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IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID W. HEATH and SUSAN J. HEATH,

Plaintiffs-Respondents,

vs.

DONALD A. MOWER and FUTURE COMMUNITY HOMES OF UTAH, INC., a corporation,

Defendants-Appellants.

Case No. 16029

BRIEF OF APPELLANTS

Appeal from a Default Judgment for Plaintiffs in the District Court of Davis County, State of Utah, The Honorable J. Duffy Palmer, Presiding

---

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FILED

1978

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT. 1

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF THE FACTS. 2

ARGUMENT. 4

POINT I: UNDER RULE 60B (1) AND (7) OF THE UTAH RULES OF CIVIL PROCEDURE, THE DEFAULT JUDGMENT SHOULD HAVE BEEN SET ASIDE. 4

POINT II: THE DEFAULT JUDGMENT SHOULD HAVE BEEN SET ASIDE BECAUSE OF THE RESPONDENTS' FAILURE TO REQUIRE THE APPELLANTS BY WRITTEN NOTICE TO APPOINT ANOTHER ATTORNEY OR TO APPEAR IN PERSON . . 14

CONCLUSION. 16

CASES CITED

Cameron vs. Carroll, 67 Cal. 500, 8 Pac. 45 12

Central Finance Company vs. Kynaston, 452 P.2d 316 (Utah, 1969) 16

Chrysler vs. Chrysler, 303 P.2d 995 (Utah, 1956). . . 14

Cutler vs. Haycock, 90 P. 897 (Utah, 1907). 8

Granite School District vs. Cox, 384 P.2d 806, (Utah, 1962). 14

Heath vs. Fabian & Clendenin, 377 P.2d 189, (Utah, 1962). 10

Mayhew vs. Standard Gilsonite Co., 376 P.2d 951, (Utah, 1962). 10

Okerlund vs. Robinson, 281 P. 200 (Utah, 1929). 15

Peterson vs. Crosier, 81 P. 860 (Utah, 1905). 13

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Library Services and Technology Act, administered by the Utah State Library.
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Riddle vs. Quinn, 90 P. 893 (Utah, 1907). 12

Utah Commercial and Savings Bank vs. Trumbo,
53 P. 1033 (Utah, 1898) 6

Warren vs. Dixon, 260 P.2d 741 (Utah, 1953) 13

Watson vs. S.F. & B. Ry. Co., 41 Cal. 17. 12

Westinghouse Electric Supply Co. vs. Paul W.
Larsen Construction, Inc., 544 P.2d 876 (Utah, 1975). 5

Wolff vs. Canadian Pac. Ry., 89 Cal. 332, 26. 12

Woods Construction Co. vs. Atlas Chemical
Industry, Inc., 337 F.2d 888 (C.A. Okla., 1964) . . . 16

RULES CITED

Rule 60B (1), (3), (7), Utah Rules of Civil
Procedure 4

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IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID W. HEATH and SUSAN M. HEATH, Plaintiffs-Respondents,	)	
vs.	)	Case No. 16029
DONALD A. MOWER and FUTURE COMMUNITY HOMES OF UTAH, INC., a corporation, Defendants-Appellants.	)	

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

Defendants-Appellants, Donald A. Mower and Future Community Homes of Utah, Inc., were sued by the plaintiffs for breach of contract and for fraudulent misrepresentation.

DISPOSITION IN THE LOWER COURT

The Honorable J. Duffy Palmer rendered a default judgment when the appellant was not present at a pre-trial hearing schedule for April 20, 1978, in favor of respondents for damages in the amount of $13,225.63. Appellants' subsequent motion to have the default judgment set aside was denied by Judge Palmer.

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RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's denial to set aside the default judgment.

STATEMENT OF THE FACTS

This case arises out of a contract between the respondents and appellant, Future Community Homes of Utah, Inc., (hereinafter "appellant corporation"). At the time this contract was entered into, appellant Mower was acting as agent for the appellant corporation. Before the construction contract was completed, there arose several difficulties and disagreements between the parties. Subsequently, the respondents filed suit against the appellants claiming that the appellant corporation had breached the contract, that appellant Mower had made fraudulent misrepresentations to the respondents, that the corporation was a sham, and that the appellant Mower should, therefore, be personally responsible for the appellant corporation's breach of contract.

