

1987

George M. Baker and Della A. Baker v. Western
Surety Company, and Craig A. Papa-Dakis,
individually and d/b/a "Auto-mart," and Auto Mart
: Brief of Appellant

Utah Court of Appeals

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BRIEF

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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GEORGE M. BAKER and
DELIA A. BAKER, -CA

Plaintiffs-Appellants
and Cross-Respondents,

v.

WESTERN SURETY COMPANY,

Defendant-Respondent
and Cross-Appellant,

and

CRAIG A. PAPA-DAKIS, individually
and d/b/a "AUTO-MART," and
AUTO MART,

Defendant.

No. 870267-CA

Priority 14(b)

---000O000---

BRIEF OF APPELLANT

Appeal from an Order Amending a Prior Judgment
of the District Court of the Third Judicial District
in and for Salt Lake County, State of Utah
The Honorable Homer F. Wilkinson, presiding

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COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

---000O000---

GEORGE M. BAKER and	:	
DELLA A. BAKER,	:	
	:	
Plaintiffs-Appellants	:	
and Cross-Respondents,	:	No. 870267-CA
	:	
v.	:	
	:	
WESTERN SURETY COMPANY,	:	
	:	Priority 14(b)
Defendant-Respondent	:	
and Cross-Appellant,	:	
	:	
and	:	
	:	
CRAIG A. PAPA-DAKIS, individually	:	
and d/b/a "AUTO-MART," and	:	
AUTO MART,	:	
	:	
Defendant.	:	

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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GEORGE M. BAKER and	:	APPELLANT'S BRIEF
DELLA A. BAKER,	:	
	:	
Plaintiffs/Appellants	:	
and Cross-Respondents,	:	No. 870267-CA
v.	:	
WESTERN SURETY COMPANY,	:	
	:	Priority 14(b)
Defendant/Respondent	:	
and Cross-Appellant,	:	
	:	
and	:	
	:	
CRAIG A. PAPA-DAKIS, individually	:	
and d/b/a "AUTO-MART," and	:	
AUTO MART,	:	
	:	
Defendant.	:	

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PARTIES

All of the parties involved appear in the caption of the case.

JURISDICTION

The Utah Supreme Court has invested this Court with jurisdiction of this matter by virtue of its Order dated July 8, 1978 (reproduced *infra* at A-5) pursuant to its "pourover" authority.

NATURE OF PROCEEDING

This is an appeal from an Order of the District Court modifying the District Court's prior judgment in favor of Plaintiffs-Appellants George M. Baker and his mother, Della A. Baker (hereinafter "the Bakers"). The case in

the District Court was a civil action by the Bakers against a defaulting and defunct auto dealer (Defendant Craig A. Papa-Dakis) and the surety on his motor vehicle dealer's bond, Defendant-Respondent Western Surety Company.

ISSUES PRESENTED

1. Was Respondent Western Surety's motion (dated February 6, 1987) to modify the December, 1986, judgment of the District Court timely?
2. Did the District Court have jurisdiction to modify its December, 1986, judgment while that judgment was on appeal by Western Surety to the Utah Supreme Court?
3. In view of the fact that Respondent Western Surety approved the December, 1986, judgment as to form, was it proper for the District Court to grant Western Surety's later motion to modify that judgment on the basis of mistake?
4. Was the District Court's December, 1986, judgment void?
5. Was it proper for the District Court to limit Appellants' execution on their December, 1986, judgment against Western Surety "to the bond?"
6. Is Western Surety's cross-appeal barred by the Utah Supreme Court's dismissal of its prior appeal?
7. Was Western Surety's cross-appeal timely filed?

DETERMINATIVE AUTHORITY

Rule 60(a) of the Utah Rules of Civil Procedure (reproduced *infra* at A-3) provides that "clerical mistakes" in a final judgment may be corrected after an appeal is docketed in the appellate court only "with leave of the appellate court."

Rule 59(e) of the Utah Rules of Civil Procedure (reproduced *infra* at A-2) requires that motions pursuant to Rule 59 must be filed within ten (10) days following the entry of the judgment.

Rule 4(a) of the Utah Rules of Appellate Procedure (reproduced *infra* at A-4) requires that an appeal be filed within thirty days from the entry of the challenged order.

STATEMENT OF THE CASE

This is a fundamentally simple action involving a defaulting motor vehicle dealer and his surety, which has been unconscionably complicated and protracted by the surety's persistent procedural efforts to avoid paying the judgment entered against it even though it has never challenged the ultimate merit of that judgment. Western Surety issued a motor vehicle dealer's bond to Defendant Craig Papa-Dakis. (Answer, Para. 6, R. at 27.) This bond¹ allowed Defendant Papa-Dakis to operate as a motor vehicle dealer within the state of Utah.

The Bakers paid approximately \$15,000.00 in cash for a vehicle for Mrs. Baker. (R. at 3.) Mrs. Baker, who is elderly, could not operate the

¹The bond is reproduced in the Addendum, *infra* at A-14.

parking brake of the vehicle and Defendant Papa-Dakis agreed to replace the vehicle with another comparable vehicle of her choosing. (R. at 62.) The Bakers returned the first vehicle and were promised a replacement. The replacement vehicle was not forthcoming and, under pressure from the Bakers, Defendant Papa-Dakis' employees provided a temporary loaner. Ultimately, the Bakers were compelled by the rightful owners of the loaner to return that vehicle and have never been provided with either the title to the original vehicle or a refund of the purchase price. (R. at 63.) Defendant Papa-Dakis is now out of business and facing numerous criminal charges.

Plaintiffs made claim upon Western Surety Company under its motor vehicle dealer's bond. Western Surety ignored that claim. Plaintiffs filed suit against Mr. Papa-Dakis and Western Surety, as his surety. (R. at 2.) On November 5, 1986, the District Court entered judgment against Defendant Papa-Dakis. (R. at 37-38, reproduced *infra* at A-6.)

Western Surety still refused to pay the Bakers' claim under its bond. On December 4, 1986, the Bakers filed their Motion for Summary Judgment against Western Surety. (R. at 43.) Western Surety responded by filing an interpleader action in the District Court² and filing a motion in the Bakers' action to stay that action. (R. at 68.) Both motions were heard by Judge Wilkinson on December 19, 1986. (R. at 86.) Judge Wilkinson denied Western Surety's motion to stay proceedings and granted the Bakers' Motion for Summary Judgment. (Transcript of 12/19/86 Hearing, R. at 312.) Upon

²The interpleader action was assigned to the Honorable Richard Moffat, whereas the Bakers' action was assigned to the Honorable Homer F. Wilkinson.

the announcement by Judge Wilkinson of his grant of the Bakers' Motion for Summary Judgment, Western Surety's Counsel orally moved to stay execution upon that judgment. (Transcript of 12/19/86 Hearing, R. at 325.) Judge Wilkinson denied that motion also. (*Id.*)

Ten days later, on December 29, 1986, Western Surety paid to the Clerk of the District Court the sum of \$20,000.00, the amount that it claims³ represents the total amount of its indebtedness under its bond. (See, Clerk's receipt, R. at 182, reproduced *infra* at A-15.)

Under pressure from the Utah State Insurance Commissioner (*see* letter dated 1/27/87, reproduced *infra* at A-16-17), Western Surety filed with the Utah Supreme Court a notice of its appeal of the District Court's denial of its motion to stay the Bakers' action. (*See*, Notice of Appeal, R. at 153.) Western Surety made clear that it did not appeal the Summary Judgment for only the denial of a stay. (*Id.*)

Judge Wilkinson having twice denied Western Surety's motion for a stay and Western Surety having appealed that denial to the Utah Supreme Court, Western Surety then obtained *ex parte* from the Honorable David B. Dee (acting for the Honorable Richard H. Moffat) a Temporary Restraining Order enjoining the Bakers from executing upon the judgment that Judge Wilkinson had granted them.⁴ At a hearing held on February 5, 1987, Judge

³There are numerous claimants with respect to the conduct of Defendant Papa-Dakis. Western Surety's claim that its liability is limited to \$20,000.00 for all claims combined is debatable under the Utah Supreme Court's decision in *Dennis Dillion Oldsmobile, Inc., v. Zdunich*, 668 P.2d 557 (Utah 1983).

