

1989

Wilbert Rowley v. Jeff Layton : Brief of Appellant

Utah Court of Appeals

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Del B. Rowe; Attorney for the Plaintiff/Respondent.

David A. Wilde; Ashton, Braunberger, Poulsen & Boud, P.C.; Attorney for the Defendant/Appellant.

Recommended Citation

Brief of Appellant, *Rowley v. Layton*, No. 890066 (Utah Court of Appeals, 1989).

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890066

WILBERT ROWLEY,
Plaintiff/Respondent,
vs.
JEFF LAYTON,
Defendant/Appellant.

(Civil No. 86-7440)

David A. Wilde, #A4695
ASHTON, BRAUNBERGER, POULSEN &
BOUD, P.C.
302 West 5400 South, Suite 103
Murray, Utah 84107
Attorney for the Defendant/Appellant

Del B. Rowe, #2813
533 West 500 South, #4
Bountiful, Utah 84010
Attorney for the Plaintiff/Respondent

FILED

MAR 28 1989

U.S. District Court
Southern District of New York
United States of America

UTAH COURT OF APPEALS

WILBERT ROWLEY,)	
)	
Plaintiff/Respondent,	)	APPELLANT'S BRIEF
)	
vs.)	
	)	Case No. 890066-CA
JEFF LAYTON,)	
	)	(Civil No. 86-7440)
Defendant/Appellant.)	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
JUDGE JAMES S. SAWAYA

David A. Wilde, #A4695
ASHTON, BRAUNBERGER, POULSEN &
BOUD, P.C.
302 West 5400 South, Suite 103
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AUTHORITIES CITED

COURT RULES

Utah Rule of Civil Procedure 36(a)	3
Utah Rule of Civil Procedure 60(b)(1)	4, 6, 8, 9, 10, 11
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CASES

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<u>Russell v. Martell</u> , 681 P.2d 1193 (Utah 1984)	10

UTAH COURT OF APPEALS

WILBERT ROWLEY,)	
	)	APPELLANT'S BRIEF
Plaintiff/Respondent,)	
)	
vs.)	
	)	Case No. 890066-CA
JEFF L. LAYTON,)	
	)	(Civil No. C86-7440)
Defendant/Appellant.)	

STATEMENT VERIFYING JURISDICTION OF THE COURT OF APPEALS

This case was originally appealed to the Utah Supreme Court, subject to assignment to the Court of Appeals, pursuant to Utah Code Annotated Section 78-2-2(3)(i) which states:

The Supreme Court has appellate jurisdiction . . . over . . . orders, judgments and decrees of any Court of record over which the Court of Appeals does not have original appellate jurisdiction.

By notice of the Utah Supreme Court dated February 2, 1989, this appeal was poured over to the Court of Appeals for disposition.

NATURE OF THE PROCEEDINGS

This was a breach of contract action filed by Plaintiff relating to a contract for the purchase of trees and water rights. This appeal deals with the propriety of a determination

by the trial court to vacate a summary judgment entered December 22, 1986.

STATEMENT OF THE ISSUES

Plaintiff filed a Motion to Vacate on or after May 6, 1987, more than four months after entry of summary judgment. Plaintiff relied on Rule 60(b)(7), when the facts asserted by Plaintiff clearly showed that relief could only be granted under Rule 60(b)(1). The trial court nevertheless granted relief under Rule 60(b)(7), which constituted an abuse of discretion on the part of the trial court.

DETERMINATIVE RULES

The determinative rule which governs disposition of this case is Rule 60(b) of the Utah Rules of Civil Procedure which establishes the conditions upon which a trial court may grant relief from a final judgment or order.

STATEMENT OF THE CASE

Plaintiff filed a Breach of Contract Claim against Defendant for non-payment of certain funds which were allegedly due pursuant to a contract for the purchase of trees and water rights. (See pages 13-16 of the Record on Appeal.) The case was originally filed by Plaintiff in San Pete County District Court, but was later transferred to Salt Lake County pursuant to Defendant's motion. (See page 2 of the Record on Appeal.) After transfer of the case to Salt Lake County, Defendant filed an Answer to Plaintiff's Complaint (See pages 18-20 of the Record on

Appeal.) and served Requests for Admissions upon Plaintiff pursuant to Rule 36(a) of the Utah Rules of Civil Procedure. (See page 21 of the Record on Appeal, and Exhibit "A" attached hereto for the Court's Convenience.)