When appellants failed to answer respondents' Complaint, a default judgment was entered against each of the appellants. This default judgment was subsequently set aside by the court because of the failure to serve the appellants. After this default judgment was set aside, respondents filed an Amended Complaint and appellants filed an Answer setting forth several affirmative defenses and a Counterclaim. On February 22, 1978, appellants' counsel, William Henderson, entered a withdrawal

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of counsel. On March 2, 1978, an amended withdrawal of counsel was filed and copies were mailed to the appellant Mower at 3063 A Northeast 57th Avenue, Vancouver, Washington. Subsequently, a pre-trial hearing was set for April 20, 1978. Notice of this hearing was sent by the court to William Henderson who had previously withdrawn as appellants' counsel and to appellant Mower at the above mentioned address. A copy of this notice was sent by certified mail to the above mentioned address, but this letter was returned unclaimed. Except for the aforementioned notice of pre-trial hearing, no other correspondence was sent to the appellant Mower. Appellant Mower, in the Affidavit attached to his Motion, specifically states that he received no notice of this hearing.

On April 19, 1978, appellant Mower discovered, after a telephone conversation with his former wife, that a pre-trial hearing was being held the next day. This was the first time that the appellant Mower had any knowledge of the pre-trial hearing set for April 20, 1978. Being unable to prepare for or attend this hearing, and in an attempt to avoid any adverse consequences resulting from him absence, he sent a mail-o-gram to the court indicating his inability to attend and his continued desire to pursue his defenses and counterclaims. This mail-o-gram was delivered on April 20, 1978, but was not filed until April 24, 1978.

On April 20, 1978, the Honorable J. Duffy Palmer entered a default judgment in favor of the respondents. This action resulted

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from defendant's absence at the pre-trial hearing. Subsequently, upon learning of the default judgment, the appellant Mower contacted his present attorney, Roger A. Livingston, to represent him in this matter. A motion was made to set aside the default judgment. This motion was made pursuant to Rules 60B (1), (3), and (7) of the Utah Rules of Civil Procedure, and was further based upon the Affidavit of the appellant Mower wherein he stated that he had no notice of the pre-trial hearing, that he had an Answer and Counterclaim on file which he intended to pursue, and that he had acted with due diligence in seeking relief from the default judgment. This motion to set aside the default judgment was heard on the 20th of July, 1978, but was denied. Because of the court's denial of this motion, the appellants have appealed to this court to have the denial of their motion reversed.

ARGUMENT

POINT I

UNDER RULE 60B (1) AND (7) OF THE UTAH RULES OF CIVIL PROCEDURE, THE DEFAULT JUDGMENT SHOULD HAVE BEEN SET ASIDE.

Rule 60B (1) and (7) of the Utah Rules of Civil Procedure states as follows:

> "On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertance, surprise, or excusable neglect . . . (7) any other reason justifying relief from the operation of the judgment."

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It has been well established by this court that the above provisions are to be liberally construed in order to allow a person his full day in court. This is especially true in the situation where a default judgment is entered. Cases of long-standing precedent, as well as recent cases, have established the principle that default judgments should be set aside to allow a full trial on the merits unless such action would result in substantial prejudice or injustice to the adverse party. This basic principle was clearly set forth in the decision of this court in the recent case of Westinghouse Electric Supply Co. vs. Paul W. Larsen Construction, Inc., 544 P.2d 876 (Utah, 1975). In that case, a default judgment had been entered against the plaintiff for an alleged failure to prosecute. Finding that there might have been some reason for the plaintiff's failure to prosecute, the court made the following statement:

> "It is indeed commendable to handle cases with dispatch. . . But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party." (Emphasis added)
> (Id. at 879)

In order to understand the respect for and dedication to this principle by the Utah Supreme Court, it is necessary to review some of the leading cases that have established and

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reaffirmed this principle. One of the leading cases was Utah Commercial and Savings Bank vs. Trumbo, 53 P. 1033 (Utah, 1898). This was a case in which the defendant was sued on a promissory note. The defendant was out of state, but had hired attorneys to represent him. After having a demurrer overruled, the defendant's attorneys wrote the defendant in California and stated that he would have to send them $100 before they could continue with his case. When the defendant never responded, the attorneys withdrew from the case. After their withdrawal, a default judgment was entered against the defendant because of his failure to answer. When the defendant discovered that a default judgment had been entered against him, he retained another attorney who made a motion to have the default judgment set aside. When the court denied the motion, an appeal was made to this court. On appeal, the decision of the lower court was reversed. Relying heavily on the absence of the defendant from the state of Utah, his lack of information as to what was being done in his case, and the existence of facts that, if true, would constitute a good defense, the court ordered the default judgment be set aside. In its decision, the court stated:

