2010

Ember Harrison v. Tiffany Thurston, an individual, Tonya Rainey, an individual, and John Does 1-10 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EMBER HARRISON, Appellant, v. TIFFANY THURSTON, an individual, TONYA RAINEY, an individual, and JOHN DOES 1 – 10, Appellee.	Case No. 20100272

BRIEF OF APPELLANT

APPEAL FROM AN ORDER DENYING RULE 60(b) MOTION TO SET ASIDE DISMISSAL OF THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE ERIC A. LUDLOW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitution, Statues and Rules

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §78A-3-102(1)(j) and §78A-3-102(4), which confers jurisdiction on the appellate court to review a trial court's decision upon transfer by the Utah Supreme Court to the Appeals Court.

ISSUES PRESENTED AND STANDARD OF REVIEW

Issue No. 1: Whether Judge Ludlow's denial of Harrison's Motion to Set Aside an Order of Dismissal for excusable neglect is legally deficient where no facts exist showing Harrison was ever aware of, nor did she participate in, her now disbarred attorney's negligent conduct?

Determinative law: *Menzies v. Galetka*, 2006 UT 81, p. 55 ("a district court's ruling on a motion to set aside a default judgment must be based on adequate findings of fact and on the law.")(internal citations and quotation marks omitted). *Cheap-O-Rooter v. Marmalade Square Condominium Homeowners Ass'n*, 2009 UT App 329, (remanding to the district court its decision on a Rule 60(b) motion for failure to make findings of fact).

Standard of Review: "We review a district court's findings of fact under a clear error standard of review." *Menzies v. Galetka*, 2006 UT 81, p. 55 (internal citation omitted). Further, no deference is accorded to the district court when the appellate court must determine whether the court's order is "deficient as a matter of law" for lack of factual findings. *Cheap-O-Rooter v. Marmalade Square Condominium Homeowners Ass'n*, 2009 UT App 329.

Issue No. 2: Whether the trial court abused its discretion denying Harrison's Rule 60(b) Motion to Set Aside the Order of Dismissal where Harrison's attorney had been suspended and Thurston did not serve a Notice to Appear or Appoint Counsel in violation of *U.R.Civ.P.* 74(c)?

Determinative Law: *Menzies v. Galetka,* 2006 UT 81, p. 54 ("It is an abuse of discretion for a district court to deny a 60(b) motion to set aside a default judgment if there is a reasonable justification for the moving party's failure and the party requested 60(b) relief in a timely fashion.")(internal citation omitted).

Standard of Review: "We review a district court's findings of fact under a clear error standard of review. We review a district court's conclusions of law for correctness, affording the trial court no deference." *Menzies v. Galetka*, 2006 UT 81, p. 55.

DETERMINATIVE LAW

UTAH RULES OF CIVIL PROCEDURE 60(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; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than three 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 RULES OF CIVIL PROCEDURE 74(c):

> *Withdrawal of counsel*

"(c) *if an attorney withdraws* - - other than under subdivision (b), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court."

STATEMENT OF THE CASE

Ember Harrison was injured in an auto accident when Defendant/Appellee (hereinafter "Thurston") collided into the back of Harrison's car. Harrison retained the services of Matthew T. Graff and Associates to represent her in her personal injury claim[1]. From that point forward, Harrison experienced a breakdown of every aspect of the legal system.

From late 2006, until Matthew Graff's disbarment for felony theft of clients' money, in June of 2009, Graff did little to advance Harrison's case and made almost no effort to maintain contact with Harrison as to the status of the case. Harrison, however,

[1] As a matter of court record, both Matthew Graff and Mark Graff were attorneys of record on this case as indicated by the caption of every pleading filed by the Graff's. While Thurston and the District Court made much of the fact that Mark Graff signed the majority of the pleadings, for the reasons discussed below, Harrison respectfully submits that whether it was Matt Graff or Mark Graff representing her is immaterial as both attorneys were removed from the case at the point in which Matt Graff was suspended from the practice of law. As such, Harrison will refer to the Graff brothers interchangeably, as they both apparently represented her.

attempted to maintain contact with Graff's office and called his office no fewer than 147 times between October, 2007, and June, 2009, to ask about the status of her case, and to provide information to Graff.

