

2015

**Thomas L. Norton, Plaintiff/ Appellant, vs. Autumn M. Hess,
Defendant/ Appellee.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THOMAS L. NORTON, :

Plaintiff/Appellant, :

vs. :

AUTUMN M. HESS, :

Defendant/Appellee. :

Appellate Case No. 20150289 - CA

BRIEF OF APPELLANT

Appeal from Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice, entered March 9, 2015, in the Second District Court for Weber County, State of Utah, by Honorable Joseph Bean.

KELLY G. CARDON, UBN 0570
3856 Washington Blvd.
Ogden, Utah 84403

Counsel for Plaintiff/Appellant

H. Justin Hitt, UBN 8762
Peterson & Associates
230 South 500 East, Suite 400
Salt Lake City, UT 84102

Counsel for Defendant/Appellee

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UTAH APPELLATE COURTS
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Ogden, Utah 84403

Counsel for Plaintiff/Appellant

H. Justin Hitt, UBN 8762
Peterson & Associates
230 South 500 East, Suite 400
Salt Lake City, UT 84102

Counsel for Defendant/Appellee

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IN THE UTAH COURT OF APPEALS

THOMAS L. NORTON,	:	
Plaintiff/Appellant,	:	
vs.	:	
AUTUMN M. HESS,	:	
Defendant/Appellee.	:	Appellate Case No. 20150289 - CA

INTRODUCTION

The record in this case supports Appellant's claim that his case was erroneously dismissed, with prejudice, when the trial court considered the Order Granting Motion for Relief from Order Pursuant to Rule 60(b), as commencement of a new action, under §78B-2-111, the Savings Statute. Said Dismissal caused irreparable harm to Appellant and is a reversible error. It is appropriate for this court to reverse and remand to the Second District Court.

JURISDICTIONAL STATEMENT

This is an appeal from Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice, entered March 9, 2015, in the Second District Court for Weber County, State of Utah, by Honorable Joseph Bean. R.0159 (Addendum "A"). A copy of the Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice is attached as Addendum "A". Appellant filed a timely Notice of Appeal. R.0167. This Court has jurisdiction pursuant to Utah Code Ann. §78A-3-102(4).

STATEMENT OF ISSUES, STANDARD OF REVIEW, PRESERVATION

Issue I: Whether the trial court committed reversible error in applying Rule 60(b) to the provisions of §78B-2-111, Utah Code Ann., the Savings Statute, and reciprocally, applying the savings statute to Rule 60(b), ultimately considering the Order Granting Plaintiff's Motion for Relief from Order Pursuant to Rule 60(b), as commencement of a new action, under §78B-2-111, the Savings Statute, as evidenced by the following erroneous Conclusions of Law:

a. The trial court's Conclusion of Law No. 7, concluding that Utah R.Civ.P. 60(b) is not intended to allow a Plaintiff additional time to resuscitate an action beyond that time allowed by the applicable statute of limitation and the one year allowed by Utah's Savings Statute.

b. The trial court's Conclusion of Law No. 9, concluding that Utah Code Ann. §78B-2-111 did not intend Utah R.Civ.P. 60(b) to add additional time onto a savings statute when there has already been one that was granted and the statute specifically limits the extension of time to one opportunity

c. The trial court's Conclusion of Law No. 10, concluding that Utah Code Ann. §78B-2-111 did not intend or was not passed with the intent that Utah R.Civ.P. 60(b) would be able to circumvent the limitations put specifically in that statute.

Standard of review: A trial court's determination of law is reviewed for correctness. See *State v. Pena*, 869 P.2d 932 (1994). A trial court's error is reversible if it

was substantial and prejudicial. See *Olson v. Olson*, 226 P.3d 751 (Utah 2010); Absent the trial court's errors, there would have been a different result to Plaintiff. See *Morra v. Grand County*, 230 P.3d 1022.

