

1998

Zions First National Bank v. Richard F. McKeen : Brief of Appellant

Utah Court of Appeals

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Bruce J. Nelson; Nelson, Rasmussen and Christensen; attorney for appellees.

Denver C. Snuffer; Nelson, Snuffer and Dahle; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

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ZIONS FIRST NATIONAL BANK,

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Plaintiff

:

vs.

:

RICHARD F. McKEEN, et al.,

: Court of Appeals No. 981733-CA

Defendant.

: Priority Number 15

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APPELLANT'S BRIEF

Denver C. Snuffer, Jr. (3032)

NELSON, SNUFFER & DAHLE, P.C.

10885 South State

Sandy, UT 84070

Telephone: 801-576-1400

Attorney for Appellant Richard A. Christenson

Bruce J. Nelson

NELSON, RASMUSSEN & CHRISTENSEN

215 South State Street, Suite 900

Salt Lake City, UT 84111

Telephone (801) 531-8400

Attorney for Defendants in Intervention/Appellees

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Utah Court of Appeals

MAY 27 1999

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Attorney for Appellant Richard A. Christenson

Bruce J. Nelson

NELSON, RASMUSSEN & CHRISTENSEN

215 South State Street, Suite 900

Salt Lake City, UT 84111

Telephone (801) 531-8400

Attorney for Defendants in Intervention/Appellees

APPELLANT'S BRIEF

Appellant, Richard A. Christenson, submits this brief in the appeal before this court.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The Appellant:

Richard A. Christenson

The Defendant-Appellee:

Uwe and Ullrich Michel.

All other parties in the case below in which the matter appealed here was raised and decided have no interest in the outcome of this appeal for reasons discussed herein.

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JURISDICTION OF APPELLATE COURT

The Utah Supreme Court had jurisdiction over this matter pursuant to Utah Code Annotated, § 78-2-2, and authority to assign this case to the Court of Appeals pursuant to Utah Code Annotated, § 78-2-2(4). This Court received this case by transfer from the Supreme Court on December 23, 1998, and has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2)(j).

ISSUE PRESENTED FOR REVIEW

1. Whether the judgment entered without notice to Richard A. Christenson should be set aside for lack of in personam jurisdiction?

The standard of review on this issue is correctness:

Because Rule 4 (of Utah Rules of Civil Procedure) governs service of process, ... and because whether service of process was proper is a jurisdictional issue, the standard of review is a correction-of-error standard:

A denial of a motion to vacate a judgment under Rule 60(b) is ordinarily reversed only for an abuse of discretion. However, when a motion to vacate a judgment is based on a claim of lack of jurisdiction, the district court has no discretion: if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs. Therefore, the propriety of the jurisdictional determination, and hence the decision not to vacate, becomes a question of law upon which we do not defer to the district court.

Bonneville Billing v. Whatley, 949 P.2d 768 at 771 (Utah App. 1997); *citing*, *State Dep't of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989)(*citations omitted*)

2. Whether the failure to give notice of the summary judgment motion deprived Richard A. Christenson of due process?

The standard of review on this issue is correctness. (*Id.*)

3. Whether a judgment entered against “Christensen” affects the rights of Richard A. Christenson?

The standard of review on this issue is correctness. (*Id.*)

APPLICABLE RULES AND REGULATIONS TO APPEAL

Rule 60 (b) of the Utah Rules of Civil Procedure. (Copy of the Rule is included in the Appendix to this brief.)

STATEMENT OF THE CASE

This appeal concerns the propriety of a judgment entered in 1984 by the Third District Court in a foreclosure case. The Plaintiff-Appellant is Mr. Richard A. Christenson.

Richard A. Christenson was not properly served or named in the case below. He was never served with a summons and complaint in this case, and consequently never appeared in the court below. His name is spelled differently than the pleadings of the case below.

Despite the non-appearance of Mr. Christenson, a summary judgment was entered. The summary judgment motion was also not served on Mr. Christenson¹. The motion was granted. The judgment entered purports to foreclose the interests of “all defendants” without regard to whether Mr. Christenson had been properly brought into the action or not.

