

1981

# George Steven Condie v. Dr. Robert L. Youngblood : Petition for Rehearing

Utah Supreme Court

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Thom D. Roberts; Attorneys for Appellant;

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IN THE SUPREME COURT

STATE OF UTAH

GEORGE STEVEN CONDIE,

Plaintiff-Appellant,

vs.

DR. ROBERT L. YOUNGBLOOD,

Defendant-Respondent.

PETITION FOR

David W. Slagle, of  
SNOW, CHRISTENSEN & MARTINEAU  
700 Continental Bank Building  
Salt Lake City, Utah 84101

ATTORNEYS FOR RESPONDENT

FILE

MAR 25 1968

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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

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PETITION FOR REHEARING

---

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

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

---

PETITION FOR REHEARING

NATURE OF THE CASE

Appellant George Steven Condie filed suit against Dr. Robert L. Youngblood, Respondent, alleging severe and substantial damages suffered as a result of the negligence and malpractice of the Respondent physician.

DISPOSITION IN LOWER COURT

In the lower court, the Honorable Homer F. Wilkinson, Judge, denied the Plaintiff-Appellant's Motion to Set Aside Judgment and affirmed the judgment of the Honorable Christine M. Durham, Judge, dismissing the Plaintiff-Appellant's Complaint.

DISPOSITION IN THE SUPREME COURT

The Supreme Court on March 5, 1980, issued and filed an opinion, pursuant to Utah Rules of Civil Procedure 73B(e), summarily affirming the Order of the District Court denying the Motion to Set Aside the Order Dismissing the Complaint and affirmed the Order Dismissing the Complaint.

### RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant requests this Court to reverse the Order of the lower court denying the Plaintiff's Motion to Set Aside Judgment and either remand for a hearing on the Defendant's Motion to Dismiss or, in the alternative, reverse the Order granting the Motion to Dismiss and remand with instructions for the Defendant to file a responsive pleading to Plaintiff's Complaint.

### RELIEF SOUGHT ON PETITION FOR REHEARING

The Plaintiff-Appellant requests this Court to reconsider the opinion summarily affirming the lower court and reach demerit of Plaintiff-Appellant's Appeal and his Motion, considering said Motion to have been brought under Utah Rules of Civil Procedure, Rule 60(b) 5, 6, and 7.

### STATEMENT OF FACTS

Plaintiff-Appellant hereby readopts the statement of facts as set forth in the Appellant's and Respondent's briefs.

Plaintiff-Appellant filed his Motion to Set Aside Judgment on July 10, 1979. As stated by this Court's opinion, Plaintiff-Appellant did not set forth a particular ground under Rule 60(b), U.R.C.P., to support his Motion. However, in said Motion in the Affidavit accompanying it, he set forth a number of reasons and grounds for the Motion to Set Aside the Judgment. These reasons and grounds qualify under Sections 5 and 7 of Rule 60(b), which does not require the three-month time limit as argued further herein.

On September 19, 1979, this Court decided and filed

its opinion in the case of Foil vs. Ballinger, 601 P.2d 144 (Utah 1979) which altered and redefined the law with regard to the statute of limitations and requirement of Notice of Intention to Commence an Action. These are grounds upon which Defendant-Respondent's Motion to Dismiss may have been granted, as more fully discussed herein, justifying Plaintiff's Motion under Rule 60(b) 6.

### ARGUMENT

#### POINT I

PLAINTIFF-APPELLANT IS ENTITLED TO RELIEF  
UNDER RULE 60(b) 5 THAT THE JUDGMENT OF  
DISMISSAL IS VOID.

The Defendant-Respondent served his Motion and Notice to Dismiss upon the Plaintiff by sending it certified mail to the address of the Plaintiff and the Plaintiff alone. The return receipt indicated an individual other than the Plaintiff had signed for and received said Notice.

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. As such, the Order of Dismissal would be void.

This rule has similarly been noticed in previous cases by this Court. In Bowen vs. Olson, 246 P.2d 602 (Utah 1952), the Court held that a default judgment previously entered in an action was void for lack of jurisdiction. In that case, the plaintiff had served summons by publication. Upon learning of the default judgment the defendant brought its motion to

set aside the judgment greater than the three-month period.

The court discussed and held that the allegations in the affidavits purporting the service by publication were deficient and defective. The court then held that the judgment issued thereon was void and that the motion could be brought greater than the three-month period notwithstanding the provisions of Section 4 of Rule 60(b). Ney vs. Harrison, 299 P.2d 1114, 5 U.2d 217 (1956), and Woody vs. Rhodes, 461 P.2d 465, 23 U.2d 249 (1969), similarly allowed motions to set aside judgments greater than the three-month period based upon improprieties in service and notice, all under the auspices and authority of Section 7 of Rule 60(b).

