 2, 1971 and there is no contention that he was misled about the legal effect of what was transpiring through the entry of the April 2, 1971 order. What occurred after the order was entered should have no bearing on its validity or effect.

ARGUMENT

POINT I.

THE DISMISSAL OF APRIL 2, 1971 WAS UPON THE MERITS AND WITH PREJUDICE.

Unless the plain language of Rule 41(b) U.R.C.P. is ignored, it is apparent that at the time of its entry, at least, the April 2, 1971 order was a dismissal of plaintiff's complaint as against both defendants "upon the merits" and with prejudice. In applicable part, Rule 41(b) states as follows:

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. *** Unless the court in its order for dismissal otherwise specifies, a dismissal under this sub-division and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Plaintiff had failed to comply with Rule 33 U.R.C.P. relating to the time within which written interrogatories to a party were to be answered. The possible penalty for his refusal to do so under Rule 37(d) U.R.C.P. was dismissal of his action. This was not asked for immediately by the defendants, but rather they asked for an order directing that the interrogatories be answered. This was uncomplished with from its entry on January 22, 1971 until the hearing of April 2, 1971. The court was therefore amply justified in entering the dismissal on April 2, 1971 either for plaintiff's refusal to answer the interrogatories or for his non-compliance with the prior order.

Plaintiff cannot contend that the court in granting the motion to dismiss specified otherwise than simply "a dismissal." The affidavits of attorneys for both defendants concerning the April 2, 1971 hearing attest to this. The order itself which was undisturbed for nearly a year says only that. The minute entry in the docket record offers no contradiction or other specification. It is further evident from Judge Hanson's reversal of the ex parte order of March 16, 1972 by his April 13, 1972 minute entry ruling formalized by order of May 3, 1972, that he fully recognized that the April 2, 1971 order was phrased as asked for by the defendants' motion and as orally directed by him at the hearing of that date.

Rule 41(b) U.R.C.P. states that a dismissal of the type involved in the instant case "operates as an adjudication upon the merits," but does not expressly state that it is a dismissal "with prejudice." It is evident from the authorities that "upon the merits" and "with prejudice" are virtually synonymous phrases. Present Utah Rule 41(b) and Federal Rule 41(b),

in so far as material here, are substantially identical. In commenting about the effect of this part of Federal Rule 41(b), Professor Moore states in Moore's Federal Practice, Vol. 5, Section 41.14 as follows:

Subject to proper qualifications, the thrust of the last sentence of Rule 41(b) is to make an order of dismissal a dismissal with prejudice. Thus, the last sentence of Rule 41(b) provides that, unless the court otherwise specifies, a dismissal under Rule 41(b) — i.e., a dismissal on defendant's motion for plaintiff's failure to prosecute, or to comply with the Rules or any order of court, or for failure to prove a claim — and any dismissal not provided for in Rule 41 — other than a dismissal for lack of jurisdiction, or for improper venue, or for lack of an indispensable party — operates as an adjudication on the merits. (Footnote citations omitted.)

It is evident that if plaintiff is to be relieved from the bar of the dismissal of April 2, 1971, that it must be done under the provisions of Rule 60, U.R.C.P.

POINT II

NO CLERICAL MISTAKE CORRECTABLE BY
RULE 60(a) OR OTHER PROVISION OF LAW
WAS MADE IN OMITTING THE WORDS
WITHOUT PREJUDICE FROM THE ORDER OF
APRIL 2, 1971.

Inasmuch as the final ruling of Judge Hanson on May 25, 1972 simply states that the dismissal of plaintiff's complaint is "without prejudice" and doesn't specify the legal grounds or citation of the Utah Rules of Civil Procedure upon which it is based, it may be argued by the plaintiff on this

appeal that the ruling was based on Rule 60(a) U.R.C.P. That rule allows a court to correct "clerical mistakes in *** orders ***" and plaintiff may argue that the omission of the words "without prejudice" was this kind of a mistake. In fact, such an order by Judge Hanson was entered on March 16, 1971, ex parte and without any prior notice to defendants' attorneys although he reversed this order by his later order of April 13, 1972 formalized by his written order of May 3, 1972.