Although Mr. Christenson was unaware of the judgment in 1984, in a subsequent proceeding before the Third District Court, this old case has been asserted as a defense. That subsequent proceeding involved Mr. Christenson and the parties Michel. Because the judgment was asserted by Michels as a defense in 1998, a motion was filed in this case to vacate the 1984 judgment due to lack of jurisdiction. The motion was unopposed by any of the named parties and was granted by the lower court.

After the motion to vacate the judgment was granted, the parties Michael moved to intervene and asked that the judgment be reinstated. Michels were allowed to intervene. The judgment was reinstated. This appeal follows.

The questions raised by this appeal deal with the propriety of the entry of the judgment in the first place and whether the interests of Mr. Christenson were effectively dealt with under the requirements of jurisdiction and due process.

The facts relevant to this appeal are as follows:

¹In fact, none of the pleadings, discovery or motions were served on Mr. Christenson.

1. Mr. Richard A. Christenson was not properly served in this case. There is no return of service in the case file evidencing service of process upon Mr. Christenson. (See case file record. None of the documents in the record of this case include a return of service, and none of the documents containing a certificate of mailing include Mr. Christenson as a recipient.)

2. Mr. Richard A. Christenson was not properly named as a party, since the named Defendant is spelled Richard A. "Christensen". (See, e.g. Record on Appeal, pages 1, 116.)

3. None of the documents, including the Motion for Summary Judgment and the Summary Judgment Order were sent, served, or otherwise provided to Mr. Richard A. Christenson. (See, e.g. Record on Appeal pages 37, 111, 113 and 117.)

4. Mr. Christenson was not aware of the existence of this lawsuit or the judgment entered in the lawsuit until very recently, when its existence was asserted in a different matter, i.e., a defense to claims of Mr. Christenson's against certain property in the City of Draper. (See, e.g. Record on Appeal, page 139.)

5. The lower court was asked to vacate the judgment in this case due to lack of in personal jurisdiction. (See, Record on Appeal, pages 136 - 142.)

6. That motion was granted and the judgment was vacated. (See, Record on Appeal, pages 148 - 149.)

7. Parties Michel moved to intervene in this case and were granted leave to intervene. (See, Record on Appeal, pages 156 - 163 and pages 324 - 325.)

8. Parties Michel opposed the vacation of the judgment and asked that it be reinstated. (See, Record on Appeal, pages 156 - 163.)

9. The lower court reinstated the judgment. (See, Record on Appeal, pages 326 - 329.)

10. This appeal followed and was timely filed. (See, Record on Appeal, pages 332-334.)

SUMMARY OF ARGUMENTS

In 1984, the Third District Court entered Summary Judgment in a judicial foreclosure action against various defendants, including one Richard “Christenson”. In 1994 Richard A. “Christensen” brought an action to quiet title to certain real property which had not been foreclosed upon but which had a large number of potential claimants. Defendants/Intervenors/Appellees Michel sought to have that 1984 judgment against “Christensen” used as a defense against Mr. Christenson’s quiet title action. Based upon the arguments of Michels, Christenson filed a motion to vacate the earlier judgment. That motion was granted and the judgment in this case vacated. Michels then moved to intervene and asked that the earlier judgment be reinstated by the lower court. The lower court then

reinstated the judgment. That action was, at least, ambiguous, and as to Mr. Christenson, improper.

The impropriety stems from both lack of applicability of the judgment to Mr. Christenson and voidness. The identity of the named parties to the earlier action and the identity of the appellant here are facially different. The second ‘applicability’ problem with the reinstatement decision here is that, assuming, *arguendo*, that the 1981 “Christensen” is the same as the present “Christenson,” the record of the earlier case shows conclusively that no service of any kind was ever obtained upon the “Christensen” defendant in the earlier action. Since there was no service in the earlier action, there was no due process as to appellant here and he cannot be bound thereby.

The second general category of impropriety of the lower court decision reinstating the 1984 judgment is that judgment is void *ab initio*. That voidness exists for at least three reasons; (1) there was no due process; (2) there was no *in personam* jurisdiction, and (3) the judgment had expired. This reason for reversing the lower court decision requires reversal even if the ‘applicability’ issues are resolved in favor of sustaining the lower court’s action here.

ARGUMENTS

I. The judgment entered without notice to Richard A. Christenson should be set aside for lack of *in personam* jurisdiction.