During that time, Graff's actions were deplorable. He missed deadlines. He lied to Harrison and the Court. He failed to respond to discovery requests and neglected to notify Harrison of discovery requests she was required to answer. For this behavior, the district court, in January, 2008, imposed sanctions on Graff/Harrison for failure to cooperate in discovery, which apparently had little impact on Graff because his most egregious failures to communicate with Harrison and comply with discovery deadlines happened after this date. This includes his failure to forward Requests for Production of Documents to Harrison, or to otherwise notify Harrison of their existence, failure to produce medical bills for the purpose of proving Harrison's damages, and failure to disclose expert witnesses at the appointed time. Harrison was unaware that Graff was essentially defaulting her entire case.

On June 9, 2009, Matt Graff was suspended from the practice of law as the result of criminal activity stemming from stealing clients' settlement proceeds. Judge Faust, who suspended Graff from the practice of law, further made a finding that there was no one in Graff's office who was capable of taking over the cases at the Graff law offices. Consequently, every file in the offices of Matthew T. Graff & Associates was turned over to a special trustee. After several months, the files were turned over to the respective clients.

While the trustee was still in possession of over 500 of Graff's files, including Harrison's, Thurston filed a Motion to Dismiss Harrison's case for failure to prosecute on June 29, 2009. The motion was mailed to Mark Graff at the Graff law offices which had been shut down by Judge Faust. No action was taken by the trustee, as he was attempting to go through 500 of Graff's files.

At no point did Thurston serve Harrison with a Notice to Appear or Appoint Counsel as required by *U.R.Civ.P. 74(c).* Meanwhile, Harrison was attempting to obtain her file from the trustee and secure other counsel. This included taking her file to an attorney in Salt Lake City, as well as another attorney in St. George, both of whom declined to represent her in this matter, before she obtained her current counsel in September, 2009.

Neither Harrison nor the trustee had knowledge of Thurston's pending Motion to Dismiss and unbeknownst to Harrison, the district court granted Thurston's Motion to Dismiss on or about August 13, 2009, in spite of the fact no Notice to Appear or Appoint had been served, and in spite of the fact her file was not being monitored by anyone.

When Harrison met with her current counsel, he investigated the status of her case and discovered that it had been dismissed. Prisbrey contacted Thurston's counsel and requested he stipulate to set aside the dismissal as Harrison had been unrepresented at the time the Motion was filed and no Notice to Appear or Apoint had been served. Based on his conversations with Thurston's counsel, it was apparent to Prisbrey that Thurston was, in fact, aware that Graff had been suspended from the practice of law at some point during

the pendency of the Motion to Dismiss and appeared to be taking advantage of Graff's suspension. Despite the fact that Prisbrey explicitly made Thurston's counsel aware of Harrison's unrepresented status at the time the Motion was Filed and ruled upon, Thurston refused to rectify the obvious miscarriage of justice.

Prisbrey then filed a Rule 60(b) Motion to Set Aside the dismissal and reinstate Harrison's case based upon the fact that Harrison was unrepresented at the time the Motion to Dismiss was filed and Thurston had not served her with a Notice to Appear or Appoint Counsel. Neither had the district court complied with the provisions of Rule 74, which mandate that no judicial action be taken until proof that the notice was served on the unrepresented party was filed with the Court. Harrison supported her Rule 60(b) Motion with evidence, including sworn affidavits, after having an opportunity to review Graff's file and understanding the full extent of Graff's misconduct in her case. Thurston opposed the motion and both parties requested a hearing.

The district court granted a one hour hearing set for March 4, 2010 in the new St. George courthouse. Due to an unfortunate series of events, Harrison was minutes late in attending the hearing. The Court went on record for a sum total of 55 seconds, during which time it denied Harrison's Rule 60(b) Motion out of hand and maintained the dismissal with prejudice on her case. All of this was done outside of Harrison's presence. It was unclear whether the denial of her motion was on the merits or because Harrison was tardy in appearing at the hearing.

Judge Ludlow never did address the merits of Harrison's Rule 60(b) Motion and specifically why Rule 74, which is intended to prevent exactly the kind of predicatment Harrison found herself in here, was violation by Thurston. The district court's denial is unexplained and inexplicable. Furthermore, because the Court failed to provide findings of fact or any legal basis for its denial, it defies reviewability of the basis for its decision.

STATEMENT OF FACTS

1. On November 15, 2006, attorneys Matthew T. Graff and Mark Graff from Matthew T. Graff and Associates filed a Complaint for personal injuries sustained by Ember Harrison in an automobile accident. (Record at 1.)