The Requests for Admissions remained unanswered for more than 30 days, and Defendant therefore moved for Summary Judgment on the grounds that the items deemed admitted entitled Defendant to judgment as a matter of law. (See pages 26-28 of the Record on Appeal, and Exhibit "B" attached hereto.) A hearing was scheduled by Defendant's counsel for December 22, 1986, and Notice of Hearing was mailed to Plaintiff's counsel. (See pages 29-30 of the Record on Appeal, and Exhibit "C" attached hereto.)

There was no appearance by Plaintiff's counsel at the hearing on December 22, 1986, and the trial court entered Summary Judgment in Defendant's favor. (See pages 31-32 of the Record on Appeal, and Exhibit "D" attached hereto.) Notice of the entry of Summary Judgment was mailed to Plaintiff's counsel within four (4) days following the entry thereof. (See pages 33-35 of the Record on Appeal, and Exhibit "E" attached hereto.)

Plaintiff's counsel later contacted Defendant's counsel on January 16, 1987, regarding the Summary Judgment which had been entered and offered an explanation as to why Plaintiff's counsel had not appeared at the hearing on December 22, 1986. Plaintiff's counsel requested at that time that the Summary Judgment be voluntarily set aside. This request was not agreed

to, and Plaintiff's counsel was specifically informed that he would have to file a Motion to Set Aside the Judgment with the Court. Plaintiff's counsel indicated that he would be filing such a motion, and the conversation was thereupon concluded. (See pages 122-125 of the Record on Appeal, and Exhibit "F" attached hereto.)

Several weeks passed, and a Motion to Vacate was finally filed by Plaintiff's counsel. (See pages 36-37 of the Record on Appeal and Exhibit "G" attached hereto.) This document was dated May 6, 1987, but the clerk's notation indicates it was received by the Court on June 4, 1987. In any event, it was well past the 90 days allowed for Rule 60(b)(1) motions. A Memorandum in Support of this Motion was also filed. (See pages 42-45 of the Record on Appeal, and Exhibit "H" attached hereto.) This Memorandum alleged the following facts:

1. Plaintiff had been incorrectly informed as to the Case Number by the Salt Lake County Clerk after the case had been transferred to Salt Lake County. (See page 44 of the Record on Appeal.)

2. Plaintiff was not aware of the correct Case Number prior to the hearing on December 22, 1986. (See page 45 of the Record on Appeal.)

3. Plaintiff filed timely responses to the Request for Admissions which were apparently lost by the Salt Lake County Court, presumably because of the incorrect Case Number. (See page 44 of the Record on Appeal.)

4. Plaintiff did not attend the Summary Judgment hearing on December 22, 1986, because he had called the Court Clerk and had been informed that no hearing was scheduled. This mis-information was again allegedly the result of the incorrect Case Number. (See page 45 of the Record on Appeal.)

The Memorandum filed by Plaintiff in support of the Motion to Vacate did not refer to the Notice of Judgment mailed to Plaintiff four days after entry of the judgment, nor did it offer any excuse or explanation as to why this Notice of Judgment was ignored for so long. Furthermore, the Memorandum specifically acknowledged the conversation between respective counsel wherein Plaintiff's counsel requested that the Summary Judgment be voluntarily set aside. (See page 45 of the Record on Appeal.) Again, the Memorandum offered no justification or explanation as to why Plaintiff did not act immediately after having been informed that the Summary Judgment would not be voluntarily set aside.

A hearing on Plaintiff's Motion to Vacate the Judgment was held in August of 1987, and the trial court set aside the Summary Judgment, "under Rule 60(b)(7) and the equitable powers of the court". (See page 40 of the Record on Appeal and Exhibit "I" attached hereto.)

A trial was subsequently scheduled, and judgment entered in Plaintiff's favor, whereupon the instant appeal was filed. (See pages 223-231 of the Record on Appeal.)

SUMMARY OF THE ARGUMENT

Accepting for the purposes of this appeal that the facts as outlined in Plaintiff's Memorandum in Support of his Motion to Vacate the Judgment are accurate, such facts clearly constitute "mistake", "inadvertence", and/or "neglect". Rule 60(b)(1) allows a judgment to be set aside for such reasons, but only if relief is requested within 90 days from the entry of judgment. Rule 60(b)(7) cannot be relied upon in an illusory attempt to circumvent the time limitations associated with Rule 60(b)(1). The trial court committed an abuse of discretion and reversible error when it granted relief under Rule 60(b)(7).

ARGUMENT

Accepting for the purposes of this appeal that the exposition of facts as outlined in Plaintiff's Memorandum in Support of the Motion to Vacate are accurate, it is nevertheless clear that the basis for Plaintiff's claim for relief was on the grounds of "mistake", "inadvertence", and/or "neglect".