Fundamental to the validity of any judgment rendered against an individual is that the court have personal jurisdiction over that individual. Personal jurisdiction could have been established via routine service of process upon Mr. Christenson. That was not done, and as a result, the court never had jurisdiction over Mr. Christenson. As recently set forth:

Because Rule 4 (of Utah Rules of Civil Procedure) governs service of process, ... and because whether service of process was proper is a jurisdictional issue, the standard of review is a correction-of-error standard:

A denial of a motion to vacate a judgment under Rule 60(b) is ordinarily reversed only for an abuse of discretion. However, when a motion to vacate a judgment is based on a claim of lack of jurisdiction, the district court has no discretion: if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs. Therefore, the propriety of the jurisdictional determination, and hence the decision not to vacate, becomes a question of law upon which we do not defer to the district court.

Bonneville Billing v. Whatley, 949 P.2d 768 at 771 (Utah App. 1997); citing, *State Dep't of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989) (*citations omitted*). Mr. Christenson's objection to the *ex parte* judgment against him is jurisdictional, and the Court has no discretion but to vacate the earlier decision.

We are not dealing with an innocuous mistake, but rather a serious error which goes to the fundamental rights of Mr. Christenson. For whatever reason, Mr. Christenson was not hailed into court in 1981, and his rights cannot be affected by the outcome of the proceeding to which he was not a party. The intervenors below inserted the rhetorical query at one point in their memoranda attempting to support the *ex parte* judgment, “[i]s it reasonable to

believe that Judge Dee would have signed an Order binding all defendants if some of the defendants had not been served?" The answer to this rhetorical question is "Of course it is reasonable." It happened. The "Judgment" was not prepared by Judge Dee. It was authored by an attorney for one of the parties in that earlier action, Mr. Richard H. Nebeker, and signed by Judge Dee. The language was understandably overreaching. No one caught it at the time. But clearly the language was inartfully over-broad. The answers to the other rhetorical questions posed by Intervenor are equally apparent when one looks at the record.

The judgment against Mr. "Christensen" is void as to Mr. Christenson. It should be vacated. It is fundamental to due process that a party be served process and have an opportunity to be heard before a judgment be entered against him. As stated in *62B Am Jur*

2d, Process:

§ 6. Effect of omission of service of process.

One who is not served with process does not have the status of a party to the proceeding. The parties and their case must be brought before the court, and this is accomplished by the use of process.

A judgment against one who was not given notice in the manner required by law of the action or proceeding in which such judgment was rendered lacks all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is fairly administered. A judgment lacking lawful service of process is void unless service is waived by appearance or otherwise, and this is true regardless of whether the defendant had actual knowledge of the proceedings. A judgment is subject to collateral attack where it is rendered against one who was never legally served with process of the court.

The Summary Judgment Order entered in the case in 1984 was sloppily drafted and refers generally and broadly to “all right, title and interest of all the Defendants” rather than referring to only those Defendants who had been properly served and brought into the action. Although the judgment should be read to refer only to those who are properly named, properly spelled (i.e., identified), and properly served with process, the broad language of the judgment could arguably reach even the interests of the non-served Defendant “Christensen”.

Although Mr. Christenson has a differently spelled last name, the parties Michel are asserting that the judgement reaches the interests of Mr. Christenson. Since Mr. Christenson was not brought into the case, never given an opportunity to know of its existence, not sent a copy of the Motion for Summary Judgment, not given a copy of the Summary Judgment at the time it was entered, and not otherwise made aware or brought into this case at any time, the judgment cannot affect the interests of Mr. Christenson. As to Mr. Christenson’s interest, this judgment was properly vacated by the lower court. The decision to reinstate the judgment was improper.

The Intervenor Michel offered no opposing facts nor any fact-based objections to the lower court. They merely offered hyperbole and argument. That was no basis to reinstate the judgment.

Intervenors assert that the interests of all *named* defendants in the 1981 action were “barred and forever foreclosed.” However, Christenson was *not a named defendant* in the 1981 action. Accordingly, his interest in the real property was not extinguished. Even so, being “named” does not alone allow the court to acquire jurisdiction. One must be both “named” and “served” with process. There was no service on Mr. Christenson.

