

1989

# Jerry Gillespie dba Jerry's Drywall and Pamela Gillespie v. John P. Pizzello : Brief of Appellant

Utah Court of Appeals

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Joseph J. Joyce; Strong & Hanni; Attorneys for Defendant-Appellant.

J. Kent Holland; Anderson & Holland; Attorneys for Plaintiffs-Respondents.

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JERRY GILLESPIE dba JERRY'S  
DRYWALL and PAMELA GILLESPIE,  
  
Plaintiff and  
Respondents,  
  
vs.  
  
JOHN P. PIZZELLO,  
  
Defendant and  
Appellant.

Category 14(b)

Joseph J. Joyce  
STRONG & HANNI  
Sixth Floor Boston Bldg.  
Salt Lake City, Utah 84111  
Attorneys for Defendant-  
Appellant

J. Kent Holland  
ANDERSON & HOLLAND  
623 East First South  
Salt Lake City, Utah 84102  
Attorneys for Plaintiffs-  
Respondents

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IN THE UTAH COURT OF APPEALS

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JERRY GILLESPIE dba JERRY'S	)	
DRYWALL and PAMELA GILLESPIE,	)	
	)	
Plaintiff and	)	
Respondents,	)	
	)	Case No. 890387-CA
vs.	)	
	)	Category 14(b)
JOHN P. PIZZELLO,	)	
	)	
Defendant and	)	
Appellant.	)	

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BRIEF OF APPELLANT

---

Appeal from the order denying motion to set aside default  
of the Third Judicial District Court, Salt Lake County  
Honorable Scott Daniels

Joseph J. Joyce  
STRONG & HANNI  
Sixth Floor Boston Bldg.  
Salt Lake City, Utah 84111  
Attorneys for Defendant-  
Appellant

J. Kent Holland  
ANDERSON & HOLLAND  
623 East First South  
Salt Lake City, Utah 84102  
Attorneys for Plaintiffs-  
Respondents

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## JURISDICTIONAL STATEMENT AND CASE HISTORY

Jurisdiction lies with this Court pursuant to Utah Code Ann. §78-2a-3(2)(j) (Supp. 1989). This appeal is taken from the March 21, 1989, final judgment of the Third Judicial District Court of Salt Lake County, The Honorable Scott Daniels presiding, denying defendant John P. Pizzello's Motion to Set Aside Default Judgment.

## STATEMENT OF ISSUES

1. Did the trial court abuse its discretion in denying defendant's motion to set aside the default judgment?
2. Was defendant denied due process, both under the United States Constitution and the Utah Constitution?
3. Did the trial court err in concluding that it had obtained jurisdiction upon the defendant John P. Pizzello through valid service of process.

## DETERMINATIVE AUTHORITIES

United States Constitution, Amendment Fourteen, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution, Article I, §7:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution, Article I, §11:

All courts shall be open, and every person for an injury done to him in his person, property or reputation, shall have a remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in the state, by himself or counsel, any civil cause to which he is a party.

Rule 4, Utah Rules of Civil Procedure: See Addendum A.

Rule 60, Utah Rules of Civil Procedure: See Addendum B.

#### STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and Disposition of the Court Below.

The controversy in the instant appeal arises out of an automobile accident which occurred on April 16, 1986. The automobile accident involved a vehicle driven and owned by defendant Dale W. Gertz and a vehicle driven by plaintiff Pamela E. Gillespie, which vehicle was owned by plaintiff Jerry Gillespie. (R. 2-3).

The Gillespies filed a complaint against the defendant Gertz on or about June 30, 1987. (R. 2). Thereafter, on or about January 7, 1988, plaintiffs amended their complaint to include defendant Sprinklers, Sod and Such and John P. Pizzello. (R. 22).

On October 11, 1988, a default judgment was entered against defendant John P. Pizzello based upon the affidavit of the process server indicating that service had been obtained against the defendant Pizzello. (R. 38-39).

On January 9, 1989, within three months of the default judgment, defendant Pizzello, through counsel, filed a motion to



set aside judgment along with a memorandum in support of motion to set aside default. (R. 47-48).

Plaintiffs' counsel filed its memorandum in opposition on or about January 23, 1989, and defendant Pizzello filed his reply memorandum on or about January 26. Also filed with the reply memorandum was a request to submit the motion for a decision. (R. 49-58).

On January 31, 1989, plaintiffs filed a request for oral argument and hearing. However, on January 17, 1989, without oral argument, the Honorable Scott Daniels caused to be filed a minute entry denying defendant's motion to set aside the default judgment. (R. 66-67; 73).

**B. Statement of Facts.**

1. The vehicle that was driven by Mr. Gertz which was involved in the April 16, 1986 automobile accident was owned by defendant Gertz but was insured under an automobile insurance policy issued to defendant John P. Pizzello by Guaranty National Insurance Company. (R. 43). The vehicle involved in the accident was a 1984 Chevrolet S-10, Utah License No. AH4-557. (R. 2).

2. On April 16, 1986, plaintiff Pamela Gillespie was stopped behind cars proceeding south on State Street, at the intersection of 3900 South in Salt Lake City. At that time, plaintiff was allegedly rear-ended by defendant Gertz while he was operating the 1984 Chevrolet S-10. (R. 3).

3. Plaintiffs alleged in their amended complaint that defendant Pizzello was involved in a partnership with defendant

Gertz known as Sprinklers, Sod and Such. Plaintiffs further alleged that the defendant Gertz was acting in the course of business conducted by Sprinklers, Sod and Such at the time of the subject accident. (R. 22-24).

4. The original complaint filed by the plaintiffs named only Dale Gertz as defendant. (R. 2). Following the filing of the original complaint, plaintiffs filed a subpoena ducus tecum upon Guaranty National Insurance Company on August 31, 1987 requesting documentation of all insurance policies issued to John P. Pizzello. (R. 10).

5. After receiving information regarding the insurance of John P. Pizzello, the Gillespies caused to be filed the amended complaint, naming as defendants Dale W. Gertz, John P. Pizzello, and Sprinklers, Sod and Such. (R. 27).

6. The Gillespies attempted to obtain personal service upon defendant Pizzello and retained David T. Holland to perfect service upon Mr. Pizzello. Mr. Holland attested that he was able to obtain personal service upon Mr. Pizzello with the summons and amended complaint on April 21, 1988. (R. 36-37).

7. On the back of the return of service, Mr. Holland wrote that he observed Mr. Pizzello go into what he believed to be Mr. Pizzello's apartment. (R. 37). Mr. Holland thereafter went to the apartment door, rang the doorbell and yelled that he had a court summons and amended complaint for Mr. Pizzello. (R. 69). Mr. Holland attested there was no answer and that no one opened the door. (R. 69). Mr. Holland further attested he continued to

pound on the door and ring the doorbell for approximately 10 minutes with no response. (R. 70). Mr. Holland then announced that as an officer of the Salt Lake Court, he was leaving the court summons and amended complaint at the front door of the apartment and that by doing so concluded that service had been obtained. (R. 70). Mr. Holland then attested that approximately five minutes later, he saw whom he believed to be Mr. Pizzello drive away from the apartment complex. (R. 71). Mr. Holland allegedly then went back to the apartment and saw that the summons and amended complaint which had been left by the door was gone. (R. 71).

8. No answer to the complaint was filed by Mr. Pizzello and on or about October 11, 1988, the Honorable Scott Daniels entered a default judgment against Mr. Pizzello. (R. 39).

9. On January 19, 1989, the defendant John P. Pizzello, within three months of the date of the default judgment, through counsel retained by defendant Pizzello's insurer, moved the court for a motion to set aside default judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. (R. 47-48). Following exchange of memoranda by the parties, Judge Daniels on January 17, 1989, caused a minute entry to be filed indicating that the defendant's motion to set aside the default judgment was denied. Judge Daniels decided the matter without oral argument despite a request for oral argument from counsel for the Gillespies. (R. 66-67; 73). On March 21, 1989, an order was signed reflecting the court's denial of defendant Pizzello's motion to set aside default judgment. (R. 74-75).