> ". . . The policy of the law is that every man shall have his day in court before judgment shall be entered against him, and where a judgment by default has been entered, and within the proper time a good defense to the action in which the judgment was rendered is made to appear, and it is shown that the default was entered through excusable neglect or mistake,

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> the default will be vacated, and the judgment set aside to permit a trial on the merits. . . The power of the court to set aside judgments by default is recognized and conferred in Section 3005, Rev. St. 1898 [now recognized in Rule 60B of the Utah Rules of Civil Procedure], and should be liberally exercised, for the purpose of directing proceedings and trying causes upon their substantial merits; and where the circumstances which led to the default are such as to cause the court to hesitate, it is better to resolve the doubt in favor of the application, so that a trial may be secured on the merits." (Emphasis added) (Id. at 1036)

As shown by the above quote, if there are any facts which should cause a court to hesitate in denying a party a trial on the merits, a default judgment should be set aside to allow such a trial to take place.

The facts of the Trumbo case are very similar to the facts in the present case. In both cases, the court was confronted with a situation in which the defendant had been absent from the state while the proceedings that led to the default judgment were taking place. Additionally, in both cases, the defendants because they were attending to business did not receive the correspondence that would have kept them informed. Finally, in both cases the defendants alleged facts that, if true, would constitute good defenses to the complaints against them. In fact, in the present case the defendant has a valid Counterclaim on file that, if true, would allow him a recovery against the respondents. The seriousness with which this court viewed its duty to set aside the default judgment in such a case is evidenced

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by this statement in the Trumbo case:

> ". . . If in such a case as is presented in this record, a court of justice can grant no relief, then it would seem difficult to conceive of a case where a court would be justified by default. Surely, it cannot be said that a person liable to be sued leaves his state at his peril, even when he has employed able counsel to care for his interests, lest perchance a judgment be taken by default which will leave him without remedy, regardless of any defense he may have. Such is not the law, and courts do not favor judgments by default . . ." (Utah Commercial and Savings Bank vs. Trumbo, supra, at 1036)

Another important case in which this court was asked to set aside a default judgment was Cutler vs. Haycock, 90 P. 897, (Utah, 1907). In that case the attorney for the defendant failed to timely file a demurrer to the plaintiff's Complaint. Relying on the existence of communication problems, this court reversed the refusal of the lower court to set aside the default judgment. In doing so, the court stated:

> ". . . Law and courts alike abhor a result that condemns a party unheard, and, unless the law unavoidably requires and justice demands it, where a party has not by his own inexcusable neglect deprived himself of the right, the courts should, and will, where equity permits, afford relief, to the end that a party may be given hearing. . ." (Emphasis added) (Id. at 901)

Another reason the court set aside the default judgment was because it would not result in any inconvenience or loss to the adverse party. In fact, the court recognized, as is the situation in the case before this court, that the default judgment was unexpected. These circumstances were emphasized by the

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court when it stated:

> ". . . Upon the other hand, there is <u>not the slightest intimation that the respondent would have suffered either inconvenience or loss</u> of any kind by setting aside the default. If costs are involved, the court can always protect against those. This is not a case where a party at great expense and sacrifice of time had prepared for trial, and would be compelled to undergo it all again if the other party is permitted to defend; nor does it present a case where any evidence has been lost to the prevailing party. It is too manifest to admit of controversy that both the default and judgment were obtained at a time when neither was expected. . ." (Emphasis added) (Id.)

As with Trumbo, the Cutler case involved circumstances very similar to the case before this court. First, the Cutler case involved problems with communication which led to the default judgment. Though the exact nature of these problems differ, the principle remains the same. Inaction, resulting from circumstances where communication cannot be expected to be quickly and expeditiously made, was the basis for the court's decision. In 1907, the mails were not reliable enough to be the basis for a default judgment. The mail service today may be better than in 1907, though some would contest even that, but the distances involved again make it unreasonable to allow a default judgment to be taken. Second, both cases involve situations where setting aside the default judgment would not prejudice the adverse party or result in any inconvenience or loss. With these considerations in mind, this court should follow the decision of the court in the Cutler case.