Christenson based his motion to vacate upon fatally defective service of process (i.e., he was never served with process). In interpreting Rule 60(b) of the Utah Rules of Civil Procedure, the courts have held, “[b]ut where the judgment is void because of a fatally defective service of process, the time limitations of Rule 60(b) have no application.” *Garcia v. Garcia*, 712 P.2d 288 at 290 (Utah 1986); *see also, Woody v. Rhodes*, 461 P.2d 465 (1969). The three month statute of limitations defense raised by Intervenors in their arguments below is not applicable.²

²Intervenors correctly point in their arguments to the amendment Rule 60(b) has undergone, and that subsection (4) of the old rule dealt with ineffective personal service. But, it is clear that when courts interpreted this old provision, they have always refrained from denying a party due process and a right to be heard based upon an inane and completely arbitrary time limit. Under the rule proposed by intervenors Michel, the original rule could have set the statutory time limit at 1 month, or 6 months, or 1 year, while having the same effect of denying individuals their Constitutional right to a hearing. The courts of Utah, as shown in the cases cited above, have been loathe to do the very thing Intervenors asked of the lower Court. Intervenors relies upon *Lincoln Benefit Life Insurance Co. v. D.T. Southern Properties* for the proposition that courts should “very cautiously” disregard the three month limitation period. *Lincoln* dealt with an appeal based upon excusable neglect, in which the moving party was served, he just failed to respond. That is not the case here.

II. The failure to give notice of the summary judgment motion deprived Richard A. Christenson of due process.

In order to preserve judicial resources and reach finality, there is a presumption that judgments are valid. However, this is only a presumption, and one that can be overcome with appropriate proof offered by a challenging party. When Judge Dee entered judgment, he may have honestly believed “all” defendants had been served. If this was so, the honest belief was wrong. On the other hand, he may have understood “all” defendants to refer only to those over whom he had jurisdiction, and not Mr. “Christensen.” He may also have not carefully considered the language, and relied upon the attorneys in that earlier action to bring any problem to his attention. We do not know. But it is singularly improper for Intervenor to speculate and ask their speculation to be accepted by the Court as a basis for “reinstating” an otherwise void or inapplicable judgment in this case.

We are also confident that if the information presented in the Motion to Vacate in 1998 had been presented to Judge Dee prior to his grant of summary judgment in 1984, he would have taken steps necessary to insure that Mr. Christenson was either relieved of the judgment or else properly served and brought into the 1981 action before entry of any judgment was issued which might affect him.

As for Mr. Christenson meeting his burden of proof, what better evidence can be presented than the underlying case file? Both sides, as well as the lower Court, have had the

opportunity to examine it. From the file it is apparent that if the Mr. Christenson who is a party to this action was intended to be a party in the earlier suit, he was not properly named in the suit due to the misspelling of his last name.

Along with valuing finality in judgments, courts must also value accuracy, proper procedure, due process and exactitude. These were all missing from the 1981 action. The file in this case shows Mr. Christenson was never served with process in the 1981 action and never filed an answer in the 1981 action. Rule 3 of the Utah Rules of Civil Procedure states that a "civil action is commenced (1) by filing a complaint with the court, [with appropriate and timely service within 120 days under Rule 4(b)] or (2) **by service of a summons together with a copy of the complaint** in accordance with Rule 4." (Emphasis added.) The requirements of Rule 3 and 4 were not met, and the action effectively did not even commence as to Mr. Christenson. The 1981 action is void as to Mr. Christenson.

From the record below we find that Mr. Christenson was not sent copies of the discovery and notices of deposition. If he had been served, why did he not get copies mailed to him? The earlier case file shows clearly that he was not sent a copy of the Motion for Summary Judgement in the case. If he had been served, why did he not get a copy mailed to him? He was not sent a copy of the Summary Judgment Order. If he had been served, why did he not get a copy mailed to him?

The record is clear. There is no basis for concluding anything other than Mr. Christenson was not served in this case.

III. A judgment entered against “Christensen” does not affect the rights of Richard A. Christenson.

The caption to the 1981 action refers to “Christensen.” In looking at the phone directory for Salt Lake City, the number of “Christensens” listed runs to over four (4) pages, and includes 25 “R.” or “Rick” or “Richard Christensens.”³ The incorrect spelling of a name in a pleading is material and cannot be dismissed as a “trivial” oversight, particularly where no service is obtained on that name for any document in the case.

