

1987

# John Swenson v. Garth Boswell : Brief of Appellant

Utah Court of Appeals

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Harold D. Mitchell; attorney for respondent.

Jeffrey B. Brown; attorney for appellant.

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## TABLE OF CONTENTS

<u>Heading</u>	<u>Page Number</u>
I. Table of Authorities	1
II. Statement of Jurisdiction	2
III. Statement of Nature of Proceedings	2
IV. Statement of the Issues	2---3
V. Determinative Constitutional Provisions, Statutes, etc.	3
VI. Statement of the Case	4
A. Nature of the Case	4
B. Course of Proceedings	4---5
C. Disposition at trial court	5
D. Relevant Facts	5---7
VII. Summary of the Argument	7
VIII. Detail of the Argument	7--11
IX. Conclusion	11
X. Certificate of Service	12
XI. Addendum	13

# I. TABLE OF AUTHORITIES

<u>Authority Cited</u>	<u>Page Number</u>
Rule 2.5	7, 8, 9, 10
Rule 15.5	10

## **II. JURISDICTION**

The authority believed to confer jurisdiction upon this court to handle this appeal is Rule 3, Utah Rules of Appellate Procedure and Rule 3, Rules of the Utah Court of Appeals;

## **III. NATURE OF PROCEEDINGS**

This is an appeal taken to the Utah Court of Appeals by Mr. Garth Boswell, who was a defendant and counterclaimant in the Case of John Swenson vs. Garth Boswell, which was filed in the Circuit Court of the State of Utah, Utah County, Provo Department. This proceeding appeals and seeks to reverse the judgment of Judge E. Patrick McGuire, which struck the Answer and Counterclaim filed by Mr. Boswell due to his failure to appoint counsel or appear in person upon the withdrawal of his former counsel, Sheldon Carter. Mr. Boswell sought by way of Motion to have the Order and Judgment striking his Answer and Counterclaim reversed, but Judge McGuire denied his Motion. It is this final denial, and the underlying actions taken by Judge McGuire, that Mr. Boswell appeals.

## **IV. STATEMENT OF THE ISSUES**

1. Whether striking an Answer and Counterclaim is an appropriate sanction under any circumstances for failure to appear in person or appoint new counsel under Rule 2.5, Rules of Practice of the District and Circuit Courts of the State of Utah;

2. If it may be an appropriate sanction, whether Circuit Court Judge McGuire abused his discretion in striking the Answer and Counterclaim of Mr. Boswell under the facts of this case;

3. Whether the provisions of Rule 2.5 require any affirmative action on behalf of a pro se defendant to appoint counsel or appear in person;

4. If the provision of Rule 2.5 do so require, whether Mr. Boswell satisfied any such requirements by personally appearing before the Circuit Court Judge;

#### **V. DETERMINATIVE CONSTITUTION PROVISIONS, ETC.**

Rule 2.5, Rules of Practice of the District Courts and Circuit Courts of the State of Utah:

When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney and upon all other parties not in default and a certificate of service must be forthwith filed with the court. An attorney may not withdraw without an order of the court where such withdrawal would result in a delay of trial. If a trial date has been set, the notice of withdrawal served upon the client shall include a notification of the trial date.

When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, the party to an action for whom such attorney was acting, must before any further proceedings are had against him, be required by the adverse party, by written notice to appoint another attorney or to appear in person.

Rule 15.5(c), Rules of Practice of the District Courts and Circuit Courts of the State of Utah:

Strict compliance with the foregoing rules may be waived by the court, in its discretion, in order to prevent manifest injustice.

## VI. STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal from a final Order of the Circuit Court of State of Utah, Utah County, Provo Department, Judge E. Patrick McGuire, which denied Mr. Boswell's Motion to Set Aside an earlier Order and Judgment by the same Judge dated July 31, 1986, which had stricken Mr. Boswell's Answer and Counterclaim because Mr. Boswell had failed to obtain a new attorney following the withdrawal of his former attorney.