## SUMMARY OF ARGUMENT

1. The trial court abused its discretion in failing to set aside the default judgment. Pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, the trial court is vested with discretion in setting aside the default judgment. The Utah Court of Appeals has held that where a reasonable excuse is offered by a defaulting party, the courts should generally tend to favor granting relief from a default judgment particularly where the adequacy of service of process has not clearly been determined.

2. The standard established by the Utah Supreme Court in determining whether a motion to set aside default judgment should be granted violates the due process clause of the Fourteenth Amendment of United States Constitution. Particularly to the extent that the defendant is required to offer proof of a meritorious defense when seeking to set aside a default judgment. The United States Supreme Court has held that a procedural rule which requires a showing a meritorious defense is unconstitutional when the requirements imposed is in addition to procedural requirements which would otherwise justify setting aside a default judgment.

3. The requirements of showing a meritorious defense in addition to the procedural requirements of Rule 60(b) also violate the Utah Constitution's guarantee of due process. Additionally, the defendant was deprived of open access to the courts as also guaranteed by the Utah Constitution.

4. The trial court lacked jurisdiction over the defen-

dant Pizzello as a result of the invalid service attempted against defendant Pizzello. Defendant was not served personally nor was there a refusal by the defendant to accept a copy of the process. As such, the court lacked the jurisdiction to enter the default against the defendant in the first instance.

#### ARGUMENT

##### POINT I.

#### THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

Defendant recognizes that the Utah Supreme Court has held that the trial court has considerable discretion in considering a motion to set aside a judgment. Defendant also acknowledges that the appellate court will not overturn a denial of a defendant's motion to set aside default unless there is an abuse of discretion on the part of the trial court.

In citing the above-mentioned rule, the Utah Supreme Court in Gardiner & Gardiner Builders v. Swapp, 656 P.2d 429 (Utah 1982), stated:

The trial court has considerable discretion ruling on a motion to set aside a default judgment under Rule 60(b) and this Court will reverse the trial court only where a clear abuse of discretion is shown. Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962); Central Finance Co. v. Kynaston, 22 Utah 2d 284, 452 P.2d 316 (1969); Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973).

Id. at 430.

In Swapp, the Supreme Court found no abuse of discretion by the trial court in refusing to set aside a default judgment

where the trial court entered a default judgment based upon the defendant's repeated failure to comply with discovery. The lower court had held that Swapp's motion to set aside the judgment was based upon negligence and was therefore not filed within the three-month time limit of Rule 60(b)(1) of the Utah Rules of Civil Procedure.

The Utah Supreme Court on occasion has ruled that the trial court abused its discretion in failing to set aside a default judgment. The Supreme Court has not particularly outlined what would constitute abuse of discretion. However, the court has issued general guidelines on the subject.

In Interstate Excavating v. Agla Development, 611 P.2d 369 (Utah 1980), the court offered the following:

It is not to be questioned that in appropriate circumstances default judgments are justified; and when they are, they are invulnerable to attack. However, they are not favored in the law, especially where a party has timely responded with challenging pleadings. When that has been done some caution should be observed to see that the party is not taken advantage of. Speaking generally about such problems, it is to be kept in mind that access to the courts for the protection of rights and the settlement of disputes is the one of the most important factors in the maintenance of a peaceful and well ordered society. . . .

\* \* \*

The uniformly acknowledged policy of the law is to accord litigants the opportunity for a hearing on the merits, where that can be done without serious injustice to the other party. To that end, the courts are generally indulgent toward

the setting aside of default judgments where there is a reasonable justification or excuse for the defendant's failure to appear, and where timely application is made to set it aside. Consistent with the objective just stated, where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so, to the end that each party may have an opportunity to present his side of the controversy and that there be a resolution in accordance with the law and justice.

Id. at 371.

In Interstate Excavating, defendant sought reversal of the denial of its motion based upon Rule 60(b), Utah Rules of Civil Procedure, to set aside a default judgment. The plaintiff filed its complaint in May of 1978. The defendant timely answered the complaint and asserted an answer and defenses as well as a counterclaim. A pretrial conference was held on April 16, 1979, at which time defendant's counsel made a motion to withdraw, which motion was granted. The court instructed plaintiff's attorney to notify the defendant to obtain new counsel. The court also set the case for trial for May 7, 1979 despite the defendant's counsel's withdrawal. Plaintiff's attorneys certified that on April 16, notice of the trial setting was mailed to the defendant's business address. Defendant's attorney also certified that he mailed to the defendant a notice of the trial setting and notice of his withdrawal as counsel. However, the defendant denied ever receiving notice from his former attorney or the plaintiff's attorney regarding the trial setting. The trial date was set for May 7 and no one appeared on behalf of the defendant. Judgment was entered by the plaintiff and defendant's counterclaim

was dismissed.

The defendant argued before the lower court that its former counsel withdrew from a number of cases simultaneously and that the notice to appoint counsel may have been misplaced with other papers served upon the defendant's office by mail. Defendant further argued in support of its motion to set aside the default that it had no notice of the trial until it received the notice of a judgment dated May 14. Upon receipt of the notice of judgment, the defendant immediately contacted present counsel, who then filed the motion to set aside the default. In overturning the lower court's denial to set aside the default judgment, the Supreme Court stated:

Application of the principles discussed herein to the instant situation leads us to the conclusion that the interests of justice will best be served by setting aside the default judgment and giving the parties that opportunity. In that connection, we call attention to the prefatory clause of Rule 60(b) that "upon such terms as are just" a party may be relieved from judgment. This authorizes the trial court to impose such terms as may be just as a condition to setting aside the default.

Id. at 371.

Under the facts of the instant case, this court is justified in concluding that the trial court abused its discretion by failing to grant defendant's motion to set aside the default. There is a genuine issue as to whether or not the service of process upon Mr. Pizzello was adequate. The alleged service upon Mr. Pizzello did not comply with Rule 4(e) of the Utah Rules of Civil Procedure, and there is no evidence offered by the



plaintiff that the defendant was refusing service. Without personal service in this matter, as will be discussed in greater detail below, the trial court may have lacked jurisdiction to enter a default judgment. At the least, the court abused its discretion when service upon the defendant was questionable.

Additionally, defendant should have been relieved of judgment based upon excusable neglect. The plaintiffs' only allegation against Mr. Pizzello is that he was in partnership with Mr. Gertz in a business known as Sprinklers, Sod and Such. The plaintiffs allege that Mr. Gertz was acting in the scope of his business at the time of the automobile accident. However, in answer to the plaintiffs' amended complaint, Mr. Gertz specifically denied that he was acting in the course and scope of his business when he was involved in the accident with Pamela Gillespie. There is no evidence to substantiate the plaintiffs' claims that Mr. Pizzello had any liability to the plaintiffs for the damages caused. Therefore, assuming the amended complaint and summons was served upon Mr. Pizzello, he was at worst liable for excusable neglect for failing to act on the matter.

The trial court erred in failing to liberally grant relief from judgment and in so doing denied the defendant his opportunity to be heard on the merits of the matter. If the defendant in Interstate Excavating was granted relief from judgment so that the interests of justice would be served by giving the parties an opportunity to litigate the merits of the case, it would appear that this defendant should also be granted the same

relief by this court.

POINT II.

THE "MUSSELMAN STANDARD" ESTABLISHED BY THE  
UTAH SUPREME COURT VIOLATES THE DUE PROCESS  
CLAUSE OF THE FOURTEENTH AMENDMENT.