As already stated by this defendant in arguing Point I above, there is no evidence in this case that counsel, the clerk or the court made any error in the manner in which the April 2, 1971 order was worded or entered. The most that may be said is that Judge Hanson, reflecting back on events in April, 1971 from a vantage point of approximately one year later, did indicate that he would have specified the order have been "without prejudice," if he had the matter to do over again. On other occasions, Judge Hanson did claim that his intention in April, 1971 had been that it be "without prejudice" although he readily conceded that this intention was unexpressed if such did exist.

On these facts, it is clear that if there was any error in the April 2, 1971 order that it was a "judicial error" and not a clerical one. The distinction between these two types of errors is fully discussed in *Richards v. Siddoway*, 24 U.2d 314, 471 P.2d 143 (1970) and it is very clear from that case that if there was an error in the instant case, it was judicial and not clerical. The *Richards* case further makes clear that Rule 60(a) allows correction only of clerical and not judicial errors. The latter must be corrected by appeal, writ of error, certiorari,

by awarding a new trial or by any means specially provided by statute. See also to this same general effect *Blankenship et al. v. Royalty Holding Co.*, 202 F.2d 77 (10th Cir. 1953).

POINT III

THE FACTS OF THE CASE DO NOT JUSTIFY THE PLAINTIFF'S BEING RELIEVED FROM THE FINAL ORDER OF APRIL 2, 1971 AND UNDER THE PROVISIONS OF RULE 60(b), U.R.C.P.

It becomes clear upon analysis of the facts and law relating to this case that if the trial court's ruling is to be sustained that it must be upon the basis of Rule 60(b) U.R.C.P. and specifically subsection(7) thereof. In applicable part, Rule 60(b) is as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due negligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendants as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equit-

able that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken.

Since the first motion by plaintiff's attorney and following the April 2, 1971 order was not made until April 6, 1972 and more than one year following the entry of the order from which plaintiff sought to be relieved, it is evident that subsections (1), (2), (3) and (4) cannot serve as the basis for the court's ruling. These require that the motion be made not more than three months after the entry of the order. Subsections (5) and (6) of Rule 60(b) are obviously inapplicable, leaving subsection (7) as the only possible grounds.

Rule 60(b)(7) allows the court to set aside the order of dismissal of April 2, 1971 for "any other reason justifying relief." This is broad language and superficially might appear to allow, if not suggest, that relief be granted in this particular case. After all, the plaintiff in this case was apparently personally innocent of any neglect in what occurred. Plaintiff has been denied a hearing on the merits and in a situation where the liability is claimed to be in his favor and his injuries are claimed to be serious. No real prejudice has been shown by the defendants, except possibly the passage of time, and plaintiff will argue that the defendants will not be hurt if the plaintiff is given a hearing on the merits. Plaintiff's argument will continue that courts abhor a forfeiture of rights and an adjudication barring a claim particularly where there has been no hearing on the merits.

On the other hand, it is respectfully submitted that if this case and record are examined carefully and not superficially, it will be seen that there is no factual basis for relief to this plaintiff under Rule 60(b)(7) or any other provision of Utah law. It is true that the facts of this case give rise to considerable sympathy for the plaintiff individually and his situation. However, this factor should not cause the court to ignore or enlarge the rules, including 60(b)(7), that the court itself has laid down for the orderly handling of cases and the administration of justice as it relates to an entire system of law and not simply to an individual case.

An examination of the record will disclose that plaintiff and his attorneys have never offered any real explanation as to what occurred from plaintiff and his attorneys' standpoint up to and including April 2, 1971 and to allow the order of that date to be entered in the first place. The only possible explanation in the record is from Gibson's affidavit of April 12, 1972 wherein he states: "That following the dismissal of this case, he had a telephone conversation with David K. Winder, attorney for defendant, and advised Mr. Winder that he had not answered the interrogatories because he had been tied up in the Legislature." (R. p. 85) Even here, the claim is not necessarily that he was so "tied up" but that he told this to one of the attorneys involved some time after April 2, 1971. Considering that Mr. Gibson did give an affidavit in this case, he certainly could have elaborated therein as to what he was involved with in the legislature that caused the problem and why generally this case was handled as it was up to April 2, 1971. In the absence of any explanation or even an attempted explanation from him, it seems consistent with established rules of fact finding to assume for purposes of this case that

there is no satisfactory explanation. There is no claim of illness, no claim of lack of notice or awareness of the proceedings that were being had. There is no claim that Mr. Gibson had ceased to represent the plaintiff or that something about their relationship prevented him from representing the plaintiff adequately. It is also clear that through the time of the April 2, 1971 hearing and for more than a month thereafter, that Mr. Gibson was fully authorized to practice law and represent the plaintiff and had been selected by the plaintiff for this purpose.