B. Course of Proceedings. During June, 1986, Mr. Boswell's attorney, Sheldon R. Carter, Esq. filed a Notice of Withdrawal of Counsel. On June 24, 1986, the attorney for Mr. Swenson, Harold D. Mitchell, Esq. filed a Notice to Appoint Counsel or Appear in Person. In addition thereto, and not in compliance with any rule that this counsel can find, Harold Mitchell also required, in said Notice, that Mr. Boswell appear or appoint new counsel within ten (10) days. On July 14, 1986, Mr. Boswell appeared before the Circuit Court personally and spoke to the Judge concerning the Notice to Appoint Counsel or Appear in Person. The Judge made a Minute Entry in the file. On July 29, 1986, Mr. Mitchell obtained an Order and a Judgment, pursuant to Motion dated July 10, 1986, striking the Answer and Counterclaim of Mr. Boswell for him failure to appear in person or appoint new counsel. The Order and Judgment dated July 31, 1986 states: "It further appeared to the court that the time period of 10 days specified in said notice has expired and that defendant has not appointed new counsel in this action not [sic] appeared pro se."

The court struck the Answer and Counterclaim of Mr. Boswell for failure to appoint counsel or appear in person within ten (10) days from the date of the Notice.

C. Disposition at trial court. There was no trial in this matter. The court struck Mr. Boswell's Answer and Counterclaim and further denied Mr. Boswell's Motion to Set Aside the Order and Judgment striking the Answer and Counterclaim and entering judgment.

D. Relevant Facts.

1. During June, 1986, Mr. Boswell's attorney, Sheldon R. Carter, Esq. filed a Notice of Withdrawal of Counsel. (See Notice of Withdrawal).

2. On June 24, 1986, Harold D. Mitchell, Esq. filed a Notice to Appoint Counsel or Appear in Person. (See Notice).

3. The Notice required that Mr. Boswell appear or appoint new counsel within ten (10) days. (See Notice).

4. On July 10, 1986, Mr. Mitchell filed a Motion to Strike the Answer and Counterclaim of Mr. Boswell for his failure to appear or appoint counsel within said ten (10) days. (See Motion).

5. Mr. Boswell did not receive a copy of this Motion. (See Affidavit of Mr. Boswell, Para. 2).

6. On July 14, 1986, the defendant appeared before the Circuit Court personally and spoke to the Judge concerning the Notice to Appoint Counsel or Appear in Person. The Judge made a



Minute Entry in the file noting Mr. Boswell's appearance. (See Minute Entry).

7. Mr. Boswell believed that all further proceedings in the case were suspended due to statements made to him by Sheldon Carter that the Counterclaim filed by Mr. Boswell exceeded the jurisdictional limits of the Circuit Court and that any further action would have to come from the District Court. (See Affidavit of Mr. Boswell, Para. 3).

8. On July 29, 1986, Mr. Mitchell obtained an Order and a Judgment, striking the Answer and Counterclaim of defendant for failure of defendant to appear in person or appoint new counsel. (See Order and Judgment).

9. The Order and Judgment dated July 31, 1986 states: "It further appeared to the court that the time period of 10 days specified in said notice has expired and that defendant has not appointed new counsel in this action not [sic] appeared pro se." (See Order and Judgment).

10. The court struck the Answer and Counterclaim of defendant for failure to appoint counsel or appear in person within ten (10) days from the date of the Notice. (See Order and Judgment).

11. On October 13, 1986, Mr. Boswell filed a Motion to Set Aside Order and Judgment supported by the Affidavit of Garth Boswell. (See Motion and Affidavit).

12. On November 24, 1986 the Court denied Mr. Boswell's

Motion by way of a Minute Entry and with no further explanation.  
(See Minute Entry).

13. On December 30, 1986 the Court entered its final Order regarding the Minute Entry dated November 24, 1986.

14. The Notice of Appeal was filed January 13, 1987.

[There is no citations to the record because the parties are not using a transcript].

#### VII. SUMMARY OF THE ARGUMENT

Rule 2.5 does not provide for any sanctions in the event that a defendant does not appear personally or appoint new counsel. Furthermore, there is no ten (10) day requirement in Rule 2.5 or in any Rule. The Court has no discretion to take any sanction against a party for failure to appear in person or appoint a new attorney pursuant to a Notice under Rule 2.5; a fortiori, it was reversible error to strike the Answer and Counterclaim of Mr. Boswell. In any event, Mr. Boswell did appear personally and did comply with Rule 2.5.