Plaintiff alleges that he was misinformed as to the correct Case Number which had been assigned by the Salt Lake County Court. If this is true, it is difficult to understand how this could be characterized as anything other than a "mistake". Even if this "mistake" was attributable to court personnel, the fact remains that Plaintiff had ample opportunity to discern the correct case number. For instance, Plaintiff acknowledged receiving Defendant's Request for Admissions, (See page 44,

paragraph 4 of the Record on Appeal); the Motion for Summary Judgment, (See page 44, paragraph 5 of the Record on Appeal); the Notice of Hearing on the Motion for Summary Judgment and the Notice of Trial Setting. (See page 45, paragraph 5 of the Record on Appeal.) Each of these documents was mailed prior to the Summary Judgment Hearing, and each contained the correct Case Number. (See the case numbers and mailing dates on these documents found at pages 21, 26-28, 29-30, and 25 of the Record on Appeal, respectively.) It is therefore clear that if Plaintiff did not know the correct Case Number, it was because of his own mistake, inadvertence or neglect.

Another instance of the mistake, inadvertence and neglect of Plaintiff's counsel relates to his claim that he contacted the Court Clerk prior to the Summary Judgment Hearing because of an alleged conflict. He claims he was informed that no hearing was scheduled, and he therefore made no appearance at the hearing. It was a mistake and negligence to fail to appear at a hearing which had been properly noticed without contacting Defendant's counsel to confirm that the hearing was cancelled.

It was also a mistake and negligence to fail to contact Defendant's attorney regarding the alleged fact that Plaintiff had already responded to the Requests for Admissions. If the Requests for Admissions had in fact been responded to at the time the Motion For Summary Judgment was filed, a simple phone call to Defendant's counsel with the offer to mail a new copy of such responses would seem in order.

The most glaring example of the neglect of Plaintiff's counsel relates to his continued failure to act after Notice of the Summary Judgment was mailed to him on December 26, 1986. Failure to act immediately following receipt of this notice cannot be characterized as anything other than neglect, and hardly excusable neglect. Furthermore, Plaintiff's counsel contacted Defendant's counsel on January 16, 1987, requesting that the Summary Judgment be voluntarily set aside. When this request was rejected, emphasis was added to the urgency with which Plaintiff's counsel would be expected to act. Nevertheless, no action was taken for more than another four months.

Cases are fairly commonplace where, as here, a party delays more than 90 days in requesting relief from a judgment which was entered due to negligence or mistake, and then makes claim to relief under Rule 60(b)(7). However, the Utah Supreme Court has been clear, explicit and consistent in repeatedly stating that Rule 60(b)(7) may not be used to circumvent the 90 day time limitation associated with Rule 60(b)(1).

In Laub v. South Central Utah Telephone Association, Inc., 657 P.2d 1304 (Utah 1982), the Utah Supreme Court found an abuse of discretion and reversed the trial court for modifying a judgment under Rule 60(b)(7) when the modification should have been granted, if at all, under Rule 60(b)(1). In Laub, the Plaintiffs were awarded judgment against the Defendant for personal injuries sustained in an automobile accident. Part of

the judgment included medical expenses which had been previously paid under the Plaintiff's PIP benefits of their own insurance policy. The Defendant later realized that Plaintiffs were receiving "double payment" and therefore moved the Court to reduce the judgment by the amount of benefits which had previously been paid. Defendant's motion was filed more than six months after the entry of judgment in Plaintiff's favor. The trial court approved the motion, and reduced the judgment accordingly.

The Supreme Court held that it was error for the trial court to modify the judgment which had been in effect for more than six months. In so ruling, the Court discussed at page 1307 the applicability of Rule 60(b)(7) and stated:

The power given to the Court by [Rule 60(b)(7)], however, "should be very cautiously and sparingly invoked by the Court only in unusual and exceptional circumstances." [See also Hughes v. Sanders, 287 F. Supp. 332, 334 (E. D. Okl. 1968).]

The Court went on to state:

The time strictures of Rule 60(b) are wholesome and necessary, for there must be an end to the time when judgments can be questioned . . . furthermore, since Subdivision (1) is applicable to the instant case, Subdivision (7) cannot apply and may not be used to circumvent the three month filing period.

In Matter of Estate of Pepper, 711 P.2d 261, 263 (Utah 1985) the Supreme Court stated:

If a party's grounds (for relief of a judgment) are properly encompassed within those four subsections [Rule 60(b)(1-4)] he cannot avoid the three month limitation by

employing the "catch-all" subsection (7).