Preservation: Plaintiff preserved the foregoing issues in Plaintiff's Memorandum in Opposition to Defendant's Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss, R.0042, pg. 6, para. 1-4; Defendant's Reply Memorandum, R.0066, pg 2, Argument I, pg. 4, Argument III; Oral arguments held on Motion to Dismiss October 9, 2014, Transcript, pg. 9, lines 20-25; pg. 10, line 1; pg. 12, lines 23-25; pg. 13, lines 1-2; pg. 17, lines 7-24; Plaintiff's Objections to Defendant's Proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice, R.0102, pg. 4, Conclusion 7; Defendant's Response to Plaintiff's Objections, R. 0107, pg. 3, para 8; Plaintiff's Reply to Defendant's Response to Plaintiff's Objections, R. 0112, pg. 3, para. 7 and Conclusion; Oral arguments held on Plaintiff's Objections held December 18, 2014, Transcript, pg. 17, lines 14-25, pg. 18, lines 1-8, pg. 18, lines 20-25, pg. 19, lines 1-18, pg. 20, lines 1-12, R.0197; Plaintiff filed a Motion for Extension to File Objections to Defendant's Second Proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice pending receipt of hearing transcripts, R.0117; Order Granting said Motion was declined on January 26, 2015, R.0137.

Issue II: The trial court erred in finding Plaintiff's Motion for Relief from Order Pursuant to Rule 60(b), filed April 18, 2014, sought relief from the judgment pursuant to

Utah R. Civ.P. 60(b)(1) and 60(b)(6), when Plaintiff's Motion was specifically brought pursuant to Utah R. Civ.P. 60(b)(6).

Standard of Review: A factual finding is deemed clearly erroneous if it is against the clear weight of the evidence. See *Gilmore v. Family Link, LLC*, 224 P.3d 741 (Utah App. 2010).

Issue III: The trial court erred in concluding, based upon the foregoing erroneous finding, Plaintiff's Motion for Relief from Order Pursuant to Utah R.Civ.P. 60(b)(6), which was previously ruled upon, was improperly granted, because the motion was brought pursuant to Rule 60(b)(1) and not timely filed within ninety days of the entry of the April 18, 2013 Order of Dismissal and therefore, not properly presented to the trial Court at that time. Said ruling was erroneous.

Standard of Review: A trial court's determination of law is reviewed for correctness. See *State v. Pena*, 869 P.2d 932 (1994).

Preservation: Plaintiff preserved the foregoing issues in his Motion for Relief specifically brought pursuant to Rule 60(b)(6). R.0011; Presented oral arguments at the hearing on Defendant's Motion to Dismiss, Transcript of Hearing of October 9, 2014, R.0178, pg. 16, lines 10-16; pg. 17, lines 7-18. See Plaintiff's Objections to Defendant's Proposed Findings of Fact, Conclusion of Law and Order of Dismissal with Prejudice, R.0102, pg. 3. See also Defendant's Response to Plaintiff's Objections, R.0107, pg. 3, para. 1, and Plaintiff's Reply to Defendant's Response, R.0112, pg. 2, para. 4. Plaintiff

further argued objections at oral arguments on Plaintiff's Objections, held December 18, 2014. See Transcript of Hearing of December 18, 2014, R.0197, pg. 15, lines 7-25, pg. 16, lines 1-10. Plaintiff filed a Motion for Extension to File Objections to Defendant's Second Proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice pending receipt of the formal hearing transcripts, R.0117; Order Granting said Motion was declined on January 26, 2015, R.0137.

STATUTORY PROVISIONS

Utah Code Ann. §78B-2-111

RULES OF CIVIL PROCEDURE

Rule 3, Utah R.Civ.P. and Rule 60(b)(6), Utah R.Civ.P.