#### VIII. DETAIL OF THE ARGUMENT

The relevant portions of Rule 2.5, Rules of Practice of the District Courts and Circuit Courts of the State of Utah, provides as follows:

When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, the party to an action for whom such attorney was acting, must before any further proceedings are had against him, be required by the adverse party, by written notice to appoint another attorney or to appear in person. [Emphasis added].

There is no sanction provided under Rule 2.5 in the event a party to the action fails to appear personally or fails to appoint counsel following the withdrawal of his former counsel. Rather, Rule 2.5, (as viewed by this attorney) is in the nature of an accommodation to an unrepresented party, meant to provide to that unrepresented person a reasonable period of time to obtain new counsel, if he so chooses, or to decide to represent himself, if he so chooses, before any further proceedings can be had against him. It is meant (or should be so viewed) to protect the unrepresented party from the immediate attacks of learned counsel when a party finds himself suddenly without representation. It is a temporary shield for the benefit of the unrepresented party. However, in the case below, Mr. Mitchell and Judge McGuire have combined to use Rule 2.5 contrary to its intent as a sword to punish Mr. Boswell, the unrepresented party.

Furthermore, there is no requirement provided in Rule 2.5 that the unrepresented party comply with a Notice under Rule 2.5 within any period of time, let alone ten (10) days as required by Mr. Mitchell. Mr. Mitchell apparently felt that he could play fast and loose with Rule 2.5 where he saw fit, and change Rule 2.5 where he fit, and could also turn around and seek severe sanction against Mr. Boswell when he felt that Mr. Boswell did not strictly comply with Rule 2.5. It just does not make any sense at all for Judge McGuire to allow Mr. Mitchell, a licensed attorney of many years experience the broad latitude apparent

here concerning Rule 2.5, and in the same instance require such strict compliance with Rule 2.5 by Mr. Boswell, who was unrepresented at the time. There was obviously a double standard applied in this case.

The proper reading of Rule 2.5 requires that one view it as an accommodation to an unrepresented party. The lack of any time requirement is compelling evidence that Rule 2.5 is indeed meant as an accommodation to an unrepresented party. Once Notice under Rule 2.5 has been served, if the unrepresented party does not obtain new counsel, then by default he has decided to represent himself. At that time, counsel can take further proceedings in the case, just as if Mr. Boswell had filed the Answer and Counterclaim pro se in the first instance.

In any event, Mr. Boswell did indeed "appear in person" as required by Rule 2.5. As the Minute Entry of Judge McGuire reflects, on July 14, 1986, Mr. Boswell "personally appeared" before Judge McGuire. Mr. Boswell complied with Rule 2.5 to the letter. Mr. Mitchell objects to this "personal appearance" in his Responsive Memorandum, stating that "Defendant did not enter his pro se appearance within ten days after June 24, 1986..." (See Memorandum in Opposition to Defendants Motion to Set Aside Judgment, dated November 7, 1986, paragraph 2). Apparently, Mr. Mitchell felt that Mr. Boswell should have sent him a Notice of Appearance Pro Se. Such is not required by Rule 2.5.

Mr. Mitchell further complains in the same Memorandum, in paragraph 3, that "...defendant, without any notice to plaintiff

or plaintiff's counsel, appeared in person at the court and spoke with Judge McGuire." Yet Mr. Boswell did exactly as Mr. Mitchell's Notice required; he "appeared in person." Although Mr. Boswell did not appear "within ten (10) days" of the date of the Notice, Rule 2.5 makes no such requirement.

In any event, dismissing an Answer and Counterclaim is an extremely severe sanction for an attorney to seek, and for a Judge to grant, merely because an unrepresented party did not (1) file with the court and serve upon opposing counsel a document entitled "Appearance Pro Se;" or (2) obtain new counsel; and (3) do either (1) or (2) within ten (10) days from the date of a Notice under Rule 2.5. It is also an extremely severe sanction to impose where Mr. Boswell, attempting to comply with the exact language of the request, personally appeared before the Judge on the case, although he did so only seven days late--even under Mr. Mitchell's ten day requirement.