⁴That TRO was improperly obtained in violation of a number of provisions, including: Section 78-7-19 of the Utah Code (prohibiting repeated applications for the same order); Rule 15.4 of the Rules of Practice; Rule

Moffat vacated the TRO as having been "wrongfully issued" and denied Western Surety's concurrent motion for a preliminary injunction. (Transcript of 2/5/87 Hearing at 39, reproduced *infra* at A-24.) Following the hearing before Judge Moffat, counsel for Western Surety and the Bakers agreed to the amount and sufficiency of a supersedeas bond to be posted by Western Surety pending the resolution of its appeal to the Utah Supreme Court. Based upon the assurances of counsel for Western Surety that a corporate surety bond was being obtained and would be posted, counsel for the Bakers agreed that no further efforts at execution would be attempted even before the bond was actually posted. (See, Stipulation, R. at 269-70, reproduced *infra* at A-25.)

Thereafter, Western Surety filed with Judge Wilkinson in the Bakers' action its "Motion for Relief from Judgment or, in the Alternative, to Limit Execution to the Interpleaded Funds." (R. at 161-165, reproduced *infra* at A-27.) That motion sought relief under Rule 60(a) and alleged that the December, 1986, judgment was "in error, as the [Bakers'] judgment should be limited to a judgment against the bond." (R. at 162-163 and *infra* at A-28 through A-29.) The motion also sought relief under Rule 60(b)(1), alleging that the December, 1986, judgment did not "accurately reflect the result of the summary judgment entered." (R. at 163 and *infra* at A-29.) Finally, the motion sought an order limiting execution "to the bond funds" (R. at 164 and *infra* at A-30.)

Western Surety's appeal of Judge Wilkinson's December, 1986,

65A(b) of the Utah Rules of Civil Procedure (in that it did not define the injury, did not state why the injury was irreparable, and did not state why it had been granted without notice); and Rule 65A(c) (in that no security was posted).

judgment was docketed with the Utah Supreme Court on February 11, 1987. Thereafter, Western Surety's motion was argued to Judge Wilkinson on February 13, 1987. Judge Wilkinson noted that he had "serious -- very serious -- question" as to whether he had jurisdiction in view of the fact that Western Surety had appealed his original denial of a stay to the Utah Supreme Court (Transcript of 2/13/87 Hearing, R. at 280 and 281, reproduced *infra* at A-31 and A-32) but, nevertheless, granted the motion, noting that his December, 1986, judgment should "only go against the bond." (*Id.* at 282.) Judge Wilkinson also stated that he felt that the Bakers were "entitled to judgment against the amount of the bond of Western Surety or the bond itself." (*Id.* at 283-84.) He went on to note that he thought "the judgment itself is void" (*Id.* at 284) and that he was granting the relief pursuant to Rule 60(b)(1) and 60(b)(5). (*Id.*)

On March 26, 1987, the Utah Supreme Court, upon the stipulation of the parties and upon the motion of Western Surety, dismissed in its entirety Western Surety's appeal from Judge Wilkinson's December, 1986, judgment. (*See*, Order, reproduced *infra* at A-20.) On April 7, 1987, the District Court entered its formal written Order on Western Surety's motion to limit execution, the sole effect of which was to grant Western Surety's motion to amend the original December 31, 1986, Judgment so as to limit Western Surety's liability "to the bond." (R. at 294-96, reproduced *infra* at A-11.)

The Bakers appealed to the Utah Supreme Court solely from the granting of Western Surety's motion to modify the original judgment so as to limit execution "to the bond." (*See*, Notice of Appeal, R. at 300-01,

reproduced *infra* at A-22.) Western Surety now attempts to cross-appeal the District Court's denial (more than four months earlier in December, 1986) of its motion for a stay. (R. at 304-05.)

SUMMARY OF ARGUMENTS

The District Court erred in attempting to amend in April of 1987 the judgment that it had entered in favor of the Bakers against Western Surety in December of 1986. Procedurally, the District Court lacked jurisdiction to order amendment of its December judgment. Jurisdiction must be found in Rule 60(a), 60(b), or 59. The District Court lacked jurisdiction under Rule 60(a) because Western Surety's appeal of the December, 1986, judgment had been docketed with the Utah Supreme Court but no leave had been obtained from the Utah Supreme Court for the modification of the judgment sought by Western Surety. The trial court attempted to justify the relief under Rule 60(b)(5) on the basis that the judgment was "void." Even if erroneous, however, the judgment would be merely voidable, not void. Moreover, grounds do not exist on the basis of "mistake" under Rule 60(b)(1). Finally, the relief that the motion actually sought was an amendment of the judgment pursuant to Rule 59; however, any motion under that rule had to be filed within ten days and the motion was, therefore, untimely.

Substantively, there is no merit to Western Surety's contention that its liability to the Bakers should be limited "to its bond." A bond is merely a civil contract which, in this case, Western Surety breached. There exists no justification to limit a defaulting party's liability to the very contract that the party has breached.

Western Surety's cross-appeal must be dismissed because it is barred. Western Surety's cross-appeal relates only to the denial in December of 1986 of its motion to stay the proceedings. The order implementing that denial was entered December 31, 1986, together with the original Judgment. The subsequent amendment, in April of 1986, of the Judgment entered concurrently with the denial of Western Surety's motion for a stay does not extend the appeal time with respect to that order. Accordingly, Western Surety's cross-appeal is untimely even if not barred by the dismissal of its prior appeal.

ARGUMENT

POINT I. THE DISTRICT COURT LACKED JURISDICTION TO AMEND THE JUDGMENT.

Any action by the trial court to amend its December, 1986, judgment had to fall within the purview of one of three possible rules of the Utah Rules of Civil Procedure: Rule 59, Rule 60(a), or Rule 60(b). As will be seen, none of those rules was applicable and the trial court lacked jurisdiction.

A. The Trial Court Lacked Jurisdiction Under Rule 60(a).

Western Surety claims that the trial court was acting under Rule 60(a) of the Utah Rules of Civil Procedure. That rule⁵ relates only to

⁵The rule is set forth in full in the Addendum, *infra* at A-3

"clerical mistakes in judgments . . . arising from oversight or omission . . . ," and provides that:

During the pendency of an appeal, such mistakes may be so corrected *before the appeal is docketed* in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Rule 60(a), Utah Rules of Civil Procedure. In this case, Western Surety's appeal of Judge Wilkinson's December, 1986, judgment was docketed on February 11, 1987. Leave was never sought of, and leave was never granted by, the Utah Supreme Court for any amendment or correction of the record or the judgment by the District Court. Accordingly, when the motion of Western Surety was heard by Judge Wilkinson on February 13, 1987, Judge Wilkinson, as he recognized⁶, lacked jurisdiction of the case. The language of Rule 60(a) is clear. If the correction of clerical errors is to be conducted after the filing of an appeal, it must be conducted either before the appeal is docketed or with leave of the appellate court. In this case, neither of the conditions was met and the District Court lacked jurisdiction to amend its December, 1986, judgment.

Moreover, counsel for Western Surety reviewed the December, 1986, judgment prior to its entry and signed that judgment as "approved as to form" before it was submitted to Judge Wilkinson for entry. (*See*, Judgment, R. at 100-02, reproduced *infra* at A-8.) Having previously approved of the form of the judgment, it was totally inappropriate for Western Surety to later complain about the form of that judgment and allege clerical errors in it.

⁶*See* Transcript of 2/13/87 Hearing, R. at 280-81, reproduced *infra* at A-31 and A-32.

Having approved of the form of the judgment, Western Surety was precluded from later claiming "clerical errors."

Both because the trial court lacked jurisdiction under the express language of Rule 60(a) of the Utah Rules of Civil Procedure, and because its counsel had approved of the form of the judgment later claimed to contain clerical errors, the District Court erred in attempting to amend the December, 1986, judgment.

B. No Grounds Existed for Relief Under Rule 60(b).

At the hearing at which he granted Western Surety's motion to amend the December, 1986, judgment, Judge Wilkinson stated that he felt the original judgment was void. (*See*, R. at 284, reproduced *infra* at A-35.) This statement manifests a clear misunderstanding of relevant law by the trial judge. A judgment which is erroneous may, under some circumstances, be voidable, but it is not void. A judgment is void only if it was entered by a court not having jurisdiction of the subject matter or in an action in which the persons against whom the judgment is signed have not been served or otherwise brought within the court's *in personam* jurisdiction. In this case, it is beyond any argument that Western Surety was properly served and that the District Courts of this state have jurisdiction in matters of this nature. There is simply no merit of any nature whatsoever to Judge Wilkinson's belief that the December 31, 1986, judgment resulting from the December 19, 1986, hearing, was "void."