Plaintiff's present attorneys lay great stress on what occurred after the April 2, 1971 hearing and particularly on the fact that Mr. Gibson was not able to practice law after May 14, 1971. The claim on this seems to be that this prevented Gibson from taking any action to obtain relief from the order on April 2, 1971. This argument makes little sense considering that Mr. Gibson had done absolutely nothing over the period of November, 1970 through April 2, 1971 to avoid the sanctions attending failure to answer the interrogatories and where he could have avoided any serious problem simply by a telephone call or letter to either of the opposing attorneys or to the court. More important, what difference could it have made if he had not been suspended from practice on May 14, 1971. A final order had been entered April 2, 1971. The time for appeal, which is jurisdictional, had run prior to May 14th, and even assuming there was some grounds to appeal. He possibly could have invoked subsection (1) of Rule 60(b) and claimed that some "mistake, inadvertance, surprise, or excusable neglect" had been involved, thereby giving him up to three months from April 2, 1971. However, it is obvious from the record that neither Mr. Gibson nor plaintiff's present attorneys claim

any such mistake, etc., existed and, as noted above, they have offered no explanation or excuse for what did occur which could possibly excuse his conduct under 60(b)(1).

Mr. Neil D. Schaerrer filed an affidavit in this case. (R. pp. 67 through 71) Although Mr. Schaerrer handled this case with commendable zeal after it first came to his attention, it is apparent from his affidavit that what he did, and considering when he got in to the case, can have no logical bearing on the issues before this court on this appeal. His affidavit discloses that he was first contacted by the plaintiff in September of 1971. Mr. Schaerrer's first contact with opposing counsel was in October of 1971. By that time, at least six months had elapsed from the April 2, 1971 order. Mr. Schaerrer alleges in his affidavit a number of things that occurred in October, 1971 and thereafter. The attempted implication from his affidavit is that these events after October, 1971 should somehow serve as a basis for relieving plaintiff from the April 2, 1971 order. These included that counsel for Allen told him in October, 1971 that the dismissal was without prejudice. They also include the claim, which was undoubtedly true, that thereafter he did considerable work. He further alleges that he delayed for some time, and perhaps as long as six months, the filing of a formal motion because he believed that the dismissal was without prejudice. Of course, the implication from Mr. Schaerrer's affidavit is that since this writer had discussed with him that the dismissal was without prejudice, this six-month delay was therefore this writer's fault and not Mr. Schaerrer's.

For purposes of argument, assume Mr. Schaerrer had immediately filed the motion, not as he did on April 6, 1972, but instead in October of 1971 and as soon as he determined

to take any action in the case. What difference could this possibly have made? There is nothing in Rule 60(b) or any other provision of law that would differentiate between six months or a year as it relates to the failure to file a motion and seek relief from a final order in a case such as this. Mr. Schaerrer's affidavit may have some effect in plaintiff's favor in this case because it compounds our sympathy for the plaintiff and the injustice to him and even possibly to Mr. Schaerrer himself. It should have no other effect since there is no relevance between events six months and longer after the entry of a judgment or order and whether that judgment or order should be set aside under Rule 60(b). It makes about as much sense to claim that the plaintiff's injuries have become worse, that the liability can now be proven more strongly in his favor or even that he needs the money more, as it does to talk about what his attorneys did six months after the law, as provided in Rule 41(b), had adjudicated that his claim had been dismissed on the merits.

Simply stated, this case comes down to whether the negligence or indifference of an attorney should suffice to serve as a basis for granting relief under subsection (7) of Rule 60(b). If it can and if this court adopts such a rule, as it must to affirm this case, then it ought to also serve as the basis for saving a client from the negligence or indifference of his attorney in other types of situations where the client loses his claim through a so-called technicality and not on the merits. For example, why shouldn't a client be relieved from the running of the statute of limitations if it results from the negligence of his attorney. Should the client not have to bear the faeful consequences of an attorney's negligent failure to file a timely appeal? More commonly, should the client be relieved when

the negligence of his lawyer causes him to lose and by reason of the lawyer's failure to present the proper legal theory or to adequately develop the facts?