The Utah Supreme Court in the case of State By and Through Dept. of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983), outlined three requirements that must be met by a defendant in order to be relieved from default judgment. Those requirements include a showing that the judgment was entered against the defendant through excusable neglect (or any other reason specified in Rule 60(b)); a showing that the defendant's motion to set aside the judgment was timely; and a showing of a meritorious defense to the action.

In the underlying action of the instant case, the defendant cited the Musselman case in its memorandum in support of motion to set aside judgment and argued to the court that the requirements outlined in Musselman had been met by the defendant Pizzello and as such, the defendant should be entitled to relief from default judgment.

The lower court on refusing to set aside the default judgment must have determined that the defendant had failed to meet one or more of the three-part test developed by the Supreme Court in Musselman. The defendant's motion, however, was timely as it was filed within three months of the date of judgment. Additionally, the defendant argued that he was entitled to have the default set aside on the basis of mistake, inadvertence,

surprise or excusable neglect under Rule 60(b)(1) of the Utah Rules of Civil Procedure. Additionally, the defendant argued that relief should be granted under Rule 60(b)(4) which provides that a party may be relieved from final judgment when the summons in the action has not been personally served upon the defendant as required by Rule 4(e) of the Utah Rules of Civil Procedure. As two of the three requirements of Musselman were clearly met, it would appear that the trial court's only basis for refusing to set aside the default judgment was based upon the failure to show a meritorious defense to the action.

The defendant did attempt to outline in the memorandum in support of motion to set aside the default and in the reply memorandum in support of motion to set aside the default his meritorious defense to the action. Whether that attempt was insufficient in showing a meritorious defense should not have been the determining factor to the denial of his motion. The need to show meritorious defense violated the defendant's constitutional right of due process guaranteed by the Fourteenth Amendment. Particularly to the extent that the defendant was required to offer proof of a meritorious defense when he sought to set aside the default judgment.

In Gary Fassio v. The Honorable Maurice Jones and Collection Management Agency, Inc., No. 88-C-965G (D. Utah 1989) (Memorandum Decision and Order) (see Addendum C), Judge Greene of the United States District Court for the District of Utah, concluded that the promulgated procedural rule of court developed in

Musselman which imposed the showing of a meritorious defense before a default judgment could be vacated was unconstitutional as a violation of the due process clause of the United States Constitution.

In Fassio, the plaintiff Gary Fassio wrote and issued a check in the amount of \$8.71 to Hires, a Salt Lake City restaurant. The check was thereafter dishonored for insufficient funds and was returned to Hires unpaid. On April 15, 1988, after receiving notice that the check was not paid, plaintiff mailed a money order in the amount of \$10.00 to Hires to cover the check and to help defray additional costs. On October 29, 1988, defendant Collection Management Agency, Inc., at the direction of Hires filed a civil action against Fassio for the collection of the dishonored check. Fassio was properly served with a summons and complaint but believed that the matter was resolved when he sent the money order to Hires. Fassio therefore did not file an answer. On June 2, 1988, a default was taken in the Third Circuit Court and on June 9, 1988, default judgment was entered against Mr. Fassio in the amount of \$190.46.

Mr. Fassio then filed a motion to set aside the default judgment pursuant to Utah Rules of Civil Procedure Rules 55(c) and 60(b) on August 23, 1988 in the Third Circuit Court. On September 22, a hearing was held on Fassio's motion to set aside the default judgment. The Circuit Court Judge, the Honorable Maurice Jones, in accordance with the Musselman decision of the Supreme Court of Utah, denied Fassio's motion on the basis that he failed to offer a proof of meritorious defense.

Fassio then filed in Federal Court under 42 U.S.C. §1983, alleging deprivation of property without due process of law as a violation of the Fourteenth Amendment of the United States Constitution.

In holding that the rule of court outlined in Musselman by the Supreme Court of Utah violated the due process clause of the Fourteenth Amendment, the Utah District Court relied upon the United States Supreme Court decision of Peralta v. Heights Medical Center, Inc., 108 S.Ct. 896, 99 L.Ed.2d 75 (1988).

In Peralta, the Heights Medical Center sued a guarantor of one of the medical center's debtors to recover on its debt. Peralta, the guarantor, did not answer or appear in the suit and a default judgment was entered against him. The judgment was recorded and enforced through a writ of attachment. Unbeknownst to Peralta, his property was sold and the proceeds were used to satisfy the judgment. Thereafter, Peralta filed a bill of review in a Texas state trial court, seeking to set aside the default judgment. Heights Medical Center moved for summary judgment, asserting that the bill of review could be granted and the default judgment set aside, only where the petitioner showed a meritorious defense to the action in which judgment had been entered. Peralta conceded that he did not have a meritorious defense. The trial court granted the summary judgment motion, and denied rehearing, then Peralta for the first time asserted that entry of the default judgment violated his Fourteenth Amendment due process rights.

On appeal to the Texas Court of Appeals, Peralta repeated

his claim that requiring a meritorious defense violated the Fourteenth Amendment, but the court affirmed and held that whether or not there was a proper service and notice, the showing of meritorious defense was required in order to set aside a default judgment. On certiorari, the Supreme Court reversed and held:

The Texas court held that the default judgment must stand absent a showing of a meritorious defense to the action which judgment was entered without proper notice to the appellant, a judgment that had substantial adverse consequences to the appellant. By reason of the due process clause of the Fourteenth Amendment, that holding is plainly infirm.

Where a person has been deprived the property in a manner contrary to the most basic tenants of due process, "it is no answer to say that in this particular case due process of the law would have lead to the same result because he had no adequate defense upon the merits."

Peralta, 99 L.Ed.2d at 82 (quoting Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 59 L.Ed. 1027, 35 S.Ct. 625 (1950)).

In Fassio, the defendants attempted to distinguish Peralta, based upon the deficiencies which existed with respect to the service of process and notice. Defendants argue that the procedural defects constituted the underlying due process violation.

However, Judge Greene asserted that had the Supreme Court considered the Peralta case strictly from a procedural standpoint, that it could have ruled on the matter on the basis of Mullen v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950). Judge Greene noted that Mullen was the landmark case which established

the fundamental due process requirement that reasonable notice must be given. Judge Greene concluded:

It appears that the Supreme Court went beyond Mullen when it decided Peralta by effectively holding that a procedural rule which requires the showing of a meritorious defense is unconstitutional when that requirement is imposed in addition to procedural requirements which otherwise would justify setting aside a default judgment. This court interprets Peralta to stand for the proposition that it is a denial of due process of law to foreclose a consideration of setting aside a default judgment because of required showing of a meritorious defense. When a default judgment otherwise should be set aside because of improper notice or for any of the grounds set forth in Rules 55(c) and 60(b), such as mistake or inadvertence, to impose the additional requirements of showing the existence of a meritorious defense is to deny a defendant due process.

Gary Fassio v. The Honorable Maurice Jones and Collection Management Agency, Civil No. 88-C-965G, United States District Court, District of Utah, Memorandum Decision Order, p. 16 (1989).

The defendant in the instant action was denied due process of law as guaranteed by the Fourteenth Amendment when he was required to establish a meritorious defense in order to be relieved from judgment. Based upon that violation, the defendant should be entitled to have the default judgment set aside.

POINT III.

THE REQUIREMENT OF A NEED TO SHOW A  
MERITORIOUS DEFENSE IN ORDER TO BE RELIEVED  
OF A DEFAULT JUDGMENT IS A VIOLATION OF THE  
UTAH CONSTITUTION'S GUARANTEE OF DUE PROCESS  
AS WELL AS A VIOLATION OF THE OPEN ACCESS  
CLAUSE OF THE UTAH CONSTITUTION.