2. On or about February 7, 2007, Defendant Tiffany Thurston filed an Answer to the Complaint where she admitted that she collided with the back of Harrison's car and was cited for following too closely. (Record at 5-8, 66.)

3. During his representation of Harrison, Graff failed to maintain communication with her and failed to forward to Harrison discovery requests from the Defendants/Appellees (hereinafter, "Thurston"). Among other things, Harrison attempted to contact Mr. Graff 147 times as confirmed by her cell phone records, the majority of which Graff failed to respond to. It was virtually impossible for Harrison to find out the status of her case from Graff's office. (Record at 218 – 219.)

4. On January 9, 2008, the District Court imposed sanctions on Graff/Harrison for failure to cooperate in discovery. The sanction consisted of attorney fees to Thurston for having to take the matter before the Court. (Record at 100 – 104.)

5. Thurston sought additional discovery from Graff in a "Supplemental Request for Production of Documents" on April 24, 2008. Graff never forwarded that request to Harrison, nor was Harrison verbally or in any written form asked to respond to that request for production of documents. Neither did Graff's office forward correspondence from Thurston requesting medical bills or otherwise make Harrison aware of the fact that Thurston was requesting the medical bills relative to her letter of August 14, 2008. (Record at 217 – 218.)

6. Likewise, Graff failed to make expert witness disclosures within the deadlines set by the Case Management Plan. (Record at 214 – 215.)

7. There is no indication in Graff's file that he ever made an attempt to contact Harrison relative to obtaining her medical bills, or requesting that she do anything as it relates to obtaining an expert witness. In fact, it does not appear as though Mr. Graff's office ever requested medical bills from any of Harrison's health care providers. (Record at 215.)

8. On June 9, 2009, Matthew T. Graff was suspended by Judge Faust from the practice of law for conversion of client funds. Judge Faust also found that no one at Graff's office was capable of taking over the files at Graff's law firm, and they would need to be assigned to a trustee. (Record at 183 – 184, 190 – 192.)

9. On June 16, 2009, Mr. Timothy Anderson, who had been designated as the trustee of Mr. Graff's files, sent correspondence to the Fifth District Court indicating that Mr. Graff had approximately 500 active files, and the trustee was attempting to get those files out to the various clients by June 30, 2009. (Record at 186 – 187, 194 – 195.)

10. On June 29, 2009, Thurston filed a Motion to Dismiss Harrison's case and served it on Graff's closed office in St. George, Utah. (Record at 164.)

11. At no time did Thurston file a Notice to Appear or Appoint Counsel as required by Utah Rule of Civil Procedure 74 prior to seeking the dismissal. (Record at 188, see Court Record generally.)

12. Harrison received notice from the trustee that the trustee was attempting to get files to Graff's former clients, and there was difficulty obtaining her files. The files were originally thought to have been in the St. George office, where the case had been filed. However, further examination found that the files were in Mr. Graff's office in Cedar City. (Record at 187.)

13. After receiving her files from the trustee, Harrison traveled to Salt Lake City to meet with Mr. Daniel Hindert at Parsons, Behle & Latimer. Mr. Hindert retained the file, and unfortunately, later indicated to Harrison that he would not be able to represent her in this matter. (Record at 187.)

14. Then, Harrison contacted Mr. Thomas Bayles in St. George about representation. Mr. Bayles indicated he would not be able to represent her. He did,

however, agree to represent Harrison in a separate matter where Graff had been her attorney. (Record at 187.)

15. On September 1, 2009, Mr. Prisbrey was first contacted by Harrison in this matter. On that date, Prisbrey contacted Mr. Patrick Burt, Counsel for Thurston. Prisbrey also contacted Mr. Daniel W. Hindert. Mr. Hindert was not able to send the file immediately, as it was too large. Prisbrey also received excerpts of the file via facsimile from Thomas J. Bayles. As a result of those conversations and from reviewing the limited information, Prisbrey determined as follows:

a. Counsel for Thurston was aware of the fact that Graff was suspended from the practice of law. Rather than file a Rule 74 Notice to Appear or Appoint Counsel, Thurston instead filed a Motion to Dismiss the above referenced case on June 29, 2009.

b. Irrespective of the fact Graff was suspended from the practice of law and the other attorneys in Graff's office, including Mark Graff, had been removed from the cases at the Graff law firm, Thurston served the Motion to Dismiss on Mr. Graff's office in St. George, which had been closed by order of Judge Faust.

c. In spite of the fact that pursuant to Rule 74, these proceedings must be stayed and the motion was sent to Graff's office, which was shut down, counsel for Thurston refused Prisbrey's request to set aside the default which was obtained. (Record at 187 – 188.)