Western Surety also attempts to bring Judge Wilkinson's order within the purview of Subsection 1 of Rule 60(b), which relates to "mistake, inadvertence, surprise, or excusable neglect" as grounds for relief. This

section also is not applicable to the present circumstances. First, there was no evidence offered to support any relief under this ground. There were no affidavits filed and there were no witnesses called. Moreover, Western Surety had every opportunity to detect and correct any "mistake" in the December, 1986, judgment; yet, it approved that judgment as to form after several changes were made at its request. Having had an opportunity to inspect and redraft the judgment and having approved the judgment as to form, Western Surety was precluded from later claiming that the judgment contained some "mistake." With respect to "inadvertence, surprise, or excusable neglect," no evidence was offered and no argument was made to Judge Wilkinson. Those concepts are not applicable to the circumstances of this case.

C. Western Surety's Motion Actually Sought an Amendment of the December, 1986, Judgment and Was Untimely Under Rule 59.

The thrust of Western Surety's complaint was with the *substance* of the December, 1986, judgment, rather than its *form*. The motion that Western Surety really argued to the District Court was a Rule 59 motion to alter or amend the December judgment.

In essence, Western Surety's argument was that since the Bakers' claim was "on the bond," their judgment should have been "limited to the bond." Assuming, *arguendo*, the legal validity of this argument, it is immediately apparent that what is being contended is that an error had occurred in the substance of the judgment in that the relief granted was erroneous and more generous than should have been allowed. Such a motion falls under Rule 59 of the Utah Rules of Civil Procedure.

Rule 59(e), however, strictly limits the filing of motions under Rule 59 to the ten-day period following the entry of the judgment. The judgment that Western Surety sought to have amended was entered on December 31, 1986. Accordingly, its motion on February 6, 1987, was clearly untimely. The District Court erred in failing to deny an untimely Rule 59 motion.

POINT II. THERE WAS NO SUBSTANTIVE MERIT TO THE CONTENTION THAT PLAINTIFFS' JUDGMENT SHOULD HAVE BEEN LIMITED TO DEFENDANT'S BOND.

A fundamental point must be made at the outset: A bond is nothing but a civil contract, an agreement by one party to make payment if a stated condition occurs or fails to occur. In this case, Western Surety entered into a contract by which it agreed to pay up to a stated amount in the event that the auto dealer failed to comply with Utah law.⁷ Western Surety received substantial financial compensation for making that promise. Accordingly, Western Surety was obligated to honor the Bakers' claim when it became apparent that co-Defendant Papa-Dakis had defaulted in his obligations to them. Western Surety failed to pay the Bakers, ignoring their

⁷Actually, the bond contains two separate and distinct promises by Western Surety. First, Western Surety expressly agreed to "indemnify persons . . . for loss suffered . . . through the violation of any of the provisions of [Utah's] Motor Vehicle Business Act" Second, Western Surety expressly agreed that it would "pay judgments and costs adjudged against [its] principal . . . on account of fraud or fraudulent representations or for any violation or violations of said laws" It additionally agreed that it would "also pay reasonable attorney's fees in cases successfully prosecuted to judgment." The bond is reproduced in the Addendum, *infra* at A-14.

claim. Once judgment was entered against co-Defendant Papa-Dakis on November 5, 1986 (R. at 37-38, reproduced *infra* at A-6), Western Surety was expressly obligated under the provisions of its bond to pay that judgment. Western Surety still refused to pay. Western Surety was, therefore, in breach of its contract.

On December 4, 1986, the Bakers filed their Motion for Summary Judgment. (R. at 43.) On December 19, 1986, Judge Wilkinson determined that there existed no genuine dispute as to any fact material to the determination of the motion for summary judgment and granted the Bakers Summary Judgment based upon those undisputed facts (R. at 325). Nothing contained in the motion, nothing contained in Western Surety's response, and nothing contained in the arguments of counsel before Judge Wilkinson can be said to stand for the proposition that the motion was anything but a routine motion for summary judgment based upon a contractual obligation that had clearly been breached by Western Surety. The court agreed and granted Summary Judgment.

Under such circumstances, Western Surety simply breached its contractual obligations to the Bakers. Having breached those obligations, there exists no justification for limiting the Bakers' recovery upon their judgment "to the bond." The "bond" is, after all, nothing but a civil contract, which has, in this case, been breached by Western Surety. It makes no more sense in this case for Western Surety to argue that its liability or that the Bakers' execution, should be limited "to the bond funds" than it would in any other contract case to say that the Plaintiff, who has recovered judgment based upon the Defendant's breach of contract, must look solely to

the breached contract for recovery. Had Western Surety chosen to comply with its contractual obligation under the bond, then its liability to the Plaintiffs would undoubtedly have been limited in accordance with the terms of the bond. However, Western Surety, for whatever reason, chose to disregard its obligations under the bond, chose to refuse to pay the Bakers' claim, and cannot now insist that the Court limit its liability to the very contractual document that it breached.

Significantly, Western Surety cited not a single case to the District court in which a court had "limited execution to the bond." While the phrase has a certain equitable ring about it, there is no legal support for the concept.

Moreover, the Utah Supreme Court has held that a trial court may not indefinitely stay execution upon its judgment, which is precisely the relief that Western Surety obtained from the District Court in this case. For example, in *Taylor National, Inc., v. Jensen Brothers Construction*, 641 P.2d 150 (Utah 1982), the Utah Supreme Court reversed an attempt by the trial court to limit execution upon its judgment, noting:

Having found that a valid contract existed and that [Plaintiff] had performed its part of that contract, the Court correctly granted judgment to [Plaintiff] on the contract.

. . . .

While the trial court was correct in awarding judgment to [Plaintiff] it erred in permanently staying execution of that judgment against [one of the defendants]. *A party receiving a judgment is entitled to have that judgment enforced by the granting court.* That court, in its discretion, may temporarily stay

execution in order to prevent injustice, but *it may not negate its own judgment by indefinitely staying execution thereon.*

641 P.2d at 153-54 (emphasis added, footnote citations omitted). Similarly, in *Ketchum Cole v. Christensen*, 48 Utah 214, 159 Pac. 541 (1916), the Utah Supreme Court held that there is "no discretion . . . vested in the court whether it will enforce" its judgments. Simply stated, the District Court did not have the discretion to grant the relief sought by Western Surety under the facts of this case.

It should be noted that the dilemma that Western Surety perceives itself to be faced with is entirely of its own making. Western Surety's concern is that there are numerous individuals who were defrauded by Western Surety's principal. The Bakers, however, perfected their claim under the bond by giving notice and making their claim. They then proceeded to file suit against the auto dealer and recover judgment against the dealer. They then moved for summary judgment against Western Surety. At that point, rather than honoring their claim, Western Surety filed an interpleader action naming the Bakers and several other claimants as Defendants. However, that action was not served on the Bakers and no funds were actually deposited by Western Surety with respect to the interpleader action until long after Judge Wilkinson had granted Summary Judgment against Western Surety on December 19, 1986. Having been told on December 19, 1986, by Judge Wilkinson that he was granting Summary Judgment in favor of the Bakers, Western Surety elected to voluntarily pay the \$20,000.00 that it

claims to be the maximum amount due under its bond⁸ to the Clerk of the District Court in the interpleader action on December 29, 1986, rather than using those funds to satisfy the Bakers' claims and judgment against Western Surety. Having voluntarily elected to place those funds beyond the reach of the Bakers, Western Surety now fears that unless the Bakers' execution is limited to those funds, Western Surety may possibly be faced with a "double liability." Western Surety should not, however, be permitted to foist upon the Bakers the burden of the quandary that it created for itself by voluntarily paying funds to the interpleader action rather than using those funds to satisfy the judgment *that had already been rendered* against it in favor of the Bakers.

POINT III. WESTERN SURETY'S CROSS-APPEAL MUST BE DISMISSED.

A. The Cross-Appeal is Barred by the Prior Dismissal of Western Surety's Appeal.

On January 29, 1987, Western Surety appealed to the Utah Supreme Court from the District Court's denial of its motion to stay proceedings. (Notice of Appeal, R. at 153-54, reproduced *infra* at A-18.) Pursuant to a stipulation of the parties and upon the motion of Western Surety, that appeal was dismissed by the Utah Supreme Court on March 26, 1987. (*See*, Order of Dismissal reproduced *infra* at A-20.) The unqualified dismissal by Western

⁸*See*, f.n. 3, *supra*.

Surety of its appeal constitutes an abandonment of that appeal and results in what amounts to an affirmance of the order from which the appeal was taken.