The issue of whether the negligence of an attorney should relieve a client from a final order of dismissal was involved in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 8 L. ed. 2d 734, 82 S.Ct. 1386 (1962). In the *Link* case the trial judge dismissed with prejudice the plaintiff's complaint after the plaintiff's attorney failed to appear for a scheduled pre-trial conference. This order was entered despite a telephone message from plaintiff's counsel that he would be unable to attend because he was 160 miles away and busy preparing papers for filing in another court. Justice Harlan, speaking for the majority of the Supreme Court and in affirming the dismissal, stated as follows relating to the issue of whether the client should suffer for what his attorney had done:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.

The same result was reached in *Schwarz v. United States of America*, 384 F.2d 833 (2d Cir. 1967). In the *Schwarz* case the plaintiff's case had been pending for about five years and a trial date was set and notification was given to the plaintiff's attorney. On the date of trial the plaintiff's attorney ap-

peared but advised that he was not ready to proceed and requested a continuance. Upon motion by the defendant, the trial judge granted a dismissal for failure to prosecute under Rule 41(b) F.R.C.P. On appeal, the Court of Appeals affirmed and stated that it was unfortunate and it recognized that its affirmance might well deny a plaintiff with a meritorious cause of action his day in court. However, the court went on to state:

If the attorney's conduct was substantially below what is reasonable under the circumstances, the client's remedy is a suit for malpractice. If the trial court's commendable efforts to move business on its calendars are ever to succeed, they must be supported. A client damaged by such neglect has his remedy against counsel.

Obliger v. United States of America, et al., 308 F.2d 667 (2d Cir. 1962) and *Newton v. United States of America*, 308 F.2d 668 (2d Cir. 1962) were two companion cases in which the plaintiffs' complaints were dismissed for failure to prosecute and by reason of plaintiffs' failure to answer written interrogatories. In both cases a motion was made under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the dismissals and upon denial, appeal was taken. Both cases were affirmed. In affirming the *Newton* case, the court in a per curiam order said in part as follows:

Counsel's breach of duty to his clients is still more obvious in this case than in the companion case, for here, counsel did not even appear for the Review Call on December 7, 1960, at which time the appellants' complaint was dismissed without prejudice for lack of prosecution. Counsel contends that he was not notified of the call, but Judge Ryan, in denying the motion to set aside the dismissal, found that notice was duly

given. Furthermore the Law Journal carried notice of this calendar call. Not only has the appellant failed to prosecute his suit and to answer the Government's interrogatories, but his motion to vacate the dismissal was delayed for another ten months after his suit was dismissed. The conduct of counsel is replete with dilatoriness which no court should condone; and counsel's plea to ignorance of federal procedure only compounds his carelessness.

The federal cases have generally held that neither ignorance nor carelessness on the part of an attorney will provide grounds for relief under Federal Rule 60(b). See *Hoffman v. Celebrezze*, 405 F.2d 833, (8th Cir. 1969) and *U.S.A. v. Thompson*, 438 F.2d 254 (8th Cir. 1971).

The Utah Supreme Court, in dicta, reached the same conclusion in *Warren v. Dixon Ranch Co., et al.*, 123 U.2d 416, 260 P.2d 741 (1953) although the facts of the *Warren* case were not as close in point to the instant facts as are those in the federal cases just cited. In the *Warren* case a default judgment was taken against certain defendants and in the later attempts by the defendants to have the default judgment set aside, the issue was raised as to the client's right to counsel and to be competently assisted by counsel. On that point, the court, through Justice McDonough, stated:

And although a judgment may be erroneously and inequitable, equitable relief will not be granted to a party thereto on the sole ground that the negligence of the attorney, agent, trustee or other representative of the present complainant prevented a fair trial.

Our law is full of instances where the innocent principal is bound by the negligent agent. It is uniformly held that this does not serve to excuse the principal. Counsel has found no

case comparable to the instant one and where a final order was entered solely through the unexplained negligence or indifference of the plaintiff's attorney and where any court has granted relief on that basis under Rule 60(b)(7).