16. On or about September 3, 2009, Aaron J. Prisbrey entered a Limited Entry of Appearance for the purpose of obtaining relief from the Default Judgment and filed a Motion to Set Aside Default Judgment and Request for Hearing and supporting

memorandum based on the fact that Thurston failed to comply with Rule 74 before seeking court action after Graff's suspension from the practice of law. (Record at 179 – 181.)

17. In support of Harrison's Rule 60(b) Motion, Harrison included evidence in the form of documents and sworn statements. (Record at 181 – 195, 214 – 284.)

18. On or about September 17, 2009, Thurston filed a memorandum opposing Harrison's Rule 60(b) Motion. Thurston essentially reargued the points that she had made in her Motion to Dismiss concerning the failure of Graff/Harrison to comply with the Case Management Plan and cooperate in discovery. (Record at 196 – 210.)

19. Although Thurston repeatedly attributed the failings of Matt Graff to Harrison personally, Thurston did not present a single piece of evidence that would support that allegation. (Record at 196 – 210.)

20. Thurston did not offer a single piece of evidence indicating how or when it became aware that Matt Graff had been suspended, that Mark Graff had also been removed from Harrison's case, and that Harrison's file had been turned over to a trustee. Instead, Thurston made the unsupported allegation that Thurston was unaware that the Graff law offices had been shut down more than two weeks before she filed her Motion to Dismiss and mailed it to that address. (Record at 196 – 210.)

21. Finally, Thurston did not offer a single piece of credible evidence that would support its allegation that simply mailing the Motion to Dismiss to Mark Graff, who had not been disbarred, at the Graff law offices was improper in light of the circumstances that

every attorney at the Graff law offices had been removed from representing Harrison as that office was now under lock and key of the trustee. (Record at 196 – 210.)

22. The matter was set for a one hour hearing on March 4, 2010, in the new Fifth District Courthouse in courtroom 2A. (Record at 287 – 288.)

23. On March 4, 2010, at 11:00 a.m., Harrison and her attorney, Mr. Prisbrey, met to prepare for the Hearing set for 2:00 p.m. later that date. (Record at 302, 306.)

24. At approximately 10 minutes to 2:00 p.m. on the date of the Hearing, Harrison and Prisbrey entered the Fifth District Courthouse. Harrison had difficulty getting through the metal detector and after setting off the alarm on the detector on several occasions and removing several items from her person, Harrison was allowed access into the courthouse. Prisbrey was behind Harrison and was requested to wait for her. (Record at 302, 306.)

25. Harrison had been informed by the bailiff that the only court going on in the courthouse was in room 3B, and she informed Prisbrey of the same. (Record at 302, 306 – 307.)

26. This was Prisbrey's first hearing in the courthouse since it had moved in early 2010, and Prisbrey saw no dockets or information in the courthouse as to which judges were in any of the courtrooms. (Record at 302.)

27. Prisbrey, carrying a banker's box and a briefcase, took the elevator to the third floor and went with Harrison into Judge Walton's court in 3B, which was in session and appeared to be a criminal docket. (Record at 302 – 303, 307.)

28. Prisbrey left his briefcase and the banker's box on the third floor and went to the first floor to find out from the clerk where Judge Ludlow was actually holding court. Prisbrey was informed that Judge Ludlow's court was always held on the second floor in courtroom 2A. (Record at 302 – 303, 307.)

29. Prisbrey returned to the third floor to collect the banker's box and his briefcase and informed Harrison that court was on the second floor, on the west side of the building, in courtroom 2A. (Record at 303, 307.)

30. Prisbrey and Harrison went to the second floor and entered courtroom 2A at the exact time that Mr. Patrick C. Burt, attorney for Defendant, was walking out. The time, according to Harrison's cell phone was 2:03 p.m. (Record at 303, 307.)