Having once dismissed its appeal from the District Court's refusal to grant its motion to stay proceedings, Western Surety cannot now, more than five months later, reinstate its appeal. Western Surety's option was to pursue its appeal or abandon its appeal -- it chose the latter. Having abandoned its appeal, and that appeal having been dismissed by the Utah Supreme Court, Western Surety cannot now resurrect the appeal.

B. Western Surety's Cross-Appeal is Untimely.

Rule 4(a) of the Utah Rules of Appellate Procedure requires that an appeal be filed within thirty days of the entry of the challenged order.

In this case, the District Court denied from the bench on December 19, 1986, Western Surety's motion to stay the proceedings and the written Order was signed and entered on December 13, 1986 (R. at 100, reproduced *infra* at A-8). The April 7, 1987, order resulting from Western Surety's motion to the District Court to limit execution "to the bond" did not in any way alter, amend, or change the District Court's denial in December of 1986 of Western Surety's motion to stay the proceedings. Likewise, the motion to limit execution "to the bond" did not seek either expressly or by implication any amendment or modification of the District Court's December, 1986, denial of Western Surety's motion to stay the proceedings. Finally, Western Surety's acknowledgement that the Order and Judgment dated December 31, 1986, was a final and appealable order is manifest most clearly by its own appeal of that Order to the Utah Supreme Court.

The mere fact that the District Court's April 7, 1987, Order granting Western Surety's motion to limit execution "to the bond" stated that the original December 31, 1986, order granting summary judgment was so amended and then reiterated the original order in full, including the paragraph denying Western Surety's motion to stay proceedings, does not revive the time for Western Surety to appeal from the denial of its motion. Had the District Court in December of 1986 entered two separate orders on two separate pieces of paper, the untimeliness of Western Surety's cross-appeal would be obvious. Likewise, had the District Court's April 7, 1987, order merely stated that the original December 31, 1986, judgment was amended so as to limit execution "to the bond," it would be obvious that Western Surety's purported cross-appeal is untimely. Neither the fact that the denial of a separate motion to stay proceedings was included on the same piece of paper in December of 1986 as the judgment nor the fact that the written order in April of 1987 amending the judgment reiterated, for clarity, the entire operative language of the December, 1986, order and judgment serves to alter the substantive rights of the parties or extend the appeal time.

Western Surety's purported cross-appeal is untimely and this Court lacks jurisdiction of it.

CONCLUSION

Procedurally, the District Court lacked jurisdiction to amend in April of 1987 its judgment previously entered in December of 1986. The District Court had no jurisdiction to correct "clerical mistakes" because

Western Surety's appeal from the December, 1986, judgment had been docketed with the Utah Supreme Court and no leave for such correction had been applied for or received from the Utah Supreme Court. The relief sought by Western Surety did not fall within the purview of Rule 60(b) of the Utah Rules of Civil Procedure because the judgment was not "void" pursuant to Subsection 5 and no "mistake" of the nature contemplated by Subsection 1 had occurred. The relief that the motion actually sought was a substantive amendment of the judgment pursuant to Rule 59; however, the motion was grossly untimely under that rule.

Substantively, there existed no reason or justification to limit the Bakers' judgment "to the bond." A bond is merely a civil contract and in this case Western Surety had breached its contract with the Bakers. Therefore, it is not appropriate to limit the Bakers' recovery to the contract that Western Surety had breached.

Western Surety's cross-appeal is barred by the prior dismissal of the very same appeal by the Utah Supreme Court and because the cross-appeal, which relates only to the denial in December of 1986 of Western Surety's motion for a stay, is untimely.

Accordingly, the District Court's order purporting to amend the December, 1986, judgment must be vacated and Western Surety's cross-appeal dismissed. Additionally, the matter should be remanded to the District Court for the determination and assessment of the reasonable attorney's fees

incurred by the Bakers on this appeal, for which Western Surety is responsible pursuant to the terms of its bond.

RESPECTFULLY SUBMITTED this ^{11th}~~12~~ day of August, 1987.

PARKEN & KECK

By



John D. Parken

MAILING CERTIFICATE

I hereby certify that on the ____ day of August, 1987, I caused four (4) true and correct copies of the foregoing Brief of Appellant to be mailed, postage prepaid, to:

John N. Braithwaite
HANSON, DUNN, EPPERSON & SMITH
Attorneys for Defendant/Respondent and
Cross-Appellant Western Surety Company
175 South West Temple, Suite 650
Salt Lake City, Utah 84111

John D. Parken

ADDENDUM

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Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(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 diligence 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 defendant 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 equitable 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. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 4. Appeal as of right: When taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; provided however, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the district court by any party: (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the district court by any party: (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the district court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in Paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment or order but before the entry of the judgment or order of the district court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by Paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Paragraph (a) of this rule. Any such motion which is filed before expiration of the prescribed time may be ex parte unless the district court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with the district court rules of practice. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

July 8, 1987

OFFICE OF THE CLERK

John D. Parken
Marcella L. Keck
Attorneys at Law
Suite 1330
310 South Main Street
Salt Lake City, UT 84101

George M. Baker and Della M.
Baker,
Plaintiffs and Appellants,

v.

No. 870193

Western Surety Company; Craig
A. Papa-Dakis, individually and
d/b/a "Auto-Mart;" and Auto-Mart,
Defendants and Respondents.

Pursuant to the authority vested in this Court, this case is transferred to the Court of Appeals for disposition. All further pleadings and correspondence should be directed to that Court. Their address is 230 South 500 East, Suite 400, Salt Lake City, Utah 84102.

Geoffrey J. Butler, Clerk

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

NOV 5 1986

H. Byron Higley, Clerk of District Court
By S. W. Childs Deputy Clerk

John D. Parken (2518
Marcella L. Keck (4063)
ATTORNEYS FOR PLAINTIFF
Suite 1330, 310 South Main Street
Salt Lake City, Utah 84101
Telephone 521-6383

BA 211 NO, 396
11-6-86 - 11:41 am.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---ooo0ooo---

GEORGE M. BAKER and DELLA	:	
A. BAKER,	:	
	:	JUDGMENT BY DEFAULT
Plaintiffs,	:	
	:	
v.	:	
	:	
WESTERN SURETY COMPANY, CRAIG	:	
A. PAPA-DAKIS, individually and	:	Civil No. C86-7427
d/b/a "AUTO-MART;" and AUTO-	:	
MART,	:	The Honorable Homer F.
	:	Wilkinson
Defendants.	:	

---ooo0ooo---

Defendant in this action, Craig A. Papa-Dakis, individually and d/b/a "Auto-Mart," having been regularly served with process, but having failed to appear and answer or otherwise plead to the complaint on file herein; the legal time for answers having expired; and the Default of said defendant having been duly entered according to law; now, upon the motion of plaintiff, judgment is hereby entered against defendant pursuant to the prayer of the plaintiff's complaint and it is hereby

ORDERED, ADJUDGED, and DECREED that plaintiff recover from Defendants Craig A. Papa-Dakis d/b/a "Auto-Mart" and Auto Mart the sum of \$14,780.00 with interest thereon at the rate of ten (10) percent per annum and after March 18, 1986, until the date hereof, in the amount of \$935.39, and costs in the amount of \$84.75 for a total of \$15,800.14 together with interest at the rate of twelve (12%) per annum from and after the date herof until paid.

DATED this 5 day of November, 1986.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk
By B.A. Shultz
Deputy Clerk

[Signature]
District Judge

JUDGMENT

FILED IN CLERKS OFFICE
Salt Lake County Utah

DEC 31 1987

H. Dixon Hindley, Clerk 3rd Dist. Court
By [Signature] Deputy Clerk

John D. Parken (2518)
Marcella L. Keck (4063)
ATTORNEYS FOR PLAINTIFF
Suite 1330
310 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 521-6383

*BA 212 NO. 1630
1-5-87 - 8:18 am*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

GEORGE M. BAKER and DELLA M. BAKER,	:	ORDER and SUMMARY
	:	JUDGMENT
Plaintiffs,	:	
	:	Civil No. C86-7427
v.	:	
	:	The Honorable Homer F. Wilkinson
WESTERN SURETY COMPANY; CRAIG A. PAPA-DAKIS, individually and d/b/a "AUTO-MART;" and AUTO-MART,	:	
Defendants.	:	

---oooOooo---

Plaintiffs' Motion to Determine Admissions and Motion for Summary Judgment came on regularly for hearing before the above-entitled Court, the Honorable Homer F. Wilkinson presiding, at approximately 9:00 o'clock a.m. on Friday, December 19, 1986, together with Defendant Western Surety Company's Motion to Stay Proceedings; Plaintiffs were represented by their counsel, John D. Parken; Defendant Western Surety Company was represented by its counsel, Mark D. Dunn; the default of Defendants Craig A.