Corrections for such matters can be made only if the parties “are not prejudiced.” As the parties currently stand, Mr. Christenson will be prejudiced in the amount of \$1,850,000.00 if the 1984 judgment is not vacated. Further, the court never took steps to rectify the error, and it is only through the efforts of Mr. Christenson that this problem is even being addressed. As it currently stands, this Court cannot just re-spell the name of a defendant without substantial prejudice to Mr. Christenson.

The lower court refused to respell Mr. Christenson’s name. This refusal leaves the status of the lower court decision ambiguous. Does the lower court intend, by its refusal to

³There are also multiple listings, of hundreds of names, for “Christenson”, “Christiansen”, “Christiensen”, and “Christison.” All of those names are within two characters of matching the names in the earlier action.

correct the spelling, to leave the judgment without effect as to Mr. Christenson? Or, rather, does the lower court by its refusal to vacate the judgment to leave the judgment with some effect as to Mr. Christenson? This ambiguity should be cleared through the decision of this appeals court, determining as a matter of law that the 1984 judgment (in the 1981 case) is inapplicable to Mr. Richard A. Christenson.

CONCLUSION

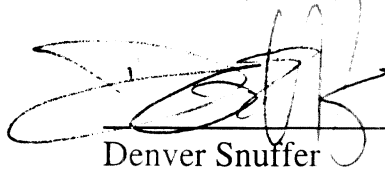
Neither Mr. "Christensen" nor Mr. Christenson was served with process in 1981. When we examine the case file, there is nothing that would suggest that either Mr. "Christensen" or Mr. Christenson was served or had notice of the underlying action. The record is clear. There is no return of service for Mr. Christenson nor for Mr. "Christensen". There is no certificate of mailing of any document showing either Mr. "Christensen" or Mr. Christenson was made a party to the earlier action. There was no service.

Since Mr. Christenson was not served at all in the earlier action, the 1984 judgment, as to Mr. Christenson, must be vacated. The law is clear on this point.

Mr. Christenson is not the same as Mr. "Christensen". Both are valid, common names. Even if the earlier action was intended to name Mr. Christenson, it was misspelled and did not succeed. The judgment is not applicable to appellant.

DATED this 27th day of May, 1999.

NELSON, SNUFFER & DAHLE

A handwritten signature in dark ink, appearing to be "Denver Snuffer", is written over a horizontal line. The signature is stylized with large, sweeping loops and a prominent vertical stroke.

Denver Snuffer

Attorneys for Appellant Richard A. Christenson

ADDENDUM

1. Rule 60(b) Utah Rules of Civil Procedure.
2. Orders from Page 326 to 329 of the Record.

ADDENDUM 1

nt for purposes of appeal. The time for from a judgment, tolled by a party's lost-judgment motion, starts to run on when the trial court enters its signed denying the motion. *Gallardo v. Bolinder*, 816 (Utah Ct. App. 1990).

gh captioned "Objections to the Pro- dings, Conclusions and Judgment," s post-trial motion was in substance under this rule, inasmuch as it asked to alter its findings and to amend its s and judgments; therefore, defen- ion tolled the time for filing a notice ntil this motion was denied. *Reeves* it, 915 P.2d 1072 (Utah Ct. App.

verdict made no award of general d was deficient in form, plaintiff's and that the jury be sent back for erations, and her failure to object t at a bench conference regarding ess of the verdict constituted right to a new trial or to appeal ohn v. J.C. Penney Co., 537 P.2d 5).

pecial verdict failed to mention gard to one part of a cause of e plaintiff failed to raise this efore the jury was discharged, eemed waived and could not be ion for new trial. *Ute-Cal Land her*, 605 P.2d 1240 (Utah 1980).