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Another case in which the court acknowledged that default judgments are not favored was Heath vs. Fabian & Clendenin, 377 P.2d 189 (Utah, 1962), where the lawfirm of Fabian & Clendenin was being sued for impropriety in having a default judgment set aside. This court, in finding that the actions of the lawfirm were not improper, emphasized the need for a full hearing on the merits:

> "Judgments by default are not favored by the courts nor are they in the interest of justice and fair play. No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case. . ." (Emphasis added) (Id. at 190)

Statements have been made in several cases emphasizing that a decision whether or not to set aside a default judgment is within the discretion of the trial court. This principle is well established, but this court has been careful to define the scope of that discretion. The lower court is not given a free hand to refuse to set aside a default judgment. In fact, the large number of cases wherein lower courts have been reversed for failing to set aside default judgments indicates that such refusals will be closely scrutinized to see if there has been an abuse of discretion. In Mayhew vs. Standard Gilsonite Co., 376 P.2d 951 (Utah, 1962), another case in which this court set aside the refusal of the lower court to set aside a default judgment, this court dealt directly with the question of discretion. As shown by the following quote, the court enunciated the principle

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that a trial court should generally be inclined to set aside default judgments and that the failure to do so where there is reasonable justification or excuse constitutes an abuse of discretion.

> "It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason <u>it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse</u> for the defendant's failure to appear, and timely application is made to set it aside." (Emphasis added) (Id. at 952)

In the prior case of <u>Cutler</u>, supra, this court specifically set forth one criterion to help lower courts in knowing when to set aside default judgments.

> ". . . That the question whether a default and judgment should or should not be vacated is one to be passed on by the trial court, and that it rests within its sound discretion, has so often been declared to be the rule of practice that it has become elementary, and needs no citation of authorities. It is equally elementary that <u>this discretion is to be applied to the facts as they appear in each case</u>, and, in the exercise of this discretion, the aim and object should be the promotion and furtherance of justice and the protection of the rights of all concerned. As has been well said, <u>in all doubtful cases the general rule of courts is to incline towards granting relief from the default</u>, and to bring about

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> a judgment on the merits. 1 Black on Judgments, § 354; Cameron v. Carroll, 67 Cal. 500, 8 Pac. 45; Wolff v. Canadian Pac. Ry., 89 Cal. 332, 26 Pac. 825; Watson v. S.F. & B. Ry. Co., 41 Cal. 17." (Emphasis added) (Cutler vs. Haycock, supra, at 900)

An additional point which the court in Cutler made was that when there was a difference of opinion between the trial court and the court of review as to whether a reasonable basis for setting aside the default judgment existed, it should be set aside.

> ". . . While, as we have already stated, the mere difference of judgment between this court and the trial court may not be conclusive, still it raises a serious doubt, and in such a case a reasonable doubt is always resolved in favor of granting a trial upon the merits where none has been had. . ." (Id. at 901)

In the case of Riddle vs. Quinn, 90 P. 893 (Utah, 1907), the court also addressed the issue of discretion:

> ". . . All the authorities are to the effect that, whether the judgment be attacked by motion or by a proceeding in equity, the matter rests within the sound discretion of the trial court. The authorities further hold that in such proceedings the courts will incline strongly toward bringing about a trial on the merits. . . In 2 Elliott's General Practice, the rule is stated in the following language: 'The appellate courts are much more reluctant to interfere where a default is set aside than in cases where the application is denied, as is evidenced by many decisions. The rule is analogous to that which prevails where new trials are granted, for, as is well known, appellate courts very seldom interfere with an order granting a new trial.'" (Emphasis added) (Id. at 896)

In this case the lower court, after finding that a notice of trial setting required by a district court rule had not been given,

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set aside the default judgment. In line with its enunciation of the principle that appellate courts are less inclined to reverse the setting aside of a default judgment than to reverse a denial to set aside a default judgment, this court affirmed the lower court's decision setting aside the default judgment.

Several decisions have been handed down by this court in which the court has refused to reverse lower court denials of motions to set aside default judgments. This in in line with the principle announced in Cutler, supra, p. 9, that a decision whether or not to set aside a default is to be made on the facts and circumstances of each case. The facts of those cases where the Supreme Court has affirmed the refusal of lower courts to set aside default judgments can easily be distinguished from the facts of the case presently before this court. In Peterson vs. Crosier, 81 P. 860 (Utah, 1905), the court refused to set aside the default judgment because the affidavit of the defendant showed a deliberate intention to abandon his defense. In the present case the affidavit of appellant Mower shows just the opposite: it shows that the appellants intend to affirmatively pursue their defenses and a counterclaim. In Warren vs. Dixon, 260 P.2d 741 (Utah, 1953), this court refused to set aside a default judgment after finding that there was proper service of process in the case and that the defendant simply neglected to retain counsel until after the default judgment had been entered.