000100

Papa-Dakis and Auto-Mart having heretofore been entered by this Court, no appearance was entered by or on behalf of Defendants Papa-Dakis and Auto-Mart; the Court having heard the arguments of counsel, having reviewed the files and records herein, including the Affidavits of George Baker and John Braithwaite; Plaintiffs' counsel having represented that he was not relying in support of Plaintiffs' Motion for Summary Judgment upon any constructive admissions; the Court being fully advised in the premises; and good cause appearing therefor, it is hereby

ORDERED as follows:

1. Defendant Western Surety Company's motion for a stay is denied; and

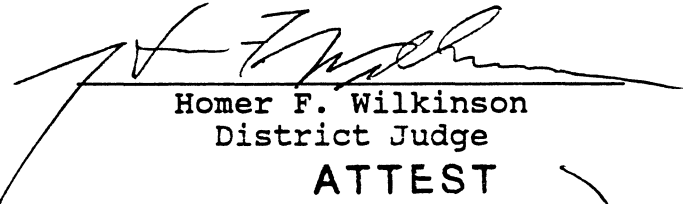
2. No genuine dispute exists as to any fact material to the determination of Plaintiffs' Motion for Summary Judgment, and that motion is hereby granted; and it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiffs be, and they are hereby, granted judgment against Defendant Western Surety Company in the amount of \$15,800.14, together with interest at the rate of twelve (12) percent per annum from and after the date hereof, and together also with Plaintiffs'

costs incurred in this action but with each party to bear their own counsel fees.

DATED this 31 day of December, 1986.

BY THE COURT:


Homer F. Wilkinson
District Judge

ATTEST

H. DIXON HINDLEY

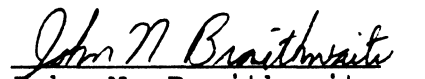
Clerk

By



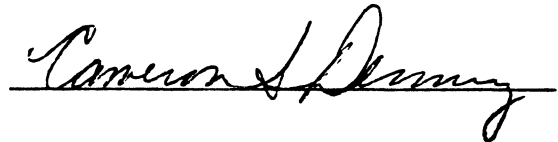
Deputy Clerk

Approved as to form:


John N. Braithwaite
Counsel for Defendant
Western Surety

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 29th day of December, 1986, I caused a true and correct copy of the foregoing Order and Judgment to be hand-delivered to John N. Braithwaite, Esq., Hanson, Dunn, Epperson & Smith, 175 South West Temple Suite 650, Salt Lake City, Utah 84101.



FILED

LED IN CLERK'S OFFICE
Salt Lake County, Utah

John N. Braithwaite, Bar No. 4544
HANSON, DUNN, EPPERSON & SMITH
A Professional Corporation
650 Clark Leaming Office Center
175 South West Temple, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 363-7611

APR 7 1987
H. Dixon Hurdley, Clerk 3rd Dist. Court
By S.A. Shields
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE M. BAKER and
DELLA A. BAKER,

Plaintiffs,

vs.

WESTERN SURETY COMPANY;
CRAIG A. PAPA-DAKIS,
individually and d/b/a
"AUTO-MART"; and AUTO-MART,
an unregistered fictitious name,

Defendants.

Bk 213 NO. 373
4-9-87-8:27 am

ORDER AND JUDGMENT

Civil No. C86-7427

The Honorable
Homer F. Wilkinson

The Motion of Western Surety Company For Relief From Judgment or, in the alternative, To Limit Execution to the Interpleaded Funds came on regularly for hearing before this Court, the Honorable Homer F. Wilkinson presiding, on Friday, February 13, 1987, at approximately 9:00 a.m., Western Surety Company appearing by and through its counsel, John N. Braithwaite, plaintiffs appearing by and through their counsel, John D. Parken, the Court having reviewed the pleadings on file

2614

herein, having reviewed the memoranda supporting and opposing said motion, having heard and considered the arguments and the representations of counsel, being fully advised in the premises, and good cause appearing therefore,

IT IS HEREBY ORDERED that the motion of Western Surety Company for relief from judgment is granted pursuant to Rule 60(b) of the Utah Rules of Civil Procedure for the reason that the Order and Summary Judgment previously signed and entered by this Court on December 31, 1986 was entered by mistake and is incorrect, and for the reason that said Order and Summary Judgment is otherwise void. Relief from judgment is accordingly granted and the Order and Summary Judgment previously entered is modified and corrected pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, so as to be entered in its entirety as follows:

IT IS HEREBY ORDERED that Western Surety Company's motion to stay proceedings is denied; and it is hereby

FURTHER ORDERED that no genuine dispute exists as to any fact material to the determination of plaintiffs' motion for summary judgment and plaintiffs are granted summary judgment against Western Surety Company's bond in the amount of \$15,800.14, together with interest at the rate of twelve (12) per cent per annum from and after December 31, 1986, and together with plaintiffs' costs incurred in this action, but with each

party to bear their own counsel fees, and it is hereby

FURTHER ORDERED that the summary judgment awarded to the plaintiffs is against the bond only, that the plaintiffs are only entitled to relief against the bond funds, which funds are deposited in the registry of the Court in the interpleader action, and that the plaintiffs' relief against the bond funds is limited as determined by the Court in the interpleader action filed on December 16, 1986, Civil No. C86-9295; and it is hereby

FURTHER ORDERED that Western Surety Company's liability is limited to the bond.

DATED this 7 day of April, 1987.

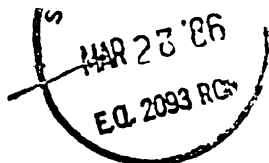
BY THE COURT:

ATTEST
M. DIXON HINDLEY
Clerk
B. A. Shields
Deputy Clerk

Homer F. Wilkinson
The Honorable HOMER F. WILKINSON
Third District Court Judge

APPROVED AS TO FORM:

John P. Parker
Attorney for Plaintiffs



BOND NO 58161261

BOND OF MOTOR VEHICLE DEALER, SALESMAN OR CRUSHER

KNOW ALL PERSONS BY THESE PRESENTS That we, Craig A. Papa-Dakis Auto Mart of
Street Address 2540 South Main Street City Salt Lake City
County of Salt Lake, Utah, as Principal and WESTERN SURETY COMPANY

a Surety Company qualified and authorized to do business in the State of Utah as Surety are jointly and severally held and firmly bound to the people of the State of Utah to indemnify persons, firms and corporations for loss suffered by reason of violation of the conditions hereinafter contained, in the total aggregate annual penal sum of Twenty Thousand and Dollars (\$20,000) as required by Utah Code Ann § 41-3-16(1), (1953, as amended) lawful money of the United States for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents The total aggregate annual liability of this bond, regardless of the number of claims, may not exceed \$20,000.00

THE CONDITION OF THIS OBLIGATION IS SUCH, That,

WHEREAS, the above bounden principal has applied for a license to do business as a _____
Motor Vehicle Dealer within the State of Utah, and that pursuant to the application, a license has been or is about to be issued

NOW, THEREFORE, if the above bounden principal shall obtain said license to do business as such _____ Motor Vehicle Dealer and shall well and truly observe and comply with all requirements and provisions of THE ACT PROVIDING FOR THE REGULATION AND CONTROL OF THE BUSINESS OF DEALING IN MOTOR VEHICLES, as provided by Chapter 3, Title 41, Utah Code Ann (1953, as amended), and indemnify persons, firms and corporations in accordance with Utah Code Ann § 41-3-16(1), (1953, as amended), for loss suffered by reason of the fraud or fraudulent representations made or through the violation of any of the provisions of said Motor Vehicle Business Act or any law respecting commerce in motor vehicles, or rule or regulation respecting commerce in motor vehicles promulgated by a licensing or regulating authority and shall pay judgments and costs adjudged against said principal so as not to exceed a total aggregate annual liability of \$20,000.00 regardless of the number of claims on this bond on account of fraud or fraudulent representations or for any violation or violations of said laws, rules or regulations during the time of said license and all lawful renewals thereof, then the above obligation shall be null and void, otherwise to remain in full force and effect Said bounden principal shall also pay reasonable attorney's fees in cases successfully prosecuted to judgment.