onal Farmers' Union Property ompson, 4 Utah 2d 7, 286 P.2d 635 (1955); *Holmes v. Nelson*, 26 P.2d 722 (1958); *Howard v.* 2d 149, 356 P.2d 275 (1960); *atz Real Estate, Inc.*, 15 Utah 98 (1964); *Hanson v. General*, 15 Utah 2d 143, 389 P.2d 61 g. Co. v. *Wilson*, 15 Utah 2d (1964); *Porcupine Reservoir* 11er Corp., 15 Utah 2d 318, 4); *Watson v. Anderson*, 29 2d 1003 (1973); *Nichols v.* 31 (Utah 1976); *Edgar v.* 05 (Utah 1977); *Time Com.* hall, 575 P.2d 701 (Utah Montgomery, 607 P.2d 828 . *Pontiac, Inc. v. Osborne*, tah 1981); *Mulherin v.* 328 P.2d 1301 (Utah 1981); *ity*, 639 P.2d 162 (Utah ortland Cement Co. v. 39 (Utah 1983); *Nelson v.* 207 (Utah 1983); *Golden* untas, 699 P.2d 730 (Utah y, 705 P.2d 1165 (Utah ified Washington County P.2d 679 (Utah 1986); P.2d 618 (Utah 1987); 0 P.2d 1318 (Utah 1987); P.2d 1372 (Utah Ct. App. Co. v. *Scherrier*, 768 P.2d 9); *Paryzek v. Paryzek*, App. 1989); *Allred v.* ah Ct. App. 1992); *Ong h Ave. Corp.*, 350 P.2d

47 (Utah 1993); *Putvin v. Thompson*, 878 P.2d 1178 (Utah Ct. App. 1994); *Ron Shepherd Ins. v. Shields*, 882 P.2d 650 (Utah 1994); *Commercial Int. Corp. v. Siggard*, 936 P.2d 1105 (Utah Ct.

App. 1997); *PDQ Lube Ctr., Inc. v. Huber*, 329 Utah Adv. Rep. 20 (Utah Ct. App. 1997); *PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792 (Utah Ct. App. 1997).

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d New Trial ¶ 11 to 14, 29 et seq., 187 to 191.

C.J.S. — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

ALR. — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 ALR.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 ALR.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 ALR.3d 1000.

Quotient verdicts, 8 ALR.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 ALR.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 ALR.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 ALR.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 ALR.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 ALR.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 ALR.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 ALR.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 ALR.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 ALR.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 ALR.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 ALR.5th 875.

After-acquired evidence of employee's misconduct as barring or limiting recovery in action for wrongful discharge, 34 ALR.5th 699.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 ALR. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 ALR. Fed. 189.

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) the judgment is void; (5) 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 (6) 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), or (3), 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.
(Amended effective April 1, 1998.)

Advisory Committee Note. — The 1998 amendment eliminates as grounds for a motion the following: "(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." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in con-

flict with rules permitting service by means other than personal service.

Amendment Notes. — The 1998 amendment deleted the former fourth ground for a motion in Subdivision (b), as described in the Advisory Committee Note above, and renumbered the grounds accordingly.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

NOTES TO DECISIONS

"Any other reason justifying relief."

- Default judgment.
- Impossibility of compliance with order.
- Incompetent counsel.
- Lack of due process.
- Merits of case.
- Mistake or inadvertence.
- Mutual mistake.
- Real party in interest.
- Refund of fine after dismissal.

Appeals.

- Clerical mistakes.
- Computation of damages.
- Correction after appeal.
- Date of judgment.
- Void judgment.
- Estate record.
- Inherent power of courts.
- Intent of court and parties.
- Judicial error distinguished.
- Order prepared by counsel.
- Predating of new trial motion.

Court's discretion.

Default judgment.

Effect of set-aside judgment.

— Admissions.

Form of motion.

Fraud.

- Burden of proof.
- Divorce action.

Independent action.

- Constitutionality of taxes.
- Divorce decree.
- Fraud or duress.
- Motion distinguished.

Invalid summons.

— Amendment without notice.

Inequity of prospective application.

Jurisdiction.

Mistake, inadvertence, surprise or excusable neglect.

- Default judgment.
- Diligence.
- Inconvenience.
- Meritorious.
- Merits of claim.
- Negligence of attorney.

— No claim for relief.

— Delayed motion for new trial.

— Factual error.

— Failure to file cost bill.

— Failure to file notice of appeal.

— Nonreceipt of notice and findings.

— Trial court's discretion.

— Unemployment compensation appeal.

— Workmen's compensation appeal.

Newly discovered evidence.

— Burden of proof.

— Discretion not abused.

Procedure.

— Notice to parties.

Res judicata.

Reversal of judgment.

— Invalidity of sale.

Satisfaction, release or discharge.

— Accord and satisfaction.