In every instance where the Utah Supreme Court has granted relief under Rule 60(b)(7), there have been at least some kind of mitigating or excusable circumstances which occurred *prior* to the entry of the final order and which partially, at least, served as the basis for granting the relief. For example, the Utah Supreme Court affirmed relief granted under Rule 60(b)(7) in *Ney v. Harrison*, 5 U.2d 217, 299 P.2d 1114 (1956), where the defendant had allowed a judgment by default for a creditor to be taken against her but where she had been under the mistaken assumption that her decree of divorce which ordered her ex-husband to pay the debt required her ex-husband to bear the obligation and to defend the action for her. See also *Mayhew v. Standard Gilsonite Co.*, 14 U.2d 52, 376 P.2d 951 (1962). In the *Mayhew* case the Supreme Court reversed an order of the District Court refusing to set aside a judgment by default under Rule 60(b). That case might be cited as authority for the liberality in giving the plaintiff his day in court on the merits. However, it is to be noted that the court in *Mayhew* made clear that the default judgment should be set aside only under circumstances "where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside."

Another Utah case that has bearing on the instant case is *Board of Education of Granite School District v. Cox*, 14 U.2d 385, 384 P.2d 806 (1963). This case involved Rule 60(b)(7) and also Rule 60(b)(1). In the *Cox* case the defendant was

served with process and failed to answer within the 20 days specified in the summons and prior to the time that plaintiff Granite School District took a judgment by default against him. He was not represented by counsel at that time and in attempting to have the judgment against him set aside, he contended that he had thought the summons and complaint was invalid because he thought a judge had to sign the summons for it to be valid. He further claimed that he had been under the impression that the plaintiff was not entitled to the relief prayed for in the complaint. In affirming the denial of the trial court to set aside the default judgment against him, Justice McDonough, speaking for the court stated the following:

The trial court was guided by Rule 60(b) of the Utah Rules of Civil Procedure which outlines the situations wherein a party may have a judgment set aside. There are seven categories therein only two of which have application here. They are: (1) mistake, inadvertence, surprise, or excusable neglect; (2) any other reason justifying relief from the operation of the judgment. In his reasons for setting the judgment aside the defendant has specifically set out number one above and evidently in an effort to qualify under the second category has asserted the following additional reasons: (1) the judgment entered was based upon a void contract for the reason that the same did not comply with the State of Frauds; (2) the purported contract was void for lack of consideration; (3) the judgment is inequitable.

Appellant in asserting the Statute of Frauds and lack of consideration has set forth defenses which apply to the merits of the case and have no application as to why appellant did not answer within the time allotted. We are concerned only with why he did not answer, not with what kind of answer would he give if he were

so inclined. This latter question arises only after consideration of the first question and a sufficient excuse therefrom being shown.

In the instant case we have an argument by plaintiff's counsel that is similar to that of counsel for the defendant in the *Cox* case. That is, we are furnished considerable information about how good plaintiff's case is on the merits, but no information about why the case was allowed to be dismissed. If this court follows its precedents, it should not consider the merits and considering the total lack of showing of "sufficient excuse" or "reasonable justification or excuse" for why the April 2, 1971 order was dismissed.

POINT IV.

THE ORDER OF MAY 25, 1972 MAKING THE APRIL 2, 1971 ORDER A DISMISSAL WITHOUT PREJUDICE WAS INVALID SINCE THERE IS NO PROCEDURE UNDER UTAH LAW FOR A REHEARING OR FURTHER HEARING BEFORE THE DISTRICT COURT AND ONCE IT HAS RULED.

The proceedings that took place in this case during March through May of 1972 typify a practice that should not be permitted to be followed in the District Court. It allows counsel who is dissatisfied with a ruling to simply turn around and petition for a rehearing, motion to reconsider, or whatever other way it is denominated and all of which are simply attempts to change a ruling already validly entered. In the instant case there was a full hearing on all of the issues involved with full participation by the court and counsel. Thereafter, the court ruled in the defendants' favor and against the plain-

tiff, this occurring on April 13, 1972. A minute entry of that date announcing the decision was entered and a formal order was entered May 3, 1972. This should have ended the proceedings in the District Court. Instead, plaintiff's attorney filed on April 21, 1972 a "Motion For Further Hearing Before Ruling Of The Court." As stated, the court had already ruled through its minute entry of April 13, 1972. Also, there was nothing in this new motion of plaintiff's attorney or the affidavits accompanying it that had not already been considered by the court. This motion did claim to raise the new factual issue that Mr. Gibson had been suspended from the practice of law on May 14, 1971. This was hardly new since it had been discussed at the April 13, 1971 hearing and Judge Hanson had been the one who had advised counsel of this fact. Moreover, and for reasons argued under Point III above, whether Mr. Gibson could or could not practice after May 14, 1971 has no materiality to the issues raised before the District Court or on this appeal.