In Russell v. Martell, 681 P.2d 1193, 1195 (Utah 1984)

the Supreme Court stated:

We have held that subparagraph 7 may not be resorted to for relief when the ground asserted for relief falls within subparagraph 1. (Citations omitted.) Otherwise, the three month limitation imposed on relief under subparagraph 1 is averted.

In Larson v. Collina, 684 P.2d 52, 54 (Utah 1984) the Court stated:

The three month period allowed for subsection (1) motions may not be circumvented by filing a motion under subsection (7).

In Calder Brothers Co. v. Anderson, 652 P.2d 922, 926 (Utah 1982) the Court stated:

Rule 60(b)(7) is not available to one who should have filed under Rule 60(b)(1) but did not.

In Pitts v. McLachlan, 567 P.2d 171, 173 (Utah 1977) the Court stated:

"It seems inescapable, also, to conclude that Rule 60(b)(1) is applicable here in the letter and spirit of rules governing procedure and practice and the doctrine of the exercise of diligence in the preservation of one's rights, failing which they are amenable to a limitations statutory feature looking to repose of litigation after a reasonable time, interdicted here to be three months under Rule 60(b)(1)

CONCLUSION

The Utah Supreme Court has been clear, explicit and consistent in repeatedly stating that Rule 60(b)(7) may not be

used to circumvent the 90 day time limitation associated with Rule 60(b)(1). Inasmuch as it is clear in this case that the basis for Plaintiff's claim for relief from the Summary Judgment was "mistake", "inadvertence" and "neglect", it was an abuse of discretion for the trial court to ignore the time limitations of Rule 60(b)(1) and grant relief "under Rule 60(b)(7) and the equitable powers of the Court". Defendant therefore requests that the Order Vacating the Summary Judgment be reversed, and that judgment in favor of Defendant be reinstated.

Respectfully submitted this 24 day of March 1989.

ASHTON, BRAUNBERGER, POULSEN
& BOUD, P.C.

By David Alan Wilde
David A. Wilde, #4694
302 West 5400 South, #103
Murray, Utah 84107
(801) 263-0300

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing APPELLANT'S BRIEF was mailed, postage prepaid, to the following this 24 day of March, 1989.

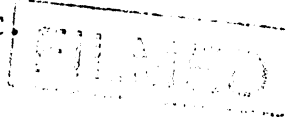
Del Rowe
533 West 500 South, #4
Bountiful, Utah 84010

David Alan Wilson

EXHIBIT "A"

Defendants Certificate of Mailing of
Requests for Admissions, etc.

David A. Wilde, USB #A4695
Braunberger, Poulsen & Boud, P.C.
Attorneys for the Defendant
302 West 5400 South, Suite 103
Murray, Utah 84107
Telephone Number: (802) 263-0300



Charmie Petropoulos

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

WILBERT ROWLEY,	)	CERTIFICATE OF MAILING
)	
Plaintiff,)	
)	
vs.)	
)	
JEFF L. LAYTON,)	
	)	Civil No. C86-7440
Defendant.)	

I hereby certify that a true and correct copy of
Defendant's Request for Production of Documents, Request for
Admissions and Interrogatories to Plaintiff was mailed on
the 15th day of October, 1986 to Plaintiff's attorney at
the following address:

Milton T. Harmon
Attorney for Plaintiff
36 South Main Street
Nephi, Utah 84648

BRAUNBERGER, POULSEN & BOUD, P.C.

David Alan Wilde
David A. Wilde
Attorney for Defendant

EXHIBIT "B"

Defendants Motion for Summary Judgment

FILED

David A. Miller, USA #A4435
Braunberger, Poulsen & Boud, P.C.
Attorneys for the Defendant
302 West 5400 South, Suite 103
Murray, Utah 84107
Telephone Number: (802) 263-0300

Earlene Matheson

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

WILBERT ROWLEY,	)	MOTION FOR SUMMARY
	)	JUDGMENT
Plaintiff,)	
)	
vs.)	
)	
JEFF L. LAYTON,)	
	)	Civil No. C86-7440
Defendant.)	