As early as 1945, the Utah Supreme Court has recognized that an essential requirement of due process is that every citizen be afforded his day in court. In a habeas corpus action in Christensen v. Harris, 163 P.2d 314 (Utah 1945), the Utah Supreme Court stated:

The phrase "due process of law" apparently originated in our judicial parlance with Lord Coke who in construing the language of Magna Carta "that no man shall be taken or imprisoned--or deprived of life, liberty or property but by the judgment of his peers or the law of the land" said that the phrase, "law of the land" meant "due process of law", which definition is the language used in our Constitution. Many attempts have been made to further define "due process" but they all resolve into the thought that a party shall have his day in court--that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or defense, after which comes judgment upon the record thus made.

Id. at 316.

More recently, in Celebrity Club, Inc. v. Utah Liquor Control, 650 P.2d 1293 (Utah 1982), the Utah Supreme Court stated:

[T]he essential requirement of due process is that every citizen be afforded his "day in court." "It has always been the policy of our law to resolve doubts in favor permitting parties to have their day in court on the merits of a controversy."



Id. at 1296 (quoting Carman v. Slavens, 546 P.2d 601, 603 (Utah 1976)).

The fact that a federal district court residing in the state of Utah has determined that the promulgated procedural rule of court developed by the Utah Supreme Court in Musselman is unconstitutional under the Federal Constitution is significant when interpreting the Utah state constitutional due process guarantees. In Untermeyer v. State Tax Comm'n, 192 P.2d 881 (Utah 1942), the Utah Supreme Court stated:

The due process clause of the state constitution is substantially the same as the Fifth and Fourteenth Amendments to the Federal Constitution. Decisions of the Supreme Court of the United States in the due processes clauses of the Federal Constitution are "highly persuasive" as to the application of that clause of our state constitution.

Id. at 885.

In support of the proposition enunciated by the Supreme Court that the due process favors permitting parties to have their day in court on the merits of a controversy, the Constitution of Utah in addition to the general due process requirements contained in Article I, §7 provide a specific guarantee of access to the courts in Article I, §11:

All courts shall be open, and every person, for an injury done to him and his person, property or reputation, shall have a remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

By allowing the defendant to be deprived of its day in

court under the circumstances where service of process is suspect and the defendant had procedurally complied with the rule for setting aside a default, offends against both the Article I, §7 guarantee of due process and the Article I, §11 guarantee of access to the courts. Such offenses should entitle the defendant to have the judgment set aside.

POINT IV.

THE TRIAL COURT LACKED JURISDICTION TO ENTER  
A DEFAULT AGAINST THE DEFENDANT INASMUCH AS  
SERVICE OF PROCESS WAS INVALID.

The Utah Supreme Court has adopted the general rule that a judgment is void and subject to attack if there is a lack of jurisdiction in the court upon the defendant. See Bowen v. Olsen, 246 P.2d 602 (Utah 1952).

At the lower court in the instant action, the plaintiffs argued that the service upon the defendant Pizzello was proper under Rule 4(i) of the Utah Rules of Civil Procedure which provides:

If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to delivery a copy thereof.

The plaintiffs relied upon the Utah Appellate Court decision of Wood v. Weenig, 736 P.2d 1053 (Utah App. 1987), where the Appellate Court stated:

We strongly believe that personal service should not become a "degrading game of wiles and tricks" nor should a defendant be able to defeat service simply by refusing to accept

the papers or instructing others, suitable under the Rules of Civil Procedure, also to reject service.

Id. at 1055. However, the facts of the instant case are substantially different than that in Wood v. Weenig. There is nothing in the record to suggest that the defendant Pizzello refused to be served.

It is conceded that the plaintiffs failed to obtain personal service upon the defendant and obtained the default judgment through the alternative service provided under Rule 4(i) which provides for service when a person refuses to accept service. Mr. Holland, the process server retained by plaintiffs' attorney attested in his affidavit that he saw an individual enter an apartment designated by the plaintiffs' attorney as that belonging to defendant Pizzello. However, at no time was this individual identified as defendant Pizzello.

Mr. Holland also attested that he saw the individual enter the designated apartment and then approached the apartment to attempt to serve the summons and amended complaint. Mr. Holland did so by yelling through the door and pounding on it for approximately 10 minutes. At no time, however, was there ever a response from any individual within said apartment. Following his futile efforts to place the summons and amended complaint in the hands of the individual within the apartment, Mr. Holland announced in a loud voice that he was an officer of the court and that service of the summons and amended complaint had been accomplished and that he was leaving a copy of the summons and amended complaint outside

the apartment door.

In contrast, in the Woods case relied upon by the plaintiffs, the deputy constable spoke for approximately 10 minutes, via an intercom, with an individual who identified herself as the daughter of the individual to be served and admitted that she was over the age of 14. The daughter refused to open the door to accept service and stated that she had been instructed by her father not to accept any legal papers. After having the conversation with the daughter for approximately 10 minutes and having heard the daughter indicate that she was not to accept legal papers, the deputy constable then announced that he was leaving the papers on the porch. The court in Woods was justified under those facts in concluding that the person to be served was refusing to accept a copy of the process.

However, under the facts of the instant case, there was no confirmation that the individual entering the designated apartment was in fact Mr. Pizzello, neither was there any discussion with Mr. Pizzello, either face to face or through the door of Mr. Pizzello's residence. In comparison with the Woods decision, it appears that the process server in the lower court was not justified in concluding that Mr. Pizzello was refusing to accept service and that service was thus accomplished under Rule 4(i) of the Utah Rules of Civil Procedure.

Additionally, the summons and amended complaint was simply left on the doorstep of the designated apartment by Mr. Holland. In Business and Professional Adjustments Co. v. Baker,

659 P.2d 1025 (Or.App. 1983), a case relied upon by the Utah Appellate Court in Woods v. Weenig, the court held that service of process was sufficient where papers were placed in a location where the defendant was likely to encounter them and where they were unlikely to be blown away or destroyed. In the instant case, the papers were certainly not placed in a location where they were unlikely to be blown away.

From the preceding, the trial court in the instant action was not justified in concluding that service had been obtained against defendant Pizzello and erred in entering the default judgment based upon Rule 4(i). Inasmuch as service was invalid, the default judgment should be set aside.

#### CONCLUSION

The defendant has presented several legitimate reasons for this court to set aside the default judgment entered against defendant Pizzello. The lower court abused its discretion in failing to set aside the default judgment pursuant to Rule 60(b) based upon the totality of the factual circumstances and the unlikelihood of Mr. Pizzello's responsibility for the damages incurred by the plaintiffs. Assuming that the defendant Pizzello was properly served, which assumption is vigorously contested by this defendant, defendant Pizzello at worse committed excusable neglect in not filing an answer in an amended complaint which alleged his only relation to the action as that of being a partner to an individual involved in an automobile accident.

Additionally, under Rule 60(b)(4), the lower court abused

its discretion in failing to set aside the default judgment where personal service was not obtained against the defendant.

The defendant's due process rights guaranteed by both the Federal Constitution and the Utah Constitution were violated by the procedural rules promulgated by the Utah Supreme Court in the Musselman decision requiring a meritorious defense be established prior to setting aside a default judgment.

Additionally, defendant asserts that the default judgment is void for lack of jurisdiction of the lower court against the defendant Pizzello. The trial court incorrectly assumed and concluded that defendant Pizzello was refusing to accept service and thus service was not obtained pursuant to Rule 4(i) of the Utah Rules of Civil Procedure.

Based upon the foregoing, defendant Pizzello respectfully requests that this court reverse the lower court's denial of the motion to set aside default judgment.

DATED this 29<sup>th</sup> day of September, 1989.