— Discharging representative of estate from further demand.

— Erroneously included damages.

— Prospective application of judgment.

Timeliness of motion.

— Confused mental condition of party.

— Dismissal for lack of prosecution.

— Fraud.

— Invalid service.

— Judicial error.

— Jurisdiction.

— Mistake, inadvertence and neglect.

— Newly discovered evidence.

— Order entered upon erroneous assumption.

— "Reasonable time."

— Reconsideration of previously denied motion.

— Satisfaction.

Unauthorized appearance.

Void judgment.

— Basis.

— Lack of jurisdiction.

Cited.

"Any other reason justifying relief."

Subdivision (b)(7) embodies three requirements: First, that the reason be one other than those listed in Subdivisions (1) through (6); second, that the reason justify relief; and third, that the motion be made within a reasonable

time: *Laub v. South Cent. Utah Tel. Co.*, 1304 (Utah 1982); *Richins Chipman & Sons*, 817 P.2d 382 (Utah 1991).

Where a defendant's motion to set aside a judgment based on Subdivisions (b)(1) through (b)(6) claimed that the plaintiff's motion for a new trial claimed that the plaintiff violated Rule 5(a) on several occasions, thereby causing surprise, centering on the plaintiff's failure to provide a copy of his summary judgment to defendant. The plaintiff later claimed that the defendant's motion for a new trial was a clear showing of plaintiff's part, the trial court concluded in denying defendant's motion that fraud was not present in what could be considered a lapse in procedure by plaintiff. *Walker v. Carlson*, 740 P.2d 1372 (Utah 1987).

Defendant's claim that he misinterpreted into an ill-advised stipulation, fully understanding its consequences, was not characterized by trial court as inadvertence, surprise or neglect under Subdivision (b)(1); because Subdivision (b)(7) could not apply to be used to circumvent the three-year period. *Richins v. Delbert Chipman*, 817 P.2d 382 (Utah Ct. App. 1991).

In an action against a county for construction and maintenance of a road, the county was not entitled to summary judgment under Subdivision (b)(7) because of a governmental immunity law, since the court decision specifically stated that the county did not have a duty to maintain the road. *Hart v. Salt Lake County Comm'n.*, 817 P.2d 382 (Utah Ct. App. 1997).

— Default judgment.

It was not an abuse of discretion for a court to relieve a defendant from a default judgment to allow her to answer where it was shown that she had mistakenly believed that she was protected by a divorce decree and that a divorce decree required her husband to be a party to the action for divorce. *Harrison*, 5 Utah 2d 217, 299 P.2d 100 (1956).

Trial judge did not abuse discretion in setting aside default judgment where defendant asserted that he thought the judgment was invalid and therefore paid no money. *Board of Educ. v. Cox*, 14 Utah 2d 806 (1963).

Where any reasonable excuse is shown by a defaulting party, courts generally tend to grant relief from a default judgment. It appears that to do so would result in injustice to the adverse party. *Westinghouse Elec. Supply Co. v. Larsen Contractor*, 544 P.2d 876 (Utah 1976).

Subdivision (b)(7) did not apply where defendant husband sought to set aside default judgment of divorce 5 1/2 years after its entry on the grounds that plaintiff incorrectly stated the extent of his assets. *Kessimakis*, 546 P.2d 888 (Utah 1976). Where defendant stated he failed

ADDENDUM 2

FILED DISTRICT COURT
Third Judicial District

SEP 28 1998

By SALT LAKE COUNTY
Deputy Clerk

DENVER C. SNUFFER, JR., #3032
NELSON, SNUFFER & DAHLE, P.C.
Attorneys for Defendant Richard A. Christenson
10885 South State Street
Sandy, UT 84070
Telephone: (801) 576-1400

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ZIONS FIRST NATIONAL BANK.)	ORDER VACATING PRIOR
a national association,)	ORDER OF JULY 29, 1998
)	
Plaintiff,)	
)	
vs.)	
)	
RICHARD F. McKEEN, et al.,)	Civil No. C-81-6354
)	
Defendants.)	Judge J. Dennis Frederick

The Court, after reviewing a Motion from proposed Intervenor Michels, conducting a telephone conference with Counsel Denver C. Snuffer, Jr. and Bruce Nelson, and being advised in the premises, enters the following order:

1. The Order of July 29, 1998 is set aside, without prejudice.
2. The parties may pursue this matter further before this court in further proceedings before either the undersigned Judge or Judge David Young in the case pending before him known as Civil No. 960902187.