31. At Prisbrey's request, Burt went back into the courtroom. Unbeknownst to Prisbrey at 2:02:13 p.m., Judge Ludlow had gone on the record and some 55 seconds later at 2:03:08 p.m. had ruled against Harrison on her Rule 60(b) Motion, leaving the order of dismissal in place against her pursuant to Burt's request. (Record at 291, 303.)

32. As Burt, Prisbrey and Harrison reentered the courtroom, there were two clerks still present. Prisbrey asked the clerks to notify Judge Ludlow that he and his client were present in the courtroom. The clerks indicated they did not have a telephone number available for Judge Ludlow and that he had left the premises. It did not appear as though the clerks made any attempt to verbally notify Judge Ludlow of Prisbrey' and Harrison's presence in the courtroom. (Record at 303, 307 – 308.)

33. Prisbrey and Harrison remained at the courthouse for approximately 45 minutes in an attempt to work with the clerks to notify Judge Ludlow of what had transpired. Apparently, Judge Ludlow was never notified that Prisbrey and Harrison had appeared in court within seconds of him leaving the bench. (Record at 304, 307 – 308.)

34. The minute entry reflects that no action was being taken against Harrison or her attorney for failure to appear at 2:00 p.m. on March 4, 2010, but rather the Court was simply ruling against Harrison consistent with the prior order of dismissal. (Record at 291.) It is from the district court's order dismissing Harrison's case with prejudice from which Appellee appeals.

SUMMARY OF ARGUMENTS

In filing her Motion for Rule 60(b) relief, Harrison presented evidence to Judge Ludlow demonstrating that she was never made aware of the negligent actions of Matthew Graff. This evidence is not contradicted anywhere in the record. In spite of the overwhelming evidence that Harrison had no knowledge of Graff's inappropriate activities, Judge Ludlow refused to set aside the dismissal of Harrison's case. Noticeably missing from his Order of Dismissal are any findings as it relates to Harrison's lack of knowledge as to what Graff was or was not doing. This lack of findings must result in reversal of the dismissal as a matter of law. *Cheap-O-Rooter, Inc. v. Marmalade Square*

Condo. Homeowners Ass'n, 2009 UT App 329, P. 13; *Menzies v. Galetka*, 2006 UT 81. Neither is it proper for the Court to deny a motion on anything other than the merits. *U.R.Civ.P.* 7. To the extent the district court denied Harrison's Rule 60(b) Motion as a sanction for her tardiness at the hearing, Harrison respectfully submits this is not grounded in law or supported by the evidence. The district court has not considered the evidence on the record, made appropriate findings of fact or otherwise supported its denial of Harrison's Rule 60(b) Motion.

In addition to his refusal to consider the actual facts presented to him and enter appropriate findings, Judge Ludlow has refused to even consider *U.R.Civ.P. 74(c)*. Here, when Graff was suspended from the practice of law for stealing money from his clients, a trustee was appointed and over 500 of his files were placed in the possession of the trustee. The trustee had requested that no action be taken on these files and Judge Faust entered an order accordingly. In violation of Judge Faust's Order and in direct violation of Rule 74(c) that requires a Notice to Appear or Appoint Counsel be served before any action be taken on a case, Ludlow dismissed Harrison's case. Then, when presented with this exact issue on the Rule 60(b) Motion, he has refused to even analyze the violation of Rule 74(c). The mandates of Rule 74(c) are not discretionary. The courts are required to take no action on a lawsuit until the Notice to Appear or Appoint has been served. That did not happen in this case.

ARGUMENT

A. THE DISTRICT COURT'S ORDER DISMISSING HARRISON'S CASE WITH PREJUDICE IS LEGALLY DEFICIENT AS IT LACKS ADEQUATE FACTUAL FINDINGS.

As set forth below, the district court's denial of the Harrison's Rule 60(b) Motion is deficient as a matter of law. Nowhere does the district court address the evidence before it on Harrison's motion. Neither does the district court offer any reason why it denied her motion, including whether that was intended to be punitive in nature. In any event, the district court's failures in this respect are fatal to the sustainability of its denial of Harrison's Rule 60(b) Motion and dismissal of her case.