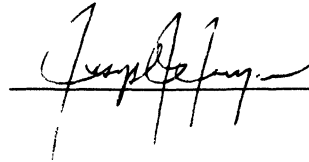
STRONG & HANNI

By Joseph J. Joyce  
Joseph J. Joyce  
Attorneys for Defendant and  
Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 29<sup>th</sup> day of September,  
1989, four true and correct copies of the foregoing document were  
mailed, postage prepaid, to:

Kenneth A. Bronston  
ANDERSON & HOLLAND  
623 East First South  
Salt Lake City, Utah 84102  
Attorneys for Plaintiffs-  
Respondents



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P6/Bnh

## ADDENDUM

Addendum A - Rule 4, Utah Rules of Civil Procedure

Addendum B - Rule 60, Utah Rules of Civil Procedure

Addendum C - Gary Fassio v. The Honorable Maurice Jones and  
Collection Management Agency, Inc., No.  
88-C-965G (D. Utah 1989)



## ADDENDUM A

Rule 4

UTAH RULES OF CIVIL PROCEDURE

### Rule 4. Process.

(a) **Issuance of summons.** The summons may be signed and issued by the plaintiff or his attorney. A summons shall be deemed to have issued when placed in the hands of a qualified person for the purpose of service. Separate summonses may be issued and served.

(b) **Time of issuance and service.** If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing. The summons must be served within one year after the filing of the complaint or the action will be deemed dismissed, provided that in any action brought against two or more defendants in which personal service has been obtained upon one of them within the year, the other or others may be served or appear at any time before trial.

(c) **Contents of summons.** The summons shall contain the name of the court, the names or designations of the parties to the action, the county in which it is brought, be directed to the defendant, state the time within which the defendant is required to answer the complaint in writing, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him. If the summons be served without a copy of the complaint, or by publication, it shall briefly state the sum of money or other relief demanded, and in case of publication of summons such summons as published shall contain a description of the subject matter or res involved in the action. Where the summons is served without a complaint, it shall note therein that a copy of said complaint will be served upon or mailed to defendant within ten days after such service or that if the address of defendant is unknown, the complaint will be filed with the clerk of the court within ten days after such service.

(d) **By whom served.** The summons, and a copy of the complaint, if any, may be served:

(1) Within the state, by the sheriff of the county where the service is made, or by his deputy, or by any other person over the age of 21 years, and not a party to the action; provided, that this rule shall not abrogate the provisions of chapter 28, Laws of Utah, 1945.

(2) In another state or United States territory by the sheriff of the county where the service is made, or by his deputy, or by a United States marshal or his deputy.

(3) In a foreign country, either:

(A) in the manner prescribed by the law of the foreign country; or  
(B) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or

(C) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(D) as directed by order of the court.

Service under (B) or (D) above may be made by any person who is not a party and is not less than 21 years of age or who is designated by order of the court.

(e) **Personal service in state.** Personal service within the state shall be as follows:

(1) Upon a natural person of the age of 14 years or over, by delivering a copy thereof to him personally, or by leaving such copy at his usual place

of abode with some person of suitable age and discretion there residing; or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

(2) Upon a natural person under the age of 14 years, by delivering a copy thereof to such person and also to his father, mother or guardian; or, if none can be found within the state, then to any person having the care and control of such minor, or with whom he resides, or in whose service he is employed.

(3) Upon a natural person judicially declared to be of unsound mind or incapable of conducting his own affairs, by delivering a copy thereof to his legal guardian.

(4) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found in the county in which the action is brought, then upon any such officer or agent, or any clerk, cashier, managing agent, chief clerk, or other agent having the management, direction or control of any property of such corporation, partnership or other unincorporated association within the state. If no such officer or agent can be found in the state, and the defendant has, or advertises or holds itself out as having, an office or place of business in this state, or does business in this state, then upon the person doing such business or in charge of such office or place of business.

(5) Upon an incorporated city, by delivering a copy thereof to the mayor or recorder; upon an incorporated town, by delivering a copy thereof to the president or clerk of the board of trustees.

(6) Upon a county, by delivering a copy thereof to a county commissioner or to the county clerk of such county.

(7) Upon a school district or board of education, by delivering a copy thereof to the president or clerk of the board.

(8) Upon an irrigation or drainage district, by delivering a copy to the president or secretary of its board.

(9) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy thereof to the attorney general.

(10) Upon a natural person, nonresident of the state of Utah, doing business in this state at one or more places of business, as set forth in Rule 17(e), by delivering a copy thereof to the defendant personally or to one of his managers, superintendents or agents.

(11) Upon a department or agency of this state, or upon any public board, commission or body, subject to suit, by delivering a copy thereof to any member of its governing board, or to its executive employee or secretary.

(12) Upon an individual incarcerated or committed at a facility operated by the State or any of its political subdivisions, by delivering a copy to the person who has the care, custody or control of the individual to be served, or to that person's designee or to the guardian or conservator of

the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served.

(f) **Other service.**

(1) **Service by publication.** Where the person upon whom service is sought resides outside of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of process, or where such party is a corporation having no officer or other agent upon whom process can be served within this state, or where in an action in rem some or all of the defendants are unknown, service of process may be made by publication, as follows:

The party desiring service of process by publication shall file a motion verified by the oath of such party or of someone in his behalf for an order of publication. It shall state the facts authorizing such service and shall show the efforts that have been made to obtain personal service within this state, and shall give the address, or last known address, of each person to be served or shall state that the same is unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been of no avail, shall order publication of the summons in a newspaper having general circulation in the county in which the action is pending. Such publication shall be made at least once a week for four successive weeks. Within ten days after the order is entered, the clerk shall mail a copy of the summons and complaint to each person whose address has been stated in the motion. Service shall be complete on the day of the last publication.

(2) **Alternative to service by publication.** In circumstances described in (1) above justifying service of summons by publication, if the party desiring service of summons shall file a verified petition stating the facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service of summons shall be given by the clerk mailing a copy of the summons and complaint to the party to be served at his address, or his last known address. Service shall be complete ten days after such mailing.

(3) **Service outside of state.** Personal service of a copy of the summons and complaint outside of this state is equivalent to service by publication and deposit in the post office, and shall be complete on the day of such service.

(g) **Manner of proof.** Within five days after service of process, proof thereof shall be made as follows:

(1) if served by a sheriff or United States marshal, or a deputy of either, by his certificate with a statement as to the date, place, and manner of service.

(2) if by any other person, by his affidavit thereof, with the same statement.

(3) if by publication by the affidavit of the publisher or printer or his foreman or principal clerk, showing the same and specifying the date of the first and last publication; and an affidavit by the clerk of the court of a deposit of a copy of the summons and complaint in the post office as prescribed by Subdivision (f) of this rule, if such deposit shall have been made.

(4) by the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved.

(h) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) **Refusal of copy.** If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.

(j) **Time of service to be endorsed on copy.** At the time of service, the person making such service shall endorse upon the copy of the summons left for the person being served, the date upon which the same was served, and shall sign his name thereto, and, if an officer, add his official title.

(k) **Designation of newspaper for publication of notice.** In any proceeding where summons or other notice is required to be published, the court shall, upon the request of the party applying for such publication, designate the newspaper and authorize and direct that such publication shall be made therein; provided, that the newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.

(l) **Service of process by telegraph or telephone.** A summons, writ, order or other process in any civil action or proceeding, and all other papers requiring service, may be transmitted by telegraph or telephone for service in any place within this state, and the telegraphic or telephonic copy of such process or paper so transmitted may be served or executed by the officer or other person to whom it is sent for that purpose, and returned by him, if return is required, in the same manner and with the same force and effect as the original thereof; and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities as if the copy were the original. The process or paper, when a writ or order, must be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph or telephone office from which it was sent. The operator sending the message may use either the original or a certified copy of the process or paper. Whenever any document to be sent by telegraph or telephone bears a seal, either private or official, it is not necessary for the operator in sending the same to telegraph or telephone a description of the seal, or any word or device thereon, but the same may be expressed in the telegraphic or telephonic copy by the letters "L.S.," or by the word "Seal."