Therefore, the lack of actual notice and the notice to the Defendant-Respondent that the Plaintiff-Appellant may not have had actual notice within a three-month period would not bar the motion here. Further, the deficiencies in the notice would make the judgment of dismissal entered void and bring Plaintiff-Appellant's motions within the provisions of Section 5 of Rule 60(b).

## POINT II

PLAINTIFF-APPELLANT IS ENTITLED TO  
RELIEF FROM THE JUDGMENT UNDER THE  
PROVISIONS OF UTAH RULES OF CIVIL  
PROCEDURE RULE 60(b) 6.

In his Motion to Dismiss, the Defendant-Respondent alleged four grounds for dismissal. Two of those grounds were that the Plaintiff-Appellant's cause of action was barred by the statute of limitations and barred by his failure to serve upon the Defendant a notice of an intention to commence an action.

On September 19, 1979, a date after the hearing on the Motion to Dismiss, this Court decided the case of Foil vs. Ballinger, 601 P.2d 144 (Utah 1979). That case concerned actions under the Utah Health Care Malpractice Act and the applicable statute of limitations and requirement of notice to commence an action for injuries suffered prior to the commencement of the act. That case redefined and set forth the applicable statute of limitations as beginning to run when the plaintiff knew or should have known that he had suffered "legal" injury — i.e., that he is aware or should be aware that his injuries were the result of the malpractice of the physician. This ruling further clarifies that the defense of the running of the statute of limitations is a factual defense to be raised only after hearing an evidence. As such, this constitutes a reversal of a prior judgment upon which the motion to dismiss may be granted, justifying relief or hearing on said relief under Section 6 of Rule 60(b).

The Ballinger case, supra, also overruled the case of Vealey vs. Clegg, 579 P.2d 919 (Utah 1978), which was the law at the time of the motion to dismiss. The Vealey case held that a notice of intention to commence an action must be served upon a defendant prior to the initiation of an action even though the injuries were suffered prior to the effective date of the Health Care Malpractice Act, a ground alleged by the defendant. Plaintiff-Appellant has consistently argued in his Motion to Set Aside and in his Brief on Appeal that the Vealey case was improperly decided and dismissal should not

be granted upon that ground. In view of this Court's reversal of this case, Plaintiff-Appellant should be entitled to his relief as prayed as result of the reversal pursuant to Section 6 of Rule 60(b).

### POINT III

#### PLAINTIFF-APPELLANT IS ENTITLED TO RELIEF UNDER SECTION 7 OF RULE 60(b) OF UTAH RULES OF CIVIL PROCEDURE.

Section 7 of Rule 60(b) provides for relief from a judgment for "any other reason justifying relief from the operation of the judgment" and requires merely that the motion be brought within a reasonable time. It is recognized that this section is not designed to obviate the timeliness requirements of Section 1 of Rule 60(b), however it is also urged and has been noted by this Court in Ney vs. Harrison, supra, at page 219-220,

The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness in enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense.

a case involving an arguable mistake and inadvertance treated and allowed under Section 7 of Rule 60(b),

As noted previously, the Defendant-Respondent had noticed that the Plaintiff-Appellant may not have received notice of the motion or of the judgment. Further, Plaintiff-Appellant has raised and continues to argue and submits that the service of notice was required upon Plaintiff's former counsel, either as a requirement under the rules and statutes

or as a measure of fairness and insurance for those individuals whose counsel has withdrawn.

Plaintiff-Appellant further argues that it is clear as a matter of law that the Defendant-Respondent was not entitled to his Judgment of Dismissal. This, combined with his lack of appearance and the problems of notice, justify relief under Section 7.

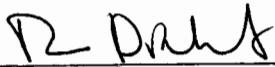
#### CONCLUSION

Plaintiff-Appellant therefore argues that this Court should not assume, based upon the lack of specification of the section of the rule application was made under, that Section 1 of Rule 60(b) was relied upon by the Plaintiff, which would plead the Plaintiff-Appellant out of court. Rather, based upon the reasons and justifications as consistently alleged and pleaded by the Plaintiff and the actions of this Court in reversing and deciding cases after the Motion to Dismiss was heard, justify and allow consideration of Plaintiff's Motion and Appeal and that Plaintiff's Motion and Appeal be heard upon its merits and the case remanded with directions for the Defendant to file an Answer to the Plaintiff's Complaint.

Respectfully submitted this 25th day of March, 1980,

ROBERTS, BLACK & DIBBLEE

By

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Petition for Rehearing, postage prepaid, to Mr. David W. Slagle, attorney for Defendant, 700 Continental Bank Building, Salt Lake City, Utah 84101, this 25<sup>th</sup> day of March, 1980.

D. D. D. D.