1980

George Steven Condie v. Dr. Robert L. Youngblood : Brief in Answer to Petition for Rehearing

Utah Supreme Court

David W. Slagle; Attorneys for Respondent;
Thom D. Roberts; Attorneys for Appellant;

IN THE SUPREME COURT OF THE

STATE OF UTAH

GEORGE STEVEN CONDIE,

Plaintiff-
Appellant,

vs.

DR. ROBERT L. YOUNGBLOOD,

Defendant-
Respondent.

Brief of
PETITIONER

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IN THE SUPREME COURT OF THE

STATE OF UTAH

GEORGE STEVEN CONDIE, Plaintiff-Appellant, vs. DR. ROBERT L. YOUNGBLOOD, Defendant-Respondent.	)	Case No. 16646

BRIEF IN ANSWER TO PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ARGUMENT

PLAINTIFF HAS FAILED TO ALLEGE ANY GROUNDS SUFFICIENT FOR A REHEARING OF THIS APPEAL.

A Petition for Rehearing by this Court can only be granted in very limited circumstances. Rule 76(e) provides that a petitioner must allege the specific points where the "Appellate Court has erred." It has long been established by this Court that a rehearing will be granted only if a petitioning party has established that the Court has misconstrued material facts, overlooked statutes or decisions which might affect the result, based the decision on wrong principles of law, or misapplied or overlooked something which materially affects the results. Cummings v. Nielson, 129 Pac. 619 (Utah 1919). No rehearing can be granted where nothing new and important is offered for

consideration. Jones v. House, 11 Pac. 619 (Utah 1901).

Likewise, new points first brought to the Supreme Court's attention on application for rehearing, though they were available on the original hearing, cannot be considered. Dahlquist v. Denver & R.G.R.R.Co., 174 Pac. 833 (Utah 1932).

Applying the aforesaid standards to the instant case clearly shows that no grounds exist for a rehearing of this matter by this Court.

First, although Respondent Youngblood made several arguments during this appeal in support of the lower court's decision not to set aside the Judgment against the plaintiff, the most fundamental reason was the failure of Plaintiff to timely request relief pursuant to Rule 60(b), U.R.C.P. in that the motion to set aside the judgment was made some five months after the date of judgment.

For this reason, the arguments raised by appellant in Point II of his Petition concerning the statute of limitations and notice of intention to commence an action are not relevant here since the question of the merits or defenses in the lawsuit is of no concern if the plaintiff cannot justify setting aside a judgment adverse to him.

This Court in its decision did not rule as to any matter concerning statute of limitations or notice to commence an action, but based its decision solely upon the

failure of Plaintiff to timely file for relief from the judgment against him. A Petition for Rehearing can only address the points raised by the previous appellate decision.

Second, appellant now attempts to escape the three month time requirement of Rule 60(b) by claiming that his Motion, although not enumerated either in the lower court nor in this Court, was really made pursuant to Subdivisions (5), (6) and (7) and not pursuant to Subdivision (1) as noted in this Court's opinion.

Once again, however, each argument advanced by appellant is inherently defective. Appellant claims that under Subdivision (5) the judgment of the lower court dismissing his case is void. He states:

> As argued in Point I of Appellant's Brief, the failure to mail a copy of the Notice to the Plaintiff-Appellant's prior attorney renders the Notice defective and, thus, any order based thereon would similarly be defective. (Appellant's Petition, p. 3.)

Thus, Appellant himself notes that this Point has already been argued in the briefs of the parties and has thus previously been considered by this Court.

In addition, as noted in Respondent's Brief (p. 14-18), Defendant's attorney properly followed Utah procedure by sending adequate notices to the address of Plaintiff notifying him of all proceedings. Defendant was under no obligation

to mail notices to an attorney no longer representing the plaintiff.

The Bowen, Ney, and Woody cases cited by appellant do not support his position (Petition, pp. 3-4). In each of these cases a defendant was seeking relief for a default judgment entered against him, and the decisions vacated the judgments when no proper jurisdiction over the defendants had been obtained by the plaintiff.

In this case, however, it is the plaintiff seeking relief from a motion filed by defendant.

There is no question of jurisdiction of the subject matter before the parties in this action, and the only question raised by Plaintiff is whether he was excused from attending the hearing dismissing his Complaint because of the reasons outlined in his Affidavit. Plaintiff claims that the address to which the Notices were sent belonged to his estranged wife, that he was traveling and not residing at the address, and that he spent most of the month of February in the hospital.

These reasons could only be classified as inadvertence for excusable neglect as stated under Subdivision (1) of Rule 60(b). This Court has previously ruled that this is the only applicable subdivision in cases where such excuses are being offered. Pitts v. McLachlan, 567 P.2d 171 (Utah 1977).

Third, appellant's attempt to use Subdivision (6) is totally unjustified since there has been no claim that the "Judgment has been satisfied, released or discharged, or a prior Judgment upon which it is based has been reversed or otherwise vacated."

Likewise, Subdivision (7) cannot be used as a substitution for relief which has been specifically enumerated in the other Subdivision of Rule 60(b). As stated by this Court in a case involving a similar contention:

> In their brief it is stated that "plaintiffs submit that these are reasons, independent or partly independent of the 'inadvertence' in not discovering the judgment creditors of Craig McLachlan." This is the basis of plaintiffs' contention that Rule 60(b)(1) is not an exclusive "remedy," with the resulting alternate contention that Rule 60(b)(7), the sort of omnibus section, should control. Under the circumstances of this case a seemingly inescapable answer is that such reasons are really not independent equitable reasons for relief but are in the nature of self-serving statements, unsupported either by equitable principles, or by any substantial authority, and not by any cited by the movants in their brief. Pitts v. McLachlan, 567 P.2d 171 (Utah 1977).

Finally, even if it were assumed arguendo that Plaintiff had filed a timely Motion for relief under Rule 60(b), the reasons stated in his affidavit justified the trial court in finding no sufficient reasons for granting relief from the prior judgment.

It is the burden of the moving party to show that he

has used due diligence and that he was prevented from appearing at the former hearing by circumstances over which he had no control. Heath v. Mower, 597 P.2d 855 (Utah 1979). There is no explanation in the Affidavit of plaintiff why he did not file his Motion to set aside the previous judgment in May -- the time he discovered its existence -- rather than in July -- the time the Motion was actually filed. Under these circumstances, the trial court had no reasons, either equitable or legal, to grant Plaintiff relief from a judgment dismissing the very lawsuit which he initiated.

CONCLUSION

The appellant has failed in his Petition for Rehearing to allege any "error" made by this Court in its previous decision. Instead, appellant has merely advanced the same arguments made in his former brief regarding the reasons for his failure to appear at the lower court proceedings.

In addition, however, he has now attempted to raise new arguments not previously made in either the lower court or this Court which under the established rules of this Court cannot be permitted.

For these reasons, therefore, the Petition for Rehearing should be denied.

Respectfully submitted,

DAVID W. SLAGLE
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief in Answer to Petition for Rehearing, postage prepaid, to Thom D. Roberts, attorney for plaintiff, 400 Ten Broadway Building, Salt Lake City, Utah 84101, this 14th day of April, 1980.