Defendant, by and through his attorneys, Braunberger, Poulsen & Boud, P.C., hereby moves the court, pursuant to Rule 56(b) of the Utah Rules of Civil Procedure, for summary judgment in the above-entitled action. This motion is based on the fact that on October 15, 1986, Defendant mailed to Plaintiff several discovery requests. Included among these discovery requests were several requests for admissions. More than 30 days have elapsed from the date these requests for admissions were mailed to Plaintiff, and Plaintiff has never responded to any such requests. Pursuant to Rule 36(a) of the Utah Rules of Civil Procedure, this failure to respond to the requests for admissions within 30 days

caused the matter contained in such requests to be deemed admitted. The matters thus admitted establish that Plaintiff breached the contract at issue in this case, and that such breach has caused Defendant damages in an amount exceeding \$6,800.00. A copy of the interrogatories submitted to Plaintiff is attached hereto as Exhibit "A", and its contents are incorporated herein by reference.

DATED this 5th day of December, 1986.

BRAUNBERGER, POULSEN & BOUD, P.C.

David Alan Wilde
David A. Wilde
Attorney for Defendant Jeff L. Layton

12/2/86,B12-13,1e

603027

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, on the 5th day of December, 1986, to the following:

Milton T. Harmon
Attorney for Plaintiff
36 South Main Street
Nephi, UT 84648

David Alan Wilde

12/2/86,B12-14,1e

000028

EXHIBIT "C"

Defendants Notice of Hearing

David A. Wilde, USA #A4595
Braunberger, Poulsen & Boud, P.C.
Attorneys for the Defendant
302 West 5400 South, Suite 103
Murray, Utah 84107
Telephone Number: (802) 263-0300

Faith Matheson

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

WILBERT ROWLEY,	)	NOTICE OF HEARING
)	
Plaintiff,)	
)	
vs.)	
)	
JEFF L. LAYTON,)	
	)	Civil No. C86-7440
Defendant.)	

NOTICE

TO THE RESPECTIVE PARTIES AND THEIR LEGAL COUNSEL:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE
that David A. Wilde, Attorney for the Defendant, will call
up for hearing Defendant's Motion for Summary Judgment
before the above-entitled Court which is located at 240 East
400 South, Salt Lake City, Utah, on Monday, December 22,
1986, at 2:00 p.m.

DATED this 5th day of December, 1986.

BRAUNBERGER, POULSEN & BOUD, P.C.

David Alan Wilde
David A. Wilde
Attorney for the Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of
the foregoing NOTICE OF HEARING was mailed, postage prepaid,
on the 5th day of December, 1986, to the following:

Milton T. Harmon
Attorney for Plaintiff
36 South Main Street
Nephi, UT 84648

David Alan Wilde

12/2/86,B15-16,1e

CP08120

EXHIBIT "D"

Order Granting Defendant's Motion
for Summary Judgment

JEFF L. LAYTON

CASE NO: **CHC-7410**

Type of hearing: Div. _____ Annul. _____ Supp. Order _____ OSC. _____ Other _____
Present: Pltf. _____ Deft. _____ Summons _____ Stipulation _____
Pltf. Atty: Milton Harmon NP Waiver _____ Publication _____
Deft. Atty: David Wilde ☐ Default of Pltf/Deft Entered
Sworn & Examined: Date: December 22, 1986
Pltf: _____ Deft: _____ Judge: James S. Sawaya
Others: _____ Clerk: Susan Gray
Reporter: Cathy Gallegos
Bailiff: Nick Kirk

ORDERS:

- ☐ Custody Evaluation Ordered ☐ Custody Awarded To _____
☐ Visitation Rights _____
☐ Pltf/Deft Awarded Support \$ _____ x _____ = _____ Per Month
☐ Pltf/Deft Awarded Alimony \$ _____ Per Month/Year ☐ Alimony Waived
☐ Payments to be made through the Clerk's Office: _____
☐ Atty. fees to the _____ in the amount of _____ ☐ Deferred
☐ Home To: _____
☐ Furnishings To: _____ Automobile To: _____
☐ Each Party Awarded their Personal Property
☐ Pltf/Deft. to Maintain Debts and Obligations
☐ Pltf/Deft. to Maintain Insurance on Minor Children
☐ Restraining Order Entered Against _____
☐ Pltf/Deft. Granted Judgment for Arrearage in the Sum of \$ _____
☐ 90-Day Waiting Period is Waived
☐ Divorce Granted To _____ As _____
☐ Decree To Become Final: ☐ Upon Entry ☐ 3-Month Interlocutory
☐ Former Name of _____ Is Restored
☐ Based on the failure of Deft to appear in response to an order of the court and on motion of Pltfs counsel, court orders _____ / _____ shall issue for Deft. _____
Returnable _____ Bail _____
☐ Based on written stipulation of respective counsel/motion of Plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice.
☐ Based on written stipulation of respective counsel/motion of Plaintiff's counsel, court orders _____
Based on motion of defendant's counsel, Court orders defendant's
motion for summary judgment be and is hereby granted.