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Again, this is very different from the present case where the appellants have retained counsel, have an Answer and Counterclaim on file, and have been confronted with a default judgment only after being besieged with communication and notice problems.

Additionally, in Chrysler vs. Chrysler, 303 P.2d 995 (Utah, 1956), this court refused to set aside a default judgment when it found that the husband, instead of pursuing a divorce action which he had instituted in this state, removed himself to the state of Nevada and instituted a second action there. The court in that case specifically found that to set aside the default judgment would be prejudicial and unfair to the defendant. Finally, Granite School District vs. Cox, 384 P.2d 806 (Utah, 1963), the court refused to set aside a default judgment after finding that service was proper and that the defendant had actual notice of the action pending against him.

POINT II

THE DEFAULT JUDGMENT SHOULD HAVE BEEN SET ASIDE BECAUSE OF THE RESPONDENTS' FAILURE TO REQUIRE THE APPELLANTS BY WRITTEN NOTICE TO APPOINT ANOTHER ATTORNEY OR TO APPEAR IN PERSON.

Rule 2.5 of the Rules of Practice in the District Courts and Circuit Courts in the State of Utah states 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)

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Nowhere does the record show that this required notice to the defendants was given.

It has been established by this court that the parties, before a district court, are bound to observe the rules of practice established for the district courts. In an early case, Riddle vs. Quinn, supra, p. 12, this court affirmed the decision of the lower court setting aside a default judgment because of the failure of one of the parties to comply with a District Court Rule. The court stated:

> "We think, therefore, that the court had proper authority to promulgate Rule 21 and that litigants in court and their attorneys were bound to observe its provisions." (Riddle, supra, at 895)

In a later case, Okerlund vs. Robinson, 281 P. 200, (Utah, 1929), the court strongly reaffirmed this rule of law. In that case, the district court rule in question required the clerk of the court to notify each attorney of the time when their cases were set for hearing. Finding that this rule had not been complied with, this court reversed the decision in the district court to not set aside the default judgment and in its opinion stated as follows:

> "The force and effect of a rule lawfully adopted and promulgated by a court is stated in 7 R.C.L. title "Courts", p. 1027, as follows: 'Rules adopted by a court without exceeding the limits of its authority are often spoken of as having the effect of rules enacted by the legislature or positive law, and therefore as being obligatory both on the court and on the parties.'" (Emphasis added) (Id. at 201)

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The court also stated that:

> ". . . Where a rule such as No. 21 has been adopted and promulgated, attorneys are entitled to rely upon it." (Id.)

This was reaffirmed in the fairly recent case of Central Finance Company vs. Kynaston, 452 P.2d 316 (Utah, 1969).

This same rule of law has been established for the Federal District Courts. Thus, it has been held that rules of practice adopted by United States District Courts have the force and effect of law and are binding upon the parties and the court which promulgated them until they are changed in an appropriate manner. Woods Construction Co. vs. Atlas Chemical Industry, Inc., 337 F.2d 888 (C.A. Okla., 1964).

These cases clearly establish that a district court rule is binding upon the parties and upon the district courts. In the present case, the respondents failed to comply with Rule 2.5 of the Rules of Practice in the District Courts. Pursuant to that provision, when a party's attorney withdraws, the adverse party must serve written notice upon the party whose attorney has withdrawn requiring that party to appoint another attorney or to appear in person. As stated above, the respondents in this case failed to serve that notice upon the appellants. Therefore, the default judgment should have been set aside.

CONCLUSION

The refusal of the lower court to set aside the default judgment constituted an abuse of discretion. The facts of this

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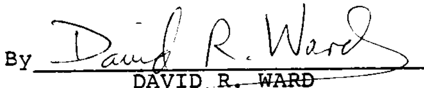
case clearly exemplify the type of situation for which Rule 60B (1) and (7) was established. It would be rare that a more compelling case for the setting aside of a default judgment could be made.

Additionally, the default judgment should be set aside because the respondents failed to comply with Rule 2.5 of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah. Such rules have the force and effect of law and the failure to comply therewith constitutes reversable error.

RESPECTFULLY SUBMITTED,

LIVINGSTON & McGARRY

By 
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CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Brief of Appellants, postage prepaid, to David E. Bean, attorney for plaintiffs-respondents, at 190 South Fort Lane, Suite 2, Layton, Utah 84041, on this ____ day of November, 1978.

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