(m) **Service by constable.** All writs and process, including executions upon judgments, issued out of a district, city or justice court in a civil action or proceeding may be served by any constable of the county.

(Amended, effective March 1, 1988.)

**Amendment Notes.** — The 1988 amendment added Subdivision (e)(12).

**Compiler's Notes.** — This rule generally follows Rule 4, F.R.C.P.

Laws 1945, ch. 28, referred to in Subdivision (d)(1), appears as § 12-1-8, relating to actions by collection agencies.

The reference, in Subdivision (e)(5), to the "president or clerk of the board of trustees" of an incorporated town seems incorrect. Accord-

ing to §§ 10-2-110 and 10-3-106, the governing body of an incorporated town consists of a council and mayor.

**Cross-References.** — Collection agencies, process server in actions by, § 12-1-8.

Condominium association or ownership, service of process on person designated in declaration, § 57-8-33.

Constable, service of process by, §§ 17-22-25, 17-25-1.

## ADDENDUM B

### UTAH RULES OF CIVIL PROCEDURE

### Rule 60

issue was deemed waived and could not be raised in a motion for new trial. *Ute-Cal Land Dev. Corp. v. Sather*, 605 P.2d 1240 (Utah 1980).

Cited in *National Farmers Union Property & Cas. Co. v. Thompson*, 4 Utah 2d 7, 286 P.2d 249 (1955); *Holmes v. Nelson*, 7 Utah 2d 435, 326 P.2d 722 (1958); *Howard v. Howard*, 11 Utah 2d 149, 356 P.2d 275 (1960); *Nunley v. Stan Katz Real Estate, Inc.*, 15 Utah 2d 126, 388 P.2d 798 (1964); *Hanson v. General Bldrs. Supply Co.*, 15 Utah 2d 143, 389 P.2d 61 (1964); *James Mfg. Co. v. Wilson*, 15 Utah 2d 210, 390 P.2d 127 (1964); *Porcupine Reservoir Co. v. Lloyd W. Keller Corp.*, 15 Utah 2d 318, 392 P.2d 620 (1964); *Watson v. Anderson*, 29 Utah 2d 36, 504 P.2d 1003 (1973); *Nichols v. State*, 554 P.2d 231 (Utah 1976); *Edgar v. Wagner*, 572 P.2d 405 (Utah 1977); *Time Com.*

*Fin. Corp. v. Brimhall*, 575 P.2d 701 (Utah 1978); *Anderton v. Montgomery*, 607 P.2d 828 (Utah 1980); *Miller Pontiac, Inc. v. Osborne*, 622 P.2d 800 (Utah 1981); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981); *Kohler v. Garden City*, 639 P.2d 162 (Utah 1981); *Pozzolan Portland Cement Co. v. Gardner*, 668 P.2d 569 (Utah 1983); *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983); *Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730 (Utah 1985); *Estate of Kay*, 705 P.2d 1165 (Utah 1985); *York v. Unqualified Washington County Elected Officials*, 714 P.2d 679 (Utah 1986); *King v. Fereday*, 739 P.2d 618 (Utah 1987); *Fackrell v. Fackrell*, 740 P.2d 1318 (Utah 1987); *Walker v. Carlson*, 740 P.2d 1372 (Utah Ct. App. 1987); *Amica Mut. Ins. Co. v. Schettler*, 100 Utah Adv. Rep. 17 (Ct. App. 1989).

### 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.

**A.L.R.** — 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 A.L.R.3d 1191.

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

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

Quotient verdicts, 8 A.L.R.3d 335.

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

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.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 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.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 A.L.R.3d 126.

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

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

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

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

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

**Key Numbers.** — New Trial ⇐ 13 et seq., 110, 116.

### 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) 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.

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

to set aside judgment, §§ 78-3-16.5, 78-4-24, 78-6-14; Appx. G, Code of Judicial Administration.

**Cross-References.** — Fee for filing motion

tion.

#### NOTES TO DECISIONS

##### ANALYSIS

##### 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.

##### Default judgment.

##### Jurisdiction.

##### Other reasons.

##### —"Any other reason justifying relief."

##### —Default judgment.

##### —Impossibility of compliance with order.

##### —Incompetent counsel.

##### —Lack of due process.

##### —Merits of case.

##### —Mistake or inadvertence.

##### —Real party in interest.

##### —Requirements.

##### —Effect of set-aside judgment.

##### —Admissions.

##### —Fraud.

##### —Divorce action.

##### —Independent action.

##### —Constitutionality of taxes.

##### —Divorce decree.

##### —Fraud or duress.

##### —Motion distinguished.

##### —Invalid summons.

##### —Amendment without notice.

##### —Mistake, inadvertence, surprise or excusable neglect.

##### —Default judgment.

##### —Delayed motion for new trial.

##### —Failure to file cost bill.

##### —Failure to file notice of appeal.

##### —Failure to receive notice and findings.

##### —Illness.

##### —Inconvenience.

##### —Merits of claim.

##### —Negligence of attorney.

##### —No claim for relief.

##### —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.

ADDENDUM C

FILED  
UNITED STATES  
DISTRICT COURT  
DISTRICT OF UTAH  
MAY 25 2 15 PM '88  
MARKUS D. ZIMMER  
CLERK  
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH - CENTRAL DIVISION

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GARY FACIO,

Plaintiff,

MEMORANDUM DECISION  
AND ORDER

vs.

THE HON. MAURICE JONES, AND  
COLLECTION MANAGEMENT AGENCY, INC.,

Civil No. 88-C-965G

Defendant.

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This matter came on for hearing on December 19, 1988, on cross motions by the plaintiff and defendant Jones for summary judgment, and on the plaintiff's motion for judgment on the pleadings. Plaintiff Gary Facio was represented by Brian M. Barnard, defendant the Honorable Maurice Jones was represented by Carlie Christensen, and defendant Collection Management Agency was represented by Ralph C. Amott. Legal memoranda were submitted on behalf of all parties. Counsel argued the motions extensively, after which the matter was taken under advisement. The court now being fully advised, sets forth its Memorandum Decision and Order.

FACTUAL BACKGROUND

On March 17, 1988, plaintiff Gary Facio wrote and issued a check in the amount of \$8.71 to a Salt Lake City eating

establishment known as HIRES. Subsequently, the check was dishonored for insufficient funds by plaintiff's bank and returned to HIRES unpaid. On or about April 15, 1988, after receiving notice that the check was not paid, plaintiff mailed a money order in the amount of \$10.00 to HIRES to cover the check and to help defray any additional costs. On April 29, 1988, defendant Collection Management Agency, Inc., commenced a civil action, on behalf of HIRES, against the plaintiff in the Third Circuit Court, Salt Lake County, Sandy department, for collection of the dishonored check. Facio was properly served with a Summons and Complaint on May 6, 1988, but believing the matter had been handled with the money order, failed to file an Answer. On June 2, 1988, a default was taken in the Third Circuit Court, and on June 9, 1988 default judgment was entered against him in the amount of \$190.46.

Pursuant to Utah Rules of Civil Procedure 55(c) and 60(b), a Motion to Set Aside the Default Judgment was filed on August 23, 1988, in the Third Circuit Court. On September 22, 1988, a hearing was held in the Third Circuit Court on Facio's Motion to Set Aside the Default Judgment. The Honorable Maurice Jones, in accordance with pronouncements of the Supreme Court of Utah, denied the Motion on the basis that Facio failed to offer proof of a meritorious defense. On September 28, 1988, a Satisfaction of Judgment was entered in Third Circuit Court by



Collection Management Agency. However, the Satisfaction of Judgment was facilitated by reason of garnishment against Facio's wages and on his bank account.