000000

David A. Wilde, USB #4695
BRAUNBERGER POULSEN & BOUD, P.C.
Attorneys for the Defendant
302 West 5400 South, Suite 103
Murray, Utah 84107
Telephone Number (801)-263-0300

DEC 22 1986

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

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

WILBERT ROWLEY,)	
	)	ORDER
Plaintiff,)	
)	
vs.)	
)	
JEFF L. LAYTON,)	
	)	Civil No. C86-7440
Defendant.)	
)	

Defendant's Motion for Summary Judgment came on for hearing before the above entitled court on Monday, December 22, 1986 at the hour of 2:00 p.m. On the basis of Defendant's Memorandum, and the arguments presented at the aforementioned hearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment be granted, and that Plaintiff's complaint against the Defendant be dismissed with prejudice.

DATED this 22nd day of December, 1986.

BY THE COURT:

[Signature]
James S. Sawaya
District Court Judge

ATTEST
H. DIXON HINDLEY
Clerk

By [Signature]
Deputy Clerk

EXHIBIT "E"

Notice of Entry of Summary Judgment

David A. Wilde, USB #1695
BRAUNBERGER, POULSEN & BOUD, P.C.
Attorneys for the Defendant
302 West 5400 South, Suite 103
Murray, Utah 84107
Telephone Number: (801)-263-0300

Dec 31 2 01 PM '86

RECEIVED
CLERK OF DISTRICT COURT
SALT LAKE COUNTY
Fauline Matheson

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

WILBERT ROWLEY,)	
	)	NOTICE OF JUDGMENT
Plaintiff,)	
)	
vs.	)	Civil No. C86-7440
)	
JEFF L. LAYTON	)	Judge James S. Sawaya
)	
Defendant.)	

PLEASE TAKE NOTICE that the above Court has
entered Summary Judgment against Plaintiff. A copy of
said judgment is attached hereto.

DATED this 26 day of December, 1986.

BRAUNBERGER, POULSEN & BOUD, P.C.

David Alan Wilde
David A. Wilde,
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing NOTICE OF JUDGMENT was mailed, postage prepaid, on the 26 day of December, 1986, to the following:

Milton T. Harmon
Attorney at Law
36 South Main Street
Nephi, Utah 84648

David Alan Wilde

BRAUNBERGER POULSEN & SOTO, P.C.
Attorneys for the Defendant
302 West 5400 South, Suite 103
Murray, Utah 84107
Telephone Number (801)-263-0300

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

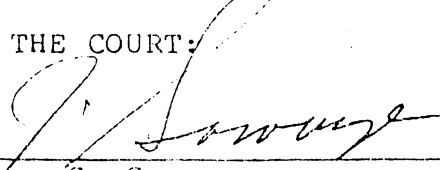
WILBERT ROWLEY,)	
	)	ORDER
Plaintiff,)	
)	
vs.)	
)	
JEFF L. LAYTON,)	
	)	Civil No. C86-7440
Defendant.)	
)	

Defendant's Motion for Summary Judgment came on for hearing before the above entitled court on Monday, December 22, 1986 at the hour of 2:00 p.m. On the basis of Defendant's Memorandum, and the arguments presented at the aforementioned hearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment be granted, and that Plaintiff's complaint against the Defendant be dismissed with prejudice.

DATED this 22nd day of December, 1986.

BY THE COURT:



James S. Sawaya
District Court Judge

EXHIBIT "F"

Affidavit of David A. Wilde

David A. Wilde, USB #4693
BRAUNBERGER, POULSEN & BOUD, P.C.
Attorneys for Defendant
302 West 5400 South, Suite 103
Murray, Utah 84107
Telephone: (801) 263-0300

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

WILBERT ROWLEY,)	
	)	AFFIDAVIT OF
Plaintiff,	)	DAVID A. WILDE
)	
vs.)	
)	
JEFF L. LAYTON,	)	Civil No. C86-7440
)	
Defendant.)	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

David A. Wilde, being first duly sworn, deposes
and states as follows:

1. I am the attorney for the Defendant in the
above entitled action.
2. I served discovery requests upon Plaintiff's
counsel on or about the 15th day of October, 1986. These
requests included interrogatories, requests for admissions,
and requests for production of documents. These requests
were served within two weeks after I had been notified that
the file had been transferred from Sanpete County to Salt

Lake County, and I therefore feel that the discovery requests were timely.