Utah State Employees Credit Union v. Riding, 24 U.2d 211, 469 P.2d 1 (1970) involved a situation where the District Court granted a summary judgment of foreclosure in favor of the plaintiff and against certain of the defendants. Later on, these defendants moved to vacate the judgment and the court denied this motion. Still later, the defendants filed a "Motion To Reconsider" and this was granted to the defendants without notice or a hearing, in effect, vacating the summary judgment that had been entered in favor of the plaintiff. In reversing the District Court and reinstating the summary judgment of foreclosure, the Supreme Court, through Justice Henriod, indicated that "* * * we are unaware of any such motion under our rules * * *" and he concluded the opinion by stating:

We think the motion to reconsider the motion to vacate the judgment is abortive under the rules, but even if it weren't, it was error under the rules to hear and act upon it without notice. We conclude that the judgment of foreclosure unappealed from, must stand absent any timely appeal.

The Utah Supreme Court in evaluating the effect to be given the ruling of a District Court has often stated, in substance, that it will presume correctness in the lower court's decision and will grant large latitude and discretion to the lower court, not disturbing its decision unless a clear abuse of discretion is shown. This "presumption" in favor of the lower court's decision is undoubtedly a very useful principle to be followed by an appellate court and particularly where the facts are disputed and where something is to be gained from the lower court's first-hand involvement with the controversy. However, this principle hardly applies here. In the first place, there isn't any dispute about the facts and this court is as qualified in every respect to rule on the issues as was Judge Hanson. Secondly, if this presumption is indulged in this particular case, to which ruling is it applied; the first one of May 3, 1972 favoring the defendants, or the latter one of May 25, 1972 favoring the plaintiff. (Dates of formal orders are used rather than the dates of minute entry decisions.) If the Supreme Court believes that it is the last ruling by Judge Hanson that is important and that is entitled to this presumption, then, at the least, the earlier ruling should be entitled to the same presumption excepting only for what the plaintiff will claim is the additional evidence that was adduced between the two hearings; i.e. the fact of Mr. Gibson's suspension from practice on May 14, 1971. Following through with this reasoning, the first ruling of May 3, 1972 should stand and be deferred to by the Su-

preme Court unless it believes that the fact of Mr. Gibson's suspension is of sufficient weight to cause it to reverse the prior ruling favoring the defendants.

With all due respect for Judge Hanson, it is submitted that the rulings made by him during March through May of 1972 in this case are sufficiently contradictory that little, if anything, can be presumed from them. It is submitted that the Supreme Court should therefore consider and decide this matter on the record before it.

CONCLUSION

On April 2, 1971 and after notice and hearing, the District Court granted both defendants' motions to dismiss plaintiff's complaint by reason of plaintiff's failure to answer written interrogatories and also by reason of plaintiff's disobedience of an order directing that the interrogatories be answered. This dismissal was upon the merits and with prejudice under Rule 41(b). Prior to its entry every reasonable attempt had been made to give the plaintiff and his attorney an opportunity to answer the interrogatories and have the case proceed ahead on the merits.

On May 25, 1972 the District Court by order purported to amend the April 2, 1971 order and to make the dismissal one without prejudice. This was apparently done pursuant to auth-

ority of Rule 60(b). That rule and Utah law generally do not allow amendment of the earlier order under these facts and particularly where there has been no explanation or excuse as to why plaintiff and his attorney allowed the April 2, 1971 order to be entered in the first place.

Respectfully submitted,

STRONG & HANNI
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I hereby certify that on the^{7th} day of November, 1972 I mailed ten copies of this brief to the clerk of the Supreme Court, State Capitol Building, Salt Lake City, Utah, four copies to Jack L. Schoenhals, Attorney for Defendant Sullivan, Kearns Building, Salt Lake City, Utah and four copies to David E. West, Attorney for Plaintiff Stewart, Walker Bank Building, Salt Lake City, Utah.

DAVID K. WINDER