Rule 15.5(c), Rules of Practice of the District Courts and Circuit Courts of the State of Utah:

Strict compliance with the foregoing rules may be waived by the court, in its discretion, in order to prevent manifest injustice.

Certainly, the Judge had the power to waive any strict compliance by Mr. Boswell with Rule 2.5 (even under Mr. Mitchell's oppressive view of Rule 2.5). Failure of Judge McGuire to so act constitutes an abuse of discretion. It is patently unfair and oppressive for Judge McGuire to allow Mr.

Mitchell great latitude in dealing with Rule 2.5 and to hold Mr. Boswell to such strict compliance.

#### IX. CONCLUSION

The Order and Judgment of Judge E. Patrick McGuire, dated July 31, 1986 should be set aside. The Order denying Mr. Boswell's Motion to Set Aside the same Order and Judgment dated July 31, 1986 should be reversed and Mr. Boswell's Answer and Counterclaim should be reinstated. The default of Mr. Boswell should be set aside. The personal property described in the complaint on file should be returned to the possession of Mr. Boswell.

DATED this \_\_\_\_\_ day of August, 1987.

BROWN, SMITH & HANNA

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Jeffrey B. Brown, Esq.  
Attorneys for Mr. Boswell

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of August, 1987,  
I mailed four true and correct copies of the foregoing Brief of  
the Appellant, first class, postage prepaid, to:

Harold D. Mitchell, Esq.  
P.O. Box 151  
Springville, Utah 84663-0151

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brief.bos

## XI. ADDENDUM



**Rule 2.4. Briefs.**

Briefs must be presented within the time fixed by the court or any extension thereof granted by the court on application, and the order extending time shall be entered in the minutes of the court. If not so filed and if no extension is thus obtained, the court may proceed to decide the case without such brief being filed.

**Rule 2.5. Withdrawal of counsel.**

When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney and upon all other parties not in default and a certificate of service must be forthwith filed with the court. An attorney may not withdraw without an order of the court where such withdrawal would result in a delay of trial. If a trial date has been set, the notice of withdrawal served upon the client shall include a notification of the trial date.

When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, the party to an action for whom such attorney was acting, must before any further proceedings are had against him, be required by the adverse party, by written notice to appoint another attorney or to appear in person.

## NOTES TO DECISIONS

**Substantial compliance.**

Defendants' attorney substantially complied with this rule where he filed a written notice of withdrawal, on which he certified that he had mailed a copy to the plaintiff's attorney and he

notified his clients by letter of his withdrawal and his reasons for doing so, although he did not certify that he mailed a copy of the notice of withdrawal to his clients. *Sperry v. Smith*, 694 P.2d 581 (Utah 1984).

**Rule 2.6. Submission of documents.**

All judgments, orders and decrees, or copies thereof, which are to be transmitted after signature by the judge and correspondence requiring a reply must be accompanied by envelopes pre-addressed and postage pre-paid in order to effect said transmittal.

**Rule 2.7. Law and motion calendar.**

(a) In the district court, except as to matters specifically reserved to other divisions, the judge presiding over the law and motion calendar shall hear and determine all law and motion matters filed in the district court, including default and ex parte matters, receiverships, injunction, restraining orders, probate, and guardianship matters; provided, however, that law and motion matters arising in connection with a case tried, or in the process of trial, by a particular judge shall be heard by such other judge. Law and motion matters shall not be referred to any other division for handling unless such matter involves a substantial controversy that is apt to require more than one hour of time.

**Rule 15.5. Exception.**

(a) All court rules of practice and administrative orders effecting procedure and practice in force and existing prior to the effective date of these rules are vacated.

(b) Courts deeming it necessary to re-enact prior court rules or develop rules supplemental to these rules shall do so by administrative order in accordance with Rule 11.1 and Rule 11.2.

(c) Strict compliance with the foregoing rules may be waived by the court, in its discretion, in order to prevent manifest injustice.

**Compiler's Notes.** — There is no Rule 11.2, as referred to in subdivision (b).

**Rule 15.6. Effective date.**

The effective date of these rules shall be July 1, 1983.