DATED this 18th day of Sept 1998.

BY THE COURT:

J. Dennis Frederick
District Court Judge

APPROVED AS TO FORM:

Denver C. Snuffer, Jr.

Bruce Nelson

~~CERTIFICATE OF SERVICE~~

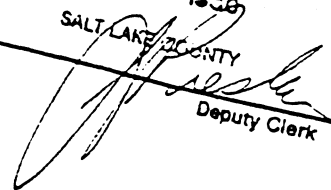
~~I hereby certify that I am employed by the office of Nelson, Snuffer & Dahle, P.C. and that I caused to either be placed in the United States mail, first class, postage prepaid; faxed; and/or hand-delivered; a true and correct copy of the foregoing ORDER VACATING JUDGMENT AGAINST RICHARD A. "CHRISTENSEN" to the following:~~

~~Bruce J. Nelson
NELSON RASMUSSEN & CHRISTENSEN
215 South State, Suite 900
Salt Lake City, UT 84111~~

~~Sent via:~~

~~____ Mail
____ Facsimile
____ Hand-delivery~~

Bruce J. Nelson (2380)
NELSON RASMUSSEN & CHRISTENSEN
215 South State, Suite 900
Salt Lake City, UT 84111
Telephone: (801) 531-8400
Attorneys for Michels (Intervenors)

FILED DISTRICT COURT
Third Judicial District
OCT - 2 1998
By  SALT LAKE COUNTY
Deputy Clerk

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

ZIONS FIRST NATIONAL BANK, a
national association,

Plaintiff,

vs.

RICHARD F. MCKEEN, et al.

Defendants.

ORDER DENYING
RENEWED MOTION TO VACATE
JUDGMENT OF RICHARD A.
CHRISTENSON

Civil No. C-81-6354

Judge J. Dennis Frederick

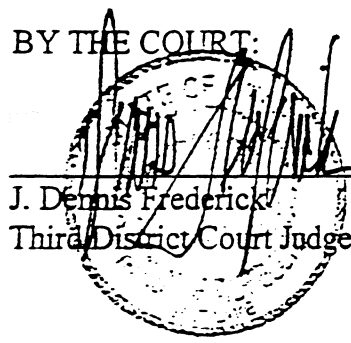
The Court, having received a Notice to Submit for Decision pursuant to the Code of Judicial Administration, Rule 4-501 on the matter of Defendant Richard A. Christenson's Renewed Motion to Vacate Judgment of Richard A. Christenson dated September 10, 1998, and having read and considered the Memorandum of points and authorities filed in support of said Motion by Defendant, the Objection to said Motion filed by Uwe Michel, Annette Michel, Ullrich

Michel and Corolla Michel (hereinafter "Michel") as Intervenors in this matter and the Defendant's Reply Memorandum, the Court now hereby ORDERS, ADJUDGES and DECREES:

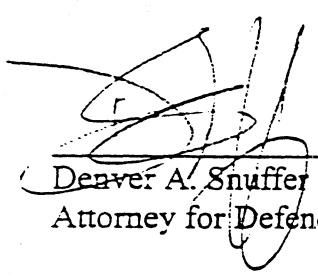
1. Defendant Richard A Christenson's Motion to Vacate Judgment is DENIED for the reasons set forth in the opposing Memorandum submitted by Michel.

SO ORDERED this 11th day of October, 1998.

BY THE COURT:


J. Dennis Frederick
Third District Court Judge

Approved as to form:


Denver A. Snuffer
Attorney for Defendant Christenson

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the office of Nelson, Snuffer & Dahle, P.C. and that I caused to either be placed in the United States mail, first class, postage prepaid; faxed; and/or hand-delivered; a true and correct copy of the foregoing APPELLANT'S BRIEF to the following:

Bruce J. Nelson
NELSON RASMUSSEN & CHRISTENSEN
215 South State, Suite 900
Salt Lake City, UT 84111

Sent via:

☒ Mail
☐ Facsimile
☐ Hand-delivery

DATED this 27th day of May, 1999.