1. The District Court Is Required to Make Factual Findings and Explain the Basis Of Its Decision On A Rule 60(b) Motion.

It is a well-settled principle that a district court must make findings of fact, based on the evidence, to support a ruling on a Rule 60(b) motion. *Cheap-O-Rooter, Inc. v. Marmalade Square Condo. Homeowners Ass'n*, 2009 UT App 329, P. 13; *Menzies v. Galetka*, 2006 UT 81, P. 55 (holding that a district court's ruling on a Rule 60(b) motion to set aside a judgment "must be based on adequate findings of fact and on the law."). In reviewing whether a district court's decision on a Rule 60(b) motion is legally sufficient,

the district court is not entitled to deference. *Cheap-O-Rooter* at P. 7; *Menzies v. Galetka*, 2006 UT 81, P. 55 ("a district court's ruling on a motion to set aside a default judgment must be based on adequate findings of fact and on the law.")(internal citations and quotation marks omitted).

In *Cheap-O-Rooter*, this Court reversed a district court's reinstatement of a plaintiff's case on a Rule 60(b) motion and remanded it back for an order that showed the district court appropriately considered and weighed the evidence. This Court held that the district court's ruling was deficient as a matter of law because it "provided no findings of fact and did not state the basis for its ruling." *Id.* at P. 13. This Court further expressed concern about the district court's willingness to grant the plaintiff's Rule 60(b) motion where the plaintiff did not provide any evidence in support of the motion. Consequently, when this Court remanded the case back to the district court, it instructed the district court to "consider and address the inadequacies in Cheap-O-Rooter's motion." *Id.* at P. 14.

The district court's ruling in this case suffers from the same defect. Although Harrison briefed the basis for her Rule 60(b) motion and supported it with evidence, the district court denied her motion out of hand in a minute entry after holding a 55 second hearing. There is simply nothing on the record to indicate what evidence the district court relied on or the legal basis for its denial of Harrison's Rule 60(b) motion. As a practical matter, it is impossible for this Court to meaningfully review a district court decision that is devoid of findings of fact and conclusions of law. Harrison respectfully submits that on this basis alone, Judge Ludlow's Order must be set aside.

Moreover, the district court's findings of fact must be based on the evidence relevant to a Rule 60(b) motion. *Menzies v. Galetka*, 2006 UT 81 (reversing a district court's denial of a Rule 60(b) motion to reinstate a case where it ignored the substantial amount of evidence on the record that supported the motion.) As it relates to the district court's duty to make factual findings and supply a basis for its ruling on a Rule 60(b) motion, *Menzies* is likewise clear that the district court is not at liberty to ignore the evidence before it, but must address all of the evidence relevant to a Rule 60(b) motion and adjudicate the issues based upon the evidentiary record and the rule of law. *Id.*

Turning to the facts of this case, Harrison's Rule 60(b) Motion provided the district court with evidence to consider in support of the motion. Harrison's Rule 60(b) "Motion to Set Aside Default Judgment" was filed after the district court dismissed Harrison's case on a Motion that was filed while she was unrepresented. That Motion to Dismiss cited a litany of grievances against Harrison concerning the manner in which she had conducted her case. This included citation to prior sanctions imposed on Harrison for failure to timely respond to discovery. In addition, Thurston pointed out that she had likewise failed to answer Thurston's "Supplemental Request for Production of Documents," provide medical bills as requested via correspondence, or make expert witness disclosures. Thurston served this Motion to Dismiss on Mark Graff at the Graff law offices and filed a Notice to Submit for Decision on August 7, 2009 and the district court granted the motion on August 13, 2009, dismissing Harrison's case with prejudice.

In the context of this dismissal, Harrison filed her Rule 60(b) motion which she supported with affidavits attesting to the fact that she was unaware that her case had been dismissed until after the fact and that she had little knowledge of the status of her case during Graff's representation despite her efforts to maintain contact with Graff's office and stay informed as to the status of her case. Harrison submitted her phone records to show that she had contacted Graff's office more than 140 times between October, 2007 and June, 2009. Harrison also submitted sworn testimony that Graff's office never sent her defendants' "Supplemental Request for Production of Documents." Neither did Graff's office forward to Harrison the correspondence sent by defendants requesting copies of her medical bills. Similarly, Prisbrey's review of the file, which was offered by way of affidavit, showed that there were no indications in the file itself that Graff ever attempted to contact Harrison about collecting her medical bills.