The Surety herein reserves the right to withdraw as such surety except as to any liability already incurred or accrued hereunder and may do so upon the giving of written notice of such withdrawal to the principal and to the Motor Vehicle Business Administrator, provided, however, that no withdrawal shall be effective for any purpose until sixty days shall have elapsed from and after the receipt of such notice by the said administrator, and further provided that no withdrawal shall in anywise affect the liability of said surety arising out of fraud or fraudulent representations or for any violation or violations of said laws, rules or regulation by the principal hereunder prior to the expiration of such period of sixty days, regardless of whether or not the loss suffered has been reduced to judgment before the lapse of sixty days

Signed and sealed this 4th day of February, 19 86

CRAIG A. PAPA-DAKIS AUTO MART

ATTEST

By _____

BY Craig A. Papa-Dakis

Principal

WESTERN SURETY COMPANY

BY _____

Surety

Attorney-in-Fact

Approved as to form

Office of the Utah Attorney General

David L. Stoddard

COPY

C-86-9295

SALT LAKE COUNTY CLERK
ROOM A-204 • COURTS BUILDING
240 EAST FOURTH SOUTH
SALT LAKE CITY, UTAH

FINES & FORFEITURES

No 18847

RECEIVED Hanson Dunn Epperson & Smith
OF

Twenty Thousand and 20/100 DOLLARS 20,000.00
Western Surety Co vs Robert Zeman Et al
Court Tender (Int Bearing)
H. DIXON HINDLEY, CLERK

CASE NO. C-86-9295

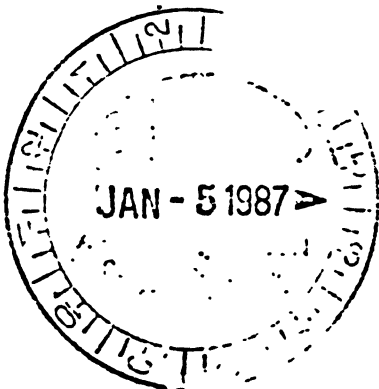
BY

DEPUTY

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT
COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY
CERTIFY THAT THE ANNEXED AND FOREGOING IS
A TRUE AND FULL COPY OF AN ORIGINAL DOCU-
MENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT
THIS 2 DAY OF JAN 1987
H. DIXON HINDLEY, CLERK
BY [Signature] DEPUTY



G/L 06JA87 03:46
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869295
\$20,000.00

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D
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000182



**STATE OF UTAH
INSURANCE DEPARTMENT**

NORMAN H. BANGERTER
Governor

160 East 300 South
P.O. Box 45803
Salt Lake City, Utah 84145
Phone: (801) 530-6400

HAROLD C. YANCEY
Insurance Commissioner

CERTIFIED MAIL

January 27, 1987

Western Surety Company
101 South Phillips Avenue
Sioux Falls, SD 57192

Attention: Joe Patrick Kirby, President

RE: Our File No. 22101

Dear Mr. Kirby:

On January 13, 1987 the above referred to file was opened pursuant to a complaint filed with the Department alleging that Western Surety has failed to satisfy an existing judgment entered in the Third District Court in the State of Utah, Salt Lake County (Civil No. C86-7427). The complaint was forwarded to Western Surety Company on or about January 16, 1987 and we are awaiting the company's response. However, an additional matter has come to the attention of the Commissioner which causes this correspondence to be forwarded to you.

The judgment at issue in this matter was entered on December 30, 1986. It was the understanding of counsel for the plaintiff in those proceedings that Western Surety would not voluntarily pay the judgment. While we understand that Western Surety has the right of appeal, it was also the understanding of plaintiff's counsel that Western Surety would not appeal. Accordingly, if that is the fact, then Western Surety is obliged to satisfy the judgment.

The Commissioner views this matter with much concern. Because of the position taken by Western Surety, through its counsel in Salt Lake City, plaintiff has been forced to seek the enforcement and satisfaction of the judgment through a massive garnishment of Western Surety Company agents doing business in this state. The garnishment has been issued to approximately twenty (20) agents and will continue until the judgment is satisfied. We have received complaints from agents, who were not parties to the lawsuit, concerning the garnishment of their trust account funds.

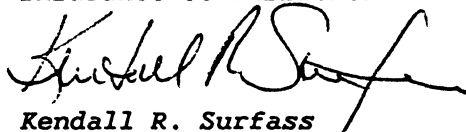
It is the position of the Commissioner that Western Surety must satisfy the judgment and not allow the continued garnishment of its agents in this state. We view the matter of the outstanding garnishment procedures to be totally unnecessary. Furthermore, Utah insureds may be placed in a perilous position under the garnishment of funds intended as premium for coverage.

Under the Utah Insurance Code, Section 31A-2-308(11), the Commissioner may revoke the Certificate of Authority of any licensee whose methods and practices he finds would endanger the legitimate interest of customers and the public. In light of that provision, the conduct of Western Surety in failing to satisfy an outstanding judgment would, in the opinion of the Commissioner, place the Certificate of Authority of the company in jeopardy in this state. The Commissioner cannot find good cause, under these facts, for Western Surety to allow a garnishment of its agents, which may jeopardize policyholders as well as the legitimate interests of the public. Subject to Western Surety's right of appeal of the judgment that is currently outstanding, the Commissioner demands that Western Surety honor the judgment and satisfy it in full. Should the company decide not to appeal the judgment and not satisfy it, the Commissioner will file a Notice of Hearing and Order to Show Cause and consider all appropriate penalties in enforcement of the Insurance Code.

Your cooperation in attendance to this matter is greatly appreciated. The Commissioner expects the written response of Western Surety within ten (10) days of receipt of this correspondence.

Sincerely,

*HAROLD C. YANCEY, CPCU
Insurance Commissioner*


Kendall R. Surfass
Market Conduct Staff Counsel

KRS:lm

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SALT LAKE COUNTY, UTAH

JAN 29 4 25 PM '87

H. DIXON HINDLEY CLERK
3rd DIST. COURT

Pauline Matheson
DEPUTY CLERK

John N. Braithwaite, Bar No. 4544
HANSON, DUNN, EPPERSON & SMITH
A Professional Corporation
650 Clark Leaming Office Center
175 South West Temple, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 363-7611

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

7.00
05

GEORGE M. BAKER and)	
DELLA A. BAKER,)	
)	
Plaintiffs,)	
	)	NOTICE OF APPEAL
vs.)	
)	
WESTERN SURETY COMPANY;)	
CRAIG A. PAPA-DAKIS,)	
individually and d/b/a)	
"AUTO-MART"; and AUTO-MART,	)	Civil No. C86-7427
an unregistered fictitious name,)	
	)	The Honorable
Defendants.	)	Homer F. Wilkinson


Western Surety Company, by and through its counsel,
hereby gives notice of its appeal from a part of that certain
order entered on December 31, 1986 by the Third Judicial District
Court in and for Salt Lake County in the above entitled action.
The part of the order appealed from is the order denying Western
Surety Company's motion to stay proceedings, which denial allowed
the subsequent grant of summary judgment exposing Western Surety
Company to multiple liability. This appeal seeks a reversal of

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the denial of the motion to stay proceedings and accordingly, seeks the vacation of the summary judgment entered subsequent to the denial of the motion to stay proceedings. This appeal is taken to the Supreme Court of the State of Utah.

DATED this 29th day of January, 1987.

HANSON, DUNN, EPPERSON & SMITH



JOHN N. BRAITHWAITE
Attorney for Plaintiff

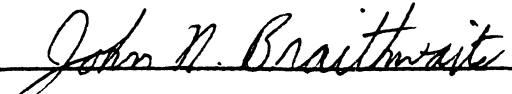
CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing to be mailed, postage prepaid, this 29th day of January, 1987, to the following:

John D. Parken
Marcella L. Keck
310 South Main, Suite 1330
Salt Lake City, UT 84101

Craig A. Papa-Dakis
1630 South Main
Salt Lake City, UT 84115

9/86-600D.14



John N. Braithwaite, Bar No. 4544
HANSON, DUNN, KPPERSON & SMITH
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IN THE SUPREME COURT OF THE STATE OF UTAH

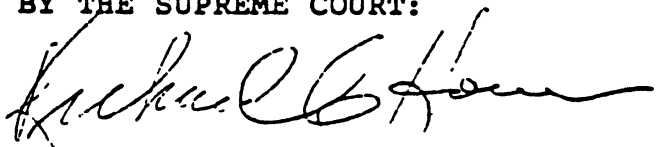
GEORGE M. BAKER and)	
DELLA A. BAKER,)	
)	
Plaintiffs/Respondents,)	ORDER OF DISMISSAL
)	
vs.)	
)	
<u>WESTERN SURETY COMPANY;</u>	)	Case No. 870059
CRAIG A. PAPA-DAKIS,)	
individually and d/b/a	)	District Court
"AUTO-MART"; and AUTO-MART,	)	Civil No. C86-7427
an unregistered fictitious name,)	
)	
Defendant/Appellant.)	