Plaintiff Facio seeks declaratory relief under 42 U.S.C. § 1983<sup>1</sup> for deprivation of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Specifically, plaintiff contends that Judge Jones' application of Utah Rules of Civil Procedure 55(c)<sup>2</sup> and 60(b)<sup>3</sup> is

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982).

<sup>2</sup> (c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Utah R. Civ. P. 55(c).

<sup>3</sup> (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),

unconstitutional to the extent that a defendant is required to offer proof of a meritorious defense when seeking to set aside a default judgment. By pendent claim, plaintiff challenges the validity of the default and default judgment entered against him. Defendant Judge Jones contends that this court lacks subject matter jurisdiction over plaintiff's claims, that the claims are moot, that his application of Rules 55(c) and 60(b) in accordance with precedent established by the Supreme Court of Utah is constitutional, and that in any event he is immune from suit as a matter of law. The parties have filed cross motions for summary judgment.

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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.

Utah R. Civ. P. 60(b).

### LEGAL ANALYSIS

The Utah Supreme Court in effect has promulgated a court rule that under Rules 55(c) and 60(b) of the Utah Rules of Civil Procedure a defendant must offer proof of a meritorious defense to an action before a default judgment can be set aside. State of Utah Dept. of Social Services v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983); Mason v. Mason, 597 P.2d 1322, 1323 (Utah 1979); Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507, 510 (Utah 1979). In its most recent pronouncement in Musselman, the court stated:

In order for defendant to be relieved from the default judgment, he must not only show that the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)), but he must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action.

Notwithstanding defendant's showing of timeliness and excusable neglect, unless he can show "some defense of at least ostensible merit as would justify a trial of the issue thus raised," his motion to set aside cannot justifiably be granted.

Musselman, 667 P.2d 1055-56 (quoting Downey State Bank, 545 P.2d at 510) (footnotes omitted). The rationale for requiring the showing of a meritorious defense before a default judgment is set aside appears to be that in terms of judicial economy courts should not be occupied with cases that can be disposed of summarily where no meritorious defense to the claim exists. In

this case Judge Jones simply followed the precedents established by the Utah Supreme Court.

Subject Matter Jurisdiction of Declaratory Judgment Action

Defendants contend that this court lacks subject matter jurisdiction because of lack of jurisdiction to review decisions of state courts. It is urged that in order to assess the constitutionality of his application of Rules 55(c) and 60(b) in this case, this court will be required to review Judge Jones' decision.

It is clearly established law that the Supreme Court has the exclusive power to review state court decisions.<sup>4</sup> However, federal trial courts can adjudicate civil rights complaints such as that brought by plaintiff without directly reviewing state court decisions.<sup>5</sup> The Tenth Circuit recognized

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<sup>4</sup> Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286, 296 (1970).

<sup>5</sup> District courts have original jurisdiction of civil actions:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

28 U.S.C. § 1343(3) (1982).

this distinction in Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

Razatos was an attorney who had been suspended from practice by the Colorado Supreme Court. He brought an action in federal district court under 42 U.S.C. § 1983 seeking declaratory relief that the Colorado procedure for disciplining attorneys violated the due process clause of the Fourteenth Amendment. The district court dismissed the action for lack of subject matter jurisdiction.<sup>6</sup> The Tenth Circuit reversed on the subject matter jurisdiction issue because of the distinction between challenging a particular state disciplinary proceeding and a general constitutional attack on state rules governing discipline. The court said that "district courts are . . . required to distinguish between general challenges to state bar rules as promulgated and challenges to state court decisions in particular cases." Id. at 1433. The court recognized that it would be inappropriate to review a particular state court proceeding and upheld the lower court on that aspect of its ruling, stating: "[T]o the extent Razatos sought review in the district court of

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<sup>6</sup> Razatos v. Colorado Supreme Court, 549 F.Supp. 798 (D. Colo. 1982). Under the Colorado scheme, the Colorado Supreme Court makes the final factual determination as to whether an attorney should be disciplined. Razatos argued that Colorado Rule of Civil Procedure 252 as construed violated the due process clause because the final fact finders did not have an opportunity to hold a hearing and assess credibility prior to Razatos' suspension.

the judicial decision of the Colorado Supreme Court, the district court properly refused to hear his complaint." Id. at 1432.

The Tenth Circuit in Razatos concluded that Razatos' constitutional challenge was not "inextricably intertwined" with the state court decision so as to require review of the rule's application.<sup>7</sup> The court said: "In order to evaluate this claim, the district court need not review the decision of the Colorado Supreme Court. It need only look at Rule 252 as promulgated, and as construed by state case law." Id. at 1434. The same is true in the case at hand. This court is simply being asked to render a ruling on a claim for declaratory relief under 42 U.S.C. § 1983 that as promulgated and construed by Utah case law, Rules 55(c) and 60(b) of the Utah Rules of Civil Procedure deprive the plaintiff of property without due process. In those circumstances, this court is not acting as an appellate court to

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<sup>7</sup> In District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), the Supreme Court recognized the distinction between challenging a rule as promulgated and practiced, and challenging a particular state court decision. The Feldman court stated:

If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding . . . then the District Court is in essence being called upon to review the state-court decision.

Id. at 483-484 n. 16.

review a decision of the Third Circuit Court of the State of Utah.

#### Pendent Claim Jurisdiction

In United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), the Supreme Court stated that pendent claim jurisdiction exists "whenever there is a claim 'arising under [the] constitution' . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case." Over time, the Supreme Court has developed a three-prong test for assessing whether a federal court should exercise jurisdiction over a pendent state claim. The test requires examination of the court's power to exercise jurisdiction, its discretion in exercising that power, and whether Congressional intent would preclude such exercise.

As to the first prong, in United Mine Workers the court said that federal courts must have power to exercise pendent jurisdiction:

The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues there is power in federal courts to hear the whole.

Id. (footnote omitted). In this regard, a plaintiff's claim must not be "so insubstantial, implausible, foreclosed by prior decisions . . . or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court . . ." Hagans v. Lavine, 415 U.S. 528, 543 (1974) (quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974)).

With respect to the second prong, "justification [for pendent jurisdiction] lies in considerations of judicial economy, convenience and fairness to litigants . . ." United Mine Workers, 383 U.S. at 726. The court thus recognized that pendent jurisdiction is a doctrine of judicial discretion and that a trial court has discretion to exercise its power when to do otherwise would result in duplicative proceedings.

To satisfy the third prong, a trial court must examine the particular statute which confers jurisdiction over the federal claim in order to determine whether Congress intended to prevent pendent state claims. In this regard, the Supreme Court has said:

[T]here must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim.



Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978), (quoting Aldinger v. Howard, 427 U.S. 1, 18 (1976)).

In the pendent claim in this case, plaintiff asks this court to set aside the default and default judgment. The three-prong test for assessing the exercise of jurisdiction over that pendent state claim is satisfied. As to the power to exercise pendent jurisdiction, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) authorize federal courts to entertain suits brought to redress the deprivation of rights secured by the Constitution, and it is clear that all of plaintiff's claims arose out of the same set of operative facts. Under the second prong it is manifest that refusal to exercise discretion in asserting pendent jurisdiction in this case would require duplicative proceedings which would not serve the ends of judicial economy, convenience and fairness to the litigants. Finally, under the third prong there is no reason to believe that Congress did not intend pendent state claims to be considered along with 42 U.S.C. § 1983 claims.<sup>6</sup>

#### Mootness

Defendants contend that plaintiff's claims are barred by mootness because the judgment against the plaintiff was

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<sup>6</sup> Federal courts routinely take jurisdiction over pendent state claims when 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) confer jurisdiction over the federal claim. Anderson v. Reynolds, 342 F.Supp. 101, 110 (D. Utah 1972) aff'd, 476 F.2d 665 (10th Cir. 1973).

satisfied on September 28, 1988. Under the facts of this case, however, the judgment was involuntarily satisfied and the vitality of the plaintiff's grievance continues to exist. In Electric Railway & Motor Coach Employees v. Missouri, 374 U.S. 74 (1963), the Supreme Court addressed an analogous question. In that case, a labor dispute existed which provoked the Governor of Missouri effectively to seize a public transit business. Although the seizure was terminated after the appellant filed a jurisdictional statement with the United State Supreme Court, the court held that the claim was not moot. The court stated: "[T]he labor dispute [giving rise to the seizure] remains unresolved. There thus exists in the present case not merely the speculative possibility of invocation of the [Act under which the governor seized the business] in some future labor dispute, but the presence of an existing unresolved dispute which continues. . . ." Id. at 77.