3. I never received any response to these discovery requests from Plaintiff's attorney or anyone else.

4. On or about November 29, 1986, I received notice that a trial setting had been scheduled for February 3, 1987.

5. When I was informed of a trial setting, which notice came after the time period had expired for Plaintiff to respond to my requests for admissions, I determined to file a Motion for Summary Judgment based on the admissions occasioned by Plaintiff's failure to respond.

6. I prepared a Motion and short Memorandum for Summary Judgment and scheduled a hearing date on my Motion for December 22, 1986. Copies of the Motion, Memorandum and Notice of Hearing were mailed to Plaintiff's attorney on December 5, 1986.

7. I was never contacted by Plaintiff's attorney regarding his inability to appear at the hearing scheduled for December 22, 1986.

8. I appeared at the hearing on December 22,

1986. Neither Plaintiff nor his counsel was present, and the order granting summary judgment was signed by the Judge on this date.

9. A notice of judgment was mailed to Plaintiff's attorney on December 26, 1986.

10. I was contacted by Plaintiff's attorney on January 16, 1987. He stated that the notice of hearing which I had previously mailed had been misplaced and that he had therefore missed the hearing on December 22, 1986. He asked if I would be willing to set aside the summary judgment. I informed him that I had discussed this potential development with my client previously, and had been specifically informed by my client that he would not agree to voluntarily set aside the judgment. I did go on to specifically state my belief that a motion to set aside the judgment would probably be upheld by the court at that point in time. Plaintiff's attorney responded that he would be filing such a Motion, and our conversation was thereupon concluded.

11. Plaintiff filed no motion to set aside the summary judgment until June 4, 1987, more than 5 months after the summary judgment had been entered, and almost 5 months after our conversation of January 16, 1987. A copy of this motion was not served upon me personally, and it was necessary that I obtain a copy from the court's file.

DATED this 1 day of September, 1987.

David Alan Wilde
David A. Wilde,
Attorney for Defendant

Subscribed and sworn to before me this 1
day of September, 1987.

Linda Edwards
Notary Public
Residing in Salt Lake County,
State of Utah

My commission expires:

9-10-88

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of
the foregoing AFFIDAVIT OF DAVID A. WILDE was mailed,
postage prepaid, on the 1 day of September, 1987,
to the following:

Milton T. Harmon
Attorney at Law
P.O. Box 97
Nephi, Utah 84648

Del Rowe
425 South 400 East #100
Salt Lake City, Utah 84111

David Alan Wilde

EXHIBIT "G"

Plaintiff's Motion to Vacate

MILTON T. HARMON
Attorney for the Plaintiff
36 South Main Street
Nephi, Utah 84648
Telephone: (801) 623-1802

JUN 4 3 46 PM '87

H. G. HINDELY CLERK

BY *[Signature]* DEPUTY CLERK

700
7809
IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WILBERT ROWLEY, :
Plaintiff, : CIVIL No. 086-7440
-VS- :
JEFF L. LAYTON, : MOTION TO VACATE JUDGMENT
Defendant. :

Comes now the Plaintiff, and moves the above entitled Court
to vacate Judgment heretofore entered in this matter.

This Motion is made pursuant to Rule 50 (b) Utah Rules of
Civil Procedure. And is supported by Affidavit of the Plaintiff
herein demonstrating reasonable compliance with the rules of
procedure and a legal and equitable basis for the granting of the
Motion.

Dated this 6th day of May, 1987.

[Signature]
MILTON T. HARMON
Attorney for the Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Motion to Vacate Judgment to: Mr. David A. Wilde, Attorney for the Defendant, 302 West 5400 South, Suite 103, Murray, Utah 84107; first class, postage prepaid. this 20th day of May, 1987.

APR 20 1987

EXHIBIT "H"

**Plaintiff's Memorandum in Support of
the Motion to Vacate**

MILTON T. HARMON #1373
Attorney for the Plaintiff
36 South Main Street
P.O. Box 97
Nephi, Utah 84648
Telephone: (801) 623-1802

Clonnie Peterson

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

WILBERT ROWLEY,	:	Civil No. C86-7440
Plaintiff,	:	MEMORANDUM IN SUPPORT OF
vs.	:	PLAINTIFF'S MOTION TO VACATE
JEFF L. LAYTON,	:	JUDGMENT, WITHDRAW ADMISSIONS,
Defendant.	:	AND AMEND COMPLAINT
	:	Judge Sawaya

Comes now the plaintiff and submits to the Court the following Memorandum in support of his Motion to Withdraw Admissions and for Leave to File an Amended Complaint herein.