Based upon the stipulation of the parties and the motion of the appellant Western Surety Company for the dismissal of this appeal, and pursuant to Rule 37(b) of the Utah Rules of Appellate Procedure,

IT IS HEREBY ORDERED that the above-referenced appeal is dismissed.

DATED this 26th day of March, 1987.

BY THE SUPREME COURT:



CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy
of the foregoing to be mailed, postage prepaid, this 26th
day of March, 1987, to the following:

John D. Parken
Marcella L. Keck
310 South Main, Suite 1330
Salt Lake City, UT 84101

John N. Braithwaite

1/86-743M.1

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SALT LAKE COUNTY, UTAH

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H. DYSON HINDEN CLERK

BY *Debra Peterson*
DEPUTY CLERK

John D. Parken (2518)
Marcella L. Keck (4063)
ATTORNEYS FOR PLAINTIFF
Suite 1330
310 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 521-6383

30-00
1539/ IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

GEORGE M. BAKER and DELLA M. BAKER,	:	NOTICE OF APPEAL
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	Civil No. C86-7427
WESTERN SURETY COMPANY; CRAIG A. PAPA-DAKIS, individually and d/b/a "AUTO-MART;" and AUTO-MART,	:	The Honorable Homer F. Wilkinson
	:	
Defendants.	:	

---oooOooo---

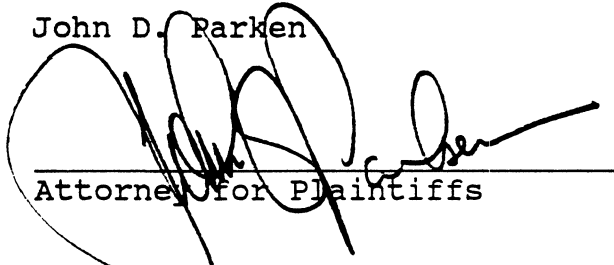
Plaintiffs, by and through their counsel, John D. Parken, hereby appeal, to the Utah Supreme Court, from the Order of the Honorable Homer F. Wilkinson granting Defendant Western Surety Company's Motion, in the Alternative, for Relief from Judgment or to Limit Execution and amending the Judgment previously entered by the District Court on December 31, 1986.

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This appeal is only from the Order, signed April 7, 1987, and not from the original Judgment, signed December 31, 1986.

DATED this 7th day of April, 1987.

John D. Parken



Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of April, 1987, I caused a true and correct copy of the foregoing Notice of Appeal to be mailed, postage prepaid to the following:

John N. Braithwaite, Esq.
Hanson, Dunn, Epperson & Smith
175 South West Temple Suite 650
Salt Lake City, Utah 84101



John D. Parken

1 THE COURT: That should be resolved by Judge
2 Wilkinson now, not by me.

3 MR. BRAITHWAITE: The motion against Western
4 Surety upon the bond liability, pursuant to the statute,
5 31-4-18, only upon the bond.

6 THE COURT: That question I think, Mr. Braithwaite
7 you have got to approach with Judge Wilkinson. That's his
8 law suit. He tried that case. You're asking me now to
9 make a ruling about whether that judgment can be executed---
10 could be satisfied and that is not in this case. It proper-
11 -ly shouldn't be a part of this case. That should be a part
12 of the case with Judge Wilkinson;so I frankly think that to
13 the extent--well, I frankly think the order was wrongfully
14 issued and I am going to dissolve the temporary restraining
15 order.

16 Now, that does not make any ruling and not intended
17 to be a ruling as to whether or not the Baker judgment has
18 priority against this fund;but I am not going to, in this
19 action, stay the execution of that judgment and if they want
20 to go try and execute anyplace they want to, such defenses
21 as may be available to those executions can be raised;but
22 they'll have to be raised in that case.

23 Now, if they execute against the fund here, that will
24 clearly raise the question of the priority that we're driving
25 at here. But everybody is entitled to be heard on that, not
 just the people who are here today. So that in the event the
 execution is made as against the County Attorney's Office

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SALT LAKE COUNTY, UTAH

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H. DICKSON AND LEEY CLERK
SALT LAKE COUNTY

BY *S.A. Shields*
DEPUTY CLERK

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE M. BAKER and
DELLA A. BAKER,

Plaintiffs,

vs.

WESTERN SURETY COMPANY;
CRAIG A. PAPA-DAKIS,
individually and d/b/a
"AUTO-MART"; and AUTO-MART,
an unregistered fictitious name,

Defendants.

STIPULATION AND MOTION
TO APPROVE SUPERSEDEAS
BOND

Civil No. C86-7427

The Honorable
Homer F. Wilkinson

STIPULATION

Western Surety Company, by and through its counsel, John N. Braithwaite, and George M. and Della A. Baker, by and through their counsel, John D. Parken, hereby stipulate and agree as follows:

1. That Western Surety Company may post a supersedeas bond in the amount of \$18,000, pursuant to Rule 62 of the Utah Rules of Civil Procedure and pursuant to the appeal taken by Western Surety Company.

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2. That pursuant to Rule 62(d) of the Utah Rules of Civil Procedure, a stay of execution or other proceedings to enforce the judgment entered in this matter will be in effect upon the approval by the Court of the supersedeas bond stipulated.

3. That despite the existence of the stay, George M. and Della A. Baker shall be entitled to participate in the interpleader action currently pending before this Court in the matter styled Western Surety Company v. Robert Benson, et al., Civil No. C86-9295, wherein the motor vehicle dealer bond funds that are the subject matter of this action have been deposited.

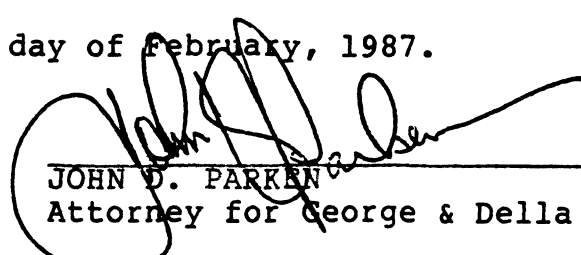
4. That despite the existence of the stay, George M. and Della A. Baker shall be entitled to seek satisfaction of the judgment entered in this action by participating in the interpleader action and by executing upon their judgment within the interpleader action, Civil No. C86-9295, to the extent deemed appropriate by the Court.

DATED this 12th day of February, 1987.



JOHN N. BRAITHWAITE
Attorney for Western Surety Co.

DATED this 5th day of February, 1987.



JOHN D. PARKEN
Attorney for George & Della Baker

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SALT LAKE COUNTY, UTAH

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H. DIXON HINDLEY CLERK
3rd DIST. COURT

BY

Thomas P. George
DEPUTY CLERK

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE M. BAKER and)	
DELLA A. BAKER,)	
)	
Plaintiffs,	)	MOTION FOR RELIEF FROM
	)	JUDGMENT OR, IN THE
vs.	)	ALTERNATIVE, TO LIMIT
	)	EXECUTION TO THE
WESTERN SURETY COMPANY;	)	INTERPLEADED FUNDS
CRAIG A. PAPA-DAKIS,)	
individually and d/b/a)	
"AUTO-MART"; and AUTO-MART,	)	Civil No. C86-7427
an unregistered fictitious name,)	
	)	The Honorable
Defendants.	)	Homer F. Wilkinson

Western Surety Company hereby moves the above entitled Court to correct the judgment entered in this matter on December 31, 1986, pursuant to Rule 60(a) of the Utah Rules of Civil Procedure or, in the alternative, to modify the judgment entered, pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. The grounds for this motion are as follows:

(1) Judgment was entered by this Court on December 31, 1986 on the plaintiff's motion for summary judgment against Western Surety Company on its motor vehicle dealer's bond.

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(2) Prior to the entry of the judgment and prior to the hearing on the motion for summary judgment held on December 19, 1986, Western Surety Company filed a complaint for interpleader on December 16, 1986, interpleading the bond amount and the numerous claimants to the bond in the matter styled Western Surety Company v. Robert Benson, et al., Civil No. C86-9295.