In the case at bar, as in Motor Coach Employees, an unresolved dispute exists. Here, the dispute is whether requiring the showing of a meritorious defense in order to set a default judgment aside is constitutional. Acting under the precedent of applicable Utah Supreme Court decisions, state court judges will continue to refuse to set aside default judgments in the absence of the showing of a meritorious defense. Therefore, the issue presented by plaintiff in this case is not precluded by

the mootness doctrine.

The Utah Supreme Court has said:

The principles that determine . . .  
justiciability . . . are the well-established  
rules which permit a court to litigate an  
issue which, although technically moot as to  
a particular litigant at the time of appeal,  
is of wide concern, affects the public  
interest, is likely to recur in a similar  
manner, and, because of the brief time any  
one person is affected, would otherwise  
likely escape judicial review. . . .

Wickham v. Fisher, 629 P.2d 896, 899 (Utah 1981) (citation  
omitted).

The matter before this court is of wide concern and  
affects the public interest in that citizens similarly situated  
are affected by the requirement that a meritorious defense must  
be shown to exist in order to set aside a default judgment.  
Furthermore, because a motion to set aside a default judgment is  
usually made within three months,<sup>9</sup> a litigant otherwise would  
have a very short period of time in which to bring a complaint  
like the one at hand. Under the circumstances, this court holds  
that plaintiff's claims are not moot.

#### Judicial Immunity

It is a well established principle in our judicial  
system that judges are immune from liability for their acts  
committed in a judicial capacity. "[A] judge is entitled to

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<sup>9</sup> Utah R. Civ. P. 60(b).

judicial immunity if he has not acted in clear absence of all jurisdiction and if the act was a judicial one." Martinez v. Winner, 771 F.2d 424, 434 (10th Cir. 1985) (quoting Stump v. Sparkman, 435 U.S. 349, 359 (1978)). See also Navajo Nation v. District Court for Utah County, 624 F.Supp. 130, 136 (D. Utah 1985). The principle of judicial immunity does not apply, however, when the plaintiff simply seeks declaratory and prospective injunctive relief rather than monetary damages. That narrow exception to the doctrine of judicial immunity applies here. Pulliam v. Allen, 466 U.S. 522 (1984).<sup>10</sup> However, under the special circumstances of this case an award of attorneys fees against Judge Jones would be unjust.

#### Constitutionality of the Utah Procedural Rules as Construed

In Peralta v. Heights Medical Center, Inc., 108 S.Ct. 896, 99 L.Ed.2d 75 (1988), the Heights Medical Center sued Peralta under his guarantee of a hospital debt incurred by one of his employees. Peralta did not answer or appear and a default judgment was entered against him. The judgment was recorded, a writ of attachment was issued, and unbeknownst to Peralta his real property was sold to satisfy the judgment. Thereafter,

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<sup>10</sup> In Pulliam, the respondents sought to enjoin a state magistrate from requiring bond for a nonincarcerable offense. The court said: "We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." Pulliam, 466 U.S. at 541-42.

Peralta began a bill of review proceeding to set aside the default judgment. Heights Medical Center filed a motion for summary judgment asserting that in order to have the default judgment set aside Peralta must show a meritorious defense to the action in which judgment had been entered. Peralta conceded that he did not have a meritorious defense. Heights Medical Center was granted summary judgment. On appeal to the Texas Court of Appeals, Peralta repeated his claim that requiring a meritorious defense violated the Fourteenth Amendment, but the court affirmed and held that whether or not there was proper service and notice, the showing of a meritorious defense was required in order to set aside a default judgment. On certiorari, the Supreme Court reversed and said:

The Texas court held that the default judgment must stand absent a showing of a meritorious defense to the action in which judgment was entered without proper notice to appellant, a judgment that had substantial adverse consequences to appellant. By reason of the Due Process Clause of the Fourteenth Amendment, that holding is plainly infirm.

Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

Peralta, 99 L.Ed.2d at 82 (quoting Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 59 L.Ed. 1027, 35 S.Ct. 625 (1915)).

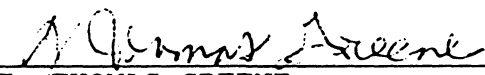
Defendants contend that Peralta is distinguishable because in that case deficiencies existed in the service of process and notice and that these defects constituted an underlying due process violation. However, if the Supreme Court had considered Peralta strictly to be a failed notice case, it could have decided the matter on the basis of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Mullane is the touchstone case for the fundamental due process requirement that reasonable notice must be given. It appears that the Supreme Court went beyond Mullane when it decided Peralta by effectively holding that a procedural rule which requires the showing of a meritorious defense is unconstitutional when that requirement is imposed in addition to procedural requirements which otherwise would justify setting aside a default judgment. This court interprets Peralta to stand for the proposition that it is a denial of due process of law to foreclose consideration of setting aside a default judgment because of a required showing of a meritorious defense. When a default judgment otherwise should be set aside because of improper notice or for any of the grounds set forth in rules 55(c) and 60(b), such as mistake or inadvertence, to impose the additional requirement of showing the existence of a meritorious defense is to deny a defendant due process.

In addition to the philosophy expressed by the Supreme Court in Peralta, there are other reasons to reject a procedural requirement that default judgments cannot be vacated in the absence of a showing of the existence of a meritorious defense. In this regard, requiring a defendant to make such a showing at the time he seeks to set aside a default judgment on otherwise permissible grounds denies that defendant the right to a substantive day in court. Setting aside a default judgment is a procedural matter, and to go straight to the substantive merits on a procedural motion is unfair. All litigants are entitled to a day in court, even if it is a short one. It is contended that a defendant will suffer no real harm or prejudice by reason of the requirement because the same judgment likely would be rendered a second time anyway. However, oftentimes the course of proceedings would be substantially altered if a default judgment were vacated even though the defendant never makes a showing of a meritorious defense. For instance, if the default judgment had been set aside in this case, plaintiff may have negotiated a settlement with the Collection Agency, or paid the debt before he suffered the embarrassment of having his wages garnished. Finally, it is manifest that judicial economy is not a valid basis or reason to justify the violation of constitutional rights.

Based upon the foregoing, the promulgated procedural rule of court which imposes the showing of a meritorious defense in addition to other requirements of Rules 55(c) and 60(b) U.R.C.P. before a default judgment can be vacated, is declared to be unconstitutional as violative of the due process clause of the United States Constitution. Accordingly, plaintiff's motion for summary judgment is granted and the default judgment entered by the Third Circuit Court against plaintiff is set aside.

Counsel for plaintiff is directed to lodge with the court a form of judgment consistent with this memorandum decision and order, after compliance with local rule 13(e).

DATED: May 25, 1989.

  
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J. THOMAS GREENE  
UNITED STATES DISTRICT JUDGE

COPIES TO: 5/30/89:  
Brian M. Barnard, Esq.  
Ralph C. Amott, Esq.  
Carlie Christensen, Esq.