With respect to the status of Harrison's representation by the Graff law firm, Prisbrey's affidavit included the Order of Judge Faust directing Graff's files to be turned over to a trustee as well as the trustee's June 16, 2009 letter to the Fifth District Court indicating that he was distributing the 500 active files from Graff's office as quickly as he could. Prisbrey's affidavit also shows that the trustee was in contact with Harrison and that she was among Graff's clients whose file had been turned over to him for distribution. Prisbrey's affidavit sets forth the manner in which Harrison methodically attempted to obtain other counsel to represent her in this case once she received her file from the trustee. Finally, Prisbrey pointed out that as a matter of record, Thurston did not serve Harrison

with a Notice to Appear or Appoint Counsel before moving forward with her Motion to Dismiss.

In contrast, while defendants provided evidence of Graff's failure to respond to discovery requests in particular and his general failure to move the case forward, they offered no evidence in their Opposition to the Rule 60(b) Motion that would suggest Harrison was in any way complicit in Graff's inaction on her case. To the contrary, all of the evidence on the record that is relevant to the Rule 60(b) Motion indicates that Harrison had no personal knowledge that Graff had failed to respond to discovery requests or make expert witness disclosures.

Thurston then made the conspicuously unsupported allegation that Thurston had no knowledge of Matt Graff's suspension in the weeks before she filed her Motion to Dismiss. She went on to argue that Matt Graff's suspension was irrelevant because Mark Graff was her attorney and Mark Graff had not been disbarred. Thurston made no attempt to explain how Harrison's case was exempted from Judge Faust's Order removing both Graffs from handling the cases at the Graff law offices.

As a practical matter, Thurston at some point become aware of the fact that Matt Graff had been disbarred and that Mark Graff had effectively been removed as Harrison's attorneys pursuant to Judge Faust's Order. If that was at any time before or during the pendency of her Motion to Dismiss, her attorneys had an affirmative obligation as officers of the court to rectify the situation and comply with Rule 74 to ensure notice to Harrison of the Motion rather than obtain a stealthy dismissal. Although the Graffs may have been

less than diligent in making disclosures during discovery, the record in this case shows that they always responded to motions. That no one responded to Thurston's motion seeking final disposition of the case should have at least given Thurston pause.

With this posture of Harrison's Rule 60(b) Motion, Harrison respectfully submits that there was substantial evidence in support of her motion that merited the court's consideration. Not only did the district court fail to set forth the factual and legal basis for its denial of Harrison's Rule 60(b) Motion, but the evidence on the record is plainly contrary to the district court's decision. As such, Harrison respectfully requests that the denial of her Rule 60(b) Motion be reversed and her lawsuit be reinstated.

2. To the Extent the District Court's Denial of Harrison's Rule 60(b) Motion Was Punitive, Such A Sanction Was Improper.

In addition, there is some question as to whether the district court's denial of Harrison's Rule 60(b) Motion was in the nature of a sanction against Harrison. As set forth in the Statement of Facts above, Harrison and her attorney were tardy in appearing at the scheduled Rule 60(b) Motion hearing. Although the hearing was scheduled to last one hour, the judge concluded the hearing in 55 seconds when he saw that Harrison was not present. In that time, which he denied Harrison's Motion and dismissed the case with prejudice – all in Harrison's absence. Not only that, but the judge apparently left the courthouse immediately thereafter. Harrison reached the courtroom within minutes of the

judge's dismissal of her case yet his clerks professed that he was out of the building and that they could not reach him. Moreover, the district court's June 4, 2010 "Order Denying 'Plaintiff's Second Motion to Set Aside Order of Dismissal'" makes it relatively clear that Harrison's Motion was in fact denied because Harrison was not in the courtroom at the appointed time.

This was a hearing pursuant to Rule 7 of the Utah Rules of Civil Procedure. Under that Rule, hearings on motions are discretionary. *U.R.Civ.P. 7(e).* There is nothing in Rule 7 that permits a court to deny a motion without considering the merits. And there is precedent for the proposition that Utah courts must still reach decisions on the merits of an argument and not on whether counsel appears at the hearing or not. In *Kilpatrick v. Bullough Abatement, Inc.*, the attorney representing the appellant failed to appear for oral argument at the Utah Supreme Court. Notwithstanding, the court ruled in favor of the appellant on the merits of the case. *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, fn. 50. Harrison respectfully submits that the district court in this case was under the same obligation to rule on the merits of her Rule 60(b) Motion whether she had appeared at the motion hearing or not.