(3) By the filing of the interpleader action, interpleader jurisdiction was established over the \$20,000 bond held by Western Surety Company.

(4) The plaintiffs in this matter are now attempting to execute upon their judgment against the assets of Western Surety Company generally, rather than against the bond funds held in the interpleader action.

(5) Western Surety Company's liability is limited to the \$20,000 bond on an aggregate annual basis, regardless of the number of claims, and the plaintiffs must satisfy their judgment against the bond funds.

(6) The plaintiffs claim that their judgment entitles them to execute upon the assets of Western Surety Company generally, and that they are not required to satisfy their judgment out of the bond funds.

(7) To the extent that the Order entered by this Court allows the plaintiffs to execute upon Western Surety Company assets generally to satisfy their judgment, the Order is in

error, as the plaintiff's judgment should be limited to a judgment against the bond. This Court may, pursuant to Rule 60(a) of the Utah Rules of Civil Procedure, correct errors in judgments and orders arising from oversight or omission on the motion of any party. The only right of action that the plaintiffs had against Western Surety Company was upon the bond, pursuant to Utah Code Ann. §41-3-18. Western Surety Company's liability arises only by reason of the bond, and the plaintiffs' motion for summary judgment was based upon and against the bond. Accordingly, the judgment should be corrected to reflect that the judgment is against Western Surety Company's bond and must be satisfied out of that bond.

(8) Alternatively, this Court may, pursuant to Rule 60(b), modify the judgment entered to accurately reflect the result of its judgment. Specifically, subdivision (1) provides for relief from orders or judgments for reasons of mistake, inadvertence, surprise, or excusable neglect. To the extent that the Order entered by this Court allows the plaintiffs to execute upon Western Surety Company assets generally to satisfy their judgment, the Order does not accurately reflect the result of the summary judgment entered. The only cause of action the plaintiffs had against Western Surety Company was against the bond, pursuant to U.C.A. §41-3-18. Western Surety Company's liability arises only by reason of the bond and its liability is

limited by the bond. Accordingly, the judgment entered should be modified to accurately reflect the result of the summary judgment.

Alternatively, Western Surety moves this Court for an Order limiting execution upon the judgment entered in this action on December 31, 1986 to the bond funds being held in the interpleader action currently pending in the matter styled Western Surety Company v. Robert Benson, et al., Civil No. C86-9295. The grounds for this motion are set forth in the foregoing paragraphs.

RESPECTFULLY SUBMITTED this 6th day of February, 1987.

HANSON, DUNN, EPPERSON & SMITH

John N. Braithwaite
JOHN N. BRAITHWAITE

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1 P R O C E E D I N G S

2 * * *

3 **THE COURT:** First of all let me state this.
4 In reading your memorandums I was concerned that I don't
5 even know if I have jurisdiction in this matter but I am
6 going to rule and I still think there's a serious
7 question. I know there's a serious question and whether
8 I have jurisdiction with that Appeal up there, of course
9 they can grant me the right to make it, but I think
10 right now the case is really in their hands. So, I
11 think there's a very serious question there.

12 **MR. BRAITHWAITE:** May I make one comment, Your
13 Honor. A phone call yesterday afternoon to the Supreme
14 Court indicated that this was not docketed yet.

15 **THE COURT:** That might be. I don't want to
16 get on that. All I know what you said in your memoran-
17 dum, you said it's on appeal to the Supreme Court.

18 **MR. PARKEN:** I want the record to be absolute-
19 ly clear on that point, Your Honor. I think it's
20 jurisdictional. The Utah Supreme Court's records, and I
21 checked with them this morning, indicate that Mr.
22 Braithwaite's appeal in this case was docketed in the
23 Utah Supreme Court on February 11th under Case
24 No. 370059.

25 **THE COURT:** Okay. Well, there you are.

1 MR. BRAITHWAITE. I don't think that takes
2 jurisdiction away from Rule 60(b), Your honor, that's
3 only in Rule 60(a).

4 THE COURT: Well, this may be another matter
5 you're to be contesting, I don't know, but I have a
6 serious -- very serious question, I'll restate it,
7 whether I have jurisdiction.

8 Now, going back to the first situation of when
9 this was before me of course on the Summary Judgment,
10 and I don't remember exactly what was presented to me at
11 that time. I do remember your being in here and I do
12 remember granting the judgment. I don't remember
13 specifically whether you said, and I'm not saying you
14 didn't, whether you said there was -- the interpleader
15 action had been filed. I do remember some statement
16 being made that the bonding company wasn't sufficiently
17 satisfied that they had liability at that point.
18 Something to that effect.

19 Now, other than that I don't remember much
20 about it. That was one of the things that I felt that
21 the plaintiff was entitled to proceed with their case.
22 If the Interpleader Action had been perfected in all
23 probability I would have granted a stay there. I don't
24 know. I maybe wanted to look at the law on it.

25 MR. BRAITHWAITE: If Your Honor would review

1 the memoranda on file for that Motion I think you will
2 see that it was --

3 THE COURT: I know what you're saying. I'm
4 saying that I did grant the Summary Judgment because of
5 the fact that they were there. They were before the
6 Court. They had come in. They had their action filed,
7 perfected and that even if the Interpleader Action had
8 been filed, which I don't remember if I knew or didn't
9 know that it was certainly filed just for the purpose of
10 granting the stay and still the bonding company was
11 questioning whether they had liability in this situa-
12 tion. But I am of the opinion, and I would so rule,
13 that the judgment awarded to the plaintiff against
14 Western Surety would only go to against the bond.
15 Western Surety is not liable for more money than what
16 they have contracted to pay out and that's the bond
17 amount. When they paid this into Court under Inter-
18 pleader Action, of course that's what you're on the
19 Supreme Court, whether the plaintiff can -- are entitled
20 to that money first since they've got their judgment
21 and whether they have to go into the Interpleader Action
22 and get their money.

23 It's my opinion that a Judge Moffatt had
24 jurisdiction to grant a stay in that action since that
25 money was then paid into the Court and the Interpleader

1 action filed with that Court. Course he thought
2 otherwise. Who has the jurisdiction to grant that stay
3 is a question. But I am saying that I definitely, and
4 I'm ruling, that the plaintiff is only entitled to
5 release against the bond. And whether they can get in
6 and get the money first or whether it has to go through
7 the Interpleader Action, the Supreme Court kicks it back
8 here, I guess we'll have to look at it again if they
9 want to rule on it, then I guess they'll make the
10 decision.

11 MR. BRAITHWAITE: Thank you, Your Honor.

12 THE COURT: And, as I say, maybe this whole
13 Ruling of mine is mute because they have jurisdiction.
14 But I am stating that position.

15 MR. PARKEN: I'm wondering if the Court wants
16 to specify so as to avoid objections to the Order under
17 what Rule Court is amending its earlier judgment to
18 limit, as you say, our judgment to the bond.

19 MR. BRAITHWAITE: Is the Court amending its
20 prior order or entering a new order?

21 THE COURT: Well, I'm ruling -- I don't know
22 what you -- I haven't read your judgment. If your
23 judgment just says a blanket judgment against Western
24 Surety then I think that's incorrect. I think you're
25 entitled to judgment against the amount of the bond of

1 Western Surety or the bond itself. And whether this is
2 -- of course you're to state the alteration I guess
3 there's a 10-day situation there, but I think the
4 judgment itself is void, and I think under Rule --

5 MR. BRAITHWAITE: 60(b).

6 THE COURT: To void judgment. I think the
7 judgment itself is void.

8 MR PARKEN: That's the basis of your ruling?

9 THE COURT: If that's the way it's worded, I
10 haven't read your judgment. I'm saying that my judgment
11 would only go against Western Surety against the bond.
12 And I don't know how your judgment reads.

13 MR. PARKEN: And the order should reflect that
14 that's pursuant to Rule 60(b)?

15 THE COURT: Well, I haven't checked it. Is
16 that right, counsel? I know judgment -- 60(b) says if a
17 judgment is void, isn't that the one?

18 MR. BRAITHWAITE: 60(b) sub 5 refers to
19 judgments that are void. 60(b) sub 1 refers to mis-
20 takes, inadvertence, excusable neglect.

21 THE COURT: I think it's really both. If
22 you've got it worded such that it's against them I
23 think it's a mistake. I think it's a void judgment.

24 MR. PARKEN: Okay.

25 MR. BRAITHWAITE: Thank you, Your Honor.

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THE COURT: Okay.

(THEREUPON, the Motion was
concluded.)

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