STATEMENT OF FACTS

1. This action is based upon a written document designated as Bill of Sale, a copy of which is attached as Exhibit "A", and involved the sale of living trees growing upon the plaintiff's property in Sanpete County, Utah, to the defendant, who in

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO VACATE
JUDGMENT, WITHDRAW ADMISSIONS, AND AMEND COMPLAINT

Page 2

addition to purchasing the trees, would also care for the same until they were harvested. The contract defined various duties of the parties with regard to the property furnished, fencing, watering, and other applicable duties of the parties. The contract also provided for annual payments of the purchase price, payable over a three year period.

2. The defendant entered into possession of the subject property and managed the same over the contract period, removing all of the trees purchased, and paid the first, and second payments, but, claiming certain offsets, failed to pay the third payment of \$6,800.00, tendering rather the sum of \$4,000.00. A copy of the letter transmitting the check of \$4,000.00 is attached hereto as Exhibit "B". The plaintiff did not accept this offer, attempted to resolve the matter through negotiations, and that having failed, initiated action in July, 1986, before the District Court of Sanpete County.

3. The defendant responded to the Sanpete County action requesting a change of venue. This request was granted by Order dated August 21, 1986. Defendant filed his answer dated August 28, 1987, with the Court designation as the Third Judicial District. And plaintiff responded with a timely Request for Trial, being

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mailed to the Third District Court Clerk. That request was held, however, since the actual case filed had not yet been sent from Sanpete County. We were also advised by the personnel at the Salt Lake County Clerk's office that the only file number available at this point was #9176, the Sanpete County number. Five telephone calls were made through September to follow up on the transmittal of the file, and in one such telephone call we were advised that the file had been received, and the assigned file number was C86-7440, whereas the actual number assigned to the case was C86-7440. This confusion in file number assignment, and the delay in having the file transmitted did play a part in the eventual entry of judgment dismissing the Complaint.

4. Following the filing of the plaintiff's Request for Trial the defendant served upon plaintiff a "combination" discovery documents including, Requests for Admission, Interrogatories, and Requests for Discovery. The plaintiff prepared a timely answer, which somehow seems to have been lost, in part due to the file number confusion. See plaintiff's letter of November 8, 1986, and the Answer submitted, which are attached as Exhibit "C".

5. Thereafter defendant filed for Summary Judgment, based upon admissions, which was granted. The hearing on the Motion was

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO VACATE
JUDGMENT, WITHDRAW ADMISSIONS, AND AMEND COMPLAINT

Page 4

noticed up for December 22, 1986. This date conflicted with previously scheduled criminal matters requiring plaintiff's counsel to appear in Fillmore, Utah, on said date. Contact was made with the Clerk of the Court, who advised that there were no matters then scheduled in file number C86-7440. And thereafter, the Clerk of the Court forwarded a Trial Notice scheduling the matter for Trial on February 3, 1987, see Exhibit "D" attached. Counsel for the plaintiff was eventually advised that this Trial was vacated. An attempt was made to resolve the Judgment matter with counsel for the defendant, with an offer for cost and expenses, but this request was refused, and the present motions were filed.

ARGUMENT

6. The present results of this matter are inequitable, and even in a strict interpretation of Rule 36(a) regarding requests for admissions, the results should not be allowed to stand. The Utah Supreme Court, in reviewing inequitable results in such a matter regarding admissions by reasons of failure to answer, has said:

"To allow this result to stand would be to allow technical considerations to prevail over substantial justice. This Court cannot condone such a result."

EXHIBIT "I"

Order Vacating the Summary Judgment

County of Salt Lake - State of Utah

FILE NO. C86-7440

TITLE: (✓ PARTIES PRESENT)

COUNSEL: (✓ COUNSEL PRESENT)

Wilbert Rowley

Milton J. Harmon

Jeff L. Layton

David A. Wilde

CLERK

HON. J. Sorenson

JUDGE

REPORTER

DATE: _____

BAILIFF

8/31/87 heard pet's motion to vacate judgment.

ruling:

Pet's motion is granted under Rule 60B(7) and the equitable powers of the court and upon condition that pet pay def a reasonable attorneys fee in the sum of \$200.

[Signature]

Copies to counsel - Sept 1, 87

EXHIBIT "J"

Rule 60(b)

Rule 60. Relief from judgment or order

(a)

(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 hereto fore 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.