Finally, to the extent that the district court's denial of her Rule 60(b) Motion was punitive in nature, Harrison respectfully submits that the court's ruling is not proper. Dismissal of a case is the harshest sanction allowed under *U.R.Civ.P. 37.* Courts are not permitted to take such punitive action without evidence to support it. Killpatrick; *see also U.R.Civ.P. 37(b)(2)*(permitting a court to impose sanctions "unless the court finds that the

failure was substantially justified.") In any event, the district court's denial of Harrison's Rule 60(b) Motion is devoid of any explanation, including any basis for punitive action by the court. As such, the district court's denial of her Rule 60(b) Motion and subsequent dismissal of her case should be reversed.

B. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO EVEN CONSIDER THE FACT THURSTON NEVER SERVED A NOTICE TO APPEAR OR APPOINT.

With respect to the substance of Harrison's Rule 60(b) Motion, Harrison respectfully submits that the district court abused its discretion when it denied her Motion to reinstate her case where there were reasonable justifications for Harrison's failures in responding to Thurston's Motion to Dismiss. *Menzies v. Galetka,* 2006 UT 81, p. 54 ("It is an abuse of discretion for a district court to deny a 60(b) motion to set aside a default judgment if there is a reasonable justification for the moving party's failure and the party requested 60(b) relief in a timely fashion.")(internal citation omitted).

The basis of Harrison's Rule 60(b) Motion is that she had no notice of Thurston's Motion to Dismiss as her attorney had been removed from the case by the time the Motion was filed. Harrison argued that no action on her case should have been taken until Thurston filed a Notice to Appear or Appoint Counsel as required by Rule 74. Moreover, as set forth above, Harrison supported her Rule 60(b) Motion with evidence, including

affidavits, which presented grounds to set aside the dismissal for both excusable neglect and for other reasons justifying relief from the dismissal under Rule 60(b)(1) and (6).

The bottom line is that neither Thurston nor the district court should have allowed Thurston's Motion to Dismiss to go forward without first complying with *U.R.Civ.P. 74.* The provisions for Rule 74 are clear that **"[n]o further proceedings shall be held** in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court." *U.R.Civ.P. 74(c).*(Emphasis added.)

Even if Thurston truly did not know that the Graffs had been removed from the case, the district court had independent notice of that fact. Graff had over 500 active files in his Southern Utah practice. Judge Ludlow had been notified of Judge Faust's Order suspending Matt Graff from the practice of law, finding that no one in Graff's office was capable of handling the files, and turning the files in the Graff law offices over to a trustee for distribution. Matthew Graff's suspension was front page news in Southern Utah and indeed throughout Utah.

Furthermore, the Fifth District Court judges received correspondence from Timothy Anderson, the trustee, acknowledging that they were attempting to distribute those files by June 30, 2009. At the very least, the district court should have questioned whether Harrison had been provided notice of the June 29, 2009 Motion to Dismiss. Rule 74 does not only apply to attorneys, but to the court as well. Here, Judge Ludlow was required to comply with and enforce the provisions of Rule 74. He did not.

Under these circumstances, Harrison respectfully submits that it is not sufficient for the district court to skirt around Matt Graff's disbarment by setting up Mark Graff as a straw man. Nor is it proper for the district court to ignore the evidence submitted by Harrison concerning her efforts to stay informed on the status of her case. *Menzies* at P.107 (holding that it is clear error to attribute negligent conduct of a client's attorney to the client himself where the evidence shows that the client was unaware of the status of the case despite efforts to maintain contact with attorney.) Neither is it proper for the district court to accept as true Thurston's unsupported allegations attributing negligence to Harrison and lack of knowledge that Harrison was unrepresented during the pendency of the Motion to Dismiss. On the substance of Harrison's Rule 60(b) Motion, the district court's denial out of hand constituted an abuse of discretion. Harrison requests that this matter be remanded back to the district court with instructions to grant Harrison's Rule 60(b) Motion.

CONCLUSION

For the reasons set forth above, Harrison respectfully requests that the District Court's denial of her Rule 60(b) Motion be reversed and remanded with instructions that the District Court grant Harrison's Motion.

DATED this _____ day of November, 2010.

Aaron J. Prisbrey
Elizabeth B. Grimshaw
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of November, 2010, a copy of the foregoing APPELLANT'S BRIEF was mailed, postage prepaid, as follows:

Utah Court of Appeals (1 original)
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ADDENDUM