STATEMENT OF THE NATURE OF THE CASE

On November 21, 2012, Plaintiff filed his Complaint, pursuant to §78B-2-111, the savings statute, R.001; on March 25, 2013, Plaintiff filed a Motion to Extend Time for Service, R.006. The trial court did not rule on the Motion to Extend Time for Service, and filed an Order of Dismissal, without prejudice, on April 23, 2013, R.0010. On April 18, 2014, Plaintiff filed a Motion for Relief from Order Pursuant to Rule 60(b)(6), R.011 and on April 28, 2014, the trial Court granted Plaintiff's Motion for Relief from Order Pursuant to Rule 60(b)(6), including a brief extension to effectuate service, R.0016. Defendant was personally served the Summons and Complaint on May 8, 2014, R.0017.

Defendant thereafter filed her Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to

Dismiss and supporting Memorandum on May 22, 2014, R.0019-0022 citing Plaintiff's claims were barred by the four year statute of limitation per §78B-2-111, Utah Code Ann., the savings statute, and for lack of subject matter jurisdiction, asserting Plaintiff's Motion for Relief from Dismissal is the "Legal Equivalent of a New Action", See Defendant's Reply Memorandum to Plaintiff's Opposition to Motion to Dismiss, R.0066. The trial Court ruled from the bench, following oral arguments on October 9, 2014, and dismissed Plaintiff's action, with prejudice. Following Plaintiff's filing of Objections to Defendant's first Proposed Findings of Fact, Conclusions of Law and Order of Dismissal, R.0102; completion of briefing and oral arguments on Plaintiff's Objections, and the Court's declining Plaintiff's Motion for Extension to file Objections to Defendant's Second Proposed Findings of Fact, Conclusions of Law and Order of Dismissal, with Prejudice, pending receipt of the formal hearing transcripts, the second proposed Findings, Conclusion and Order of Dismissal with Prejudice was entered March 9, 2015, R.159, from which this appeal is taken.

STATEMENT OF FACTS

(1) Plaintiff's claims against Defendant arise out of an automobile accident that occurred on December 6, 2006.

(2) Plaintiff filed a Complaint against Defendant in the Second District Court on December 3, 2010. The case was assigned to Judge Mark R. DeCaria, Case Number 100909529, and was timely filed within the 4 year statute of limitation. See the docket as

Exhibit 1 to Defendant's Memorandum of Points and Authorities in Support of
Defendant's Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss. R.0022

(3) On April 4, 2011, Plaintiff filed a Motion to extend time for service of the
Summons and Complaint upon Defendant. The Court granted Plaintiff an additional 120
days to serve Defendant. See docket as Exhibit 1 to Defendant's Memorandum in Support
of Motion to Dismiss. R.0022

(4) On November 22, 2011, the trial Court dismissed Plaintiff's Complaint,
without prejudice, pursuant to Utah R.Civ.P. Rule 4, for failure to serve Defendant
within the additional 120 days. See docket as Exhibit 1 to Defendant's Memorandum in
Support of Motion to Dismiss. R.0022

(5) Plaintiff timely re-filed his Complaint on November 21, 2012, in the Second
District Court, pursuant to §78-22-111, U.C.A., the savings statute. The case was
assigned to Judge Michael D. Lyon. Case Number 120907652. R.0001

~~(6) Plaintiff had been unable to locate Defendant for service, and on March 25,~~
2013. Plaintiff filed a Motion to extend time for service of the Summons and Complaint,
Case Number 120907652. Judge Lyon did not rule on Plaintiff's Motion. R.0006

(7) On April 23, 2013, Judge Lyon dismissed, without prejudice, Plaintiff's
Complaint for failure to timely serve Defendant. Case Number 120907652. R.0010

(8) On April 18, 2014, Plaintiff filed a Motion for Relief from Order Pursuant
to Utah R.Civ.P. Rule 60(b)(6), as to Judge Lyon's Order of Dismissal, without

prejudice, of April 23, 2013, Case Number 120907652. R.0011

(9) On April 28, 2014, the Court entered an Order Granting Plaintiff's Motion for Relief from Order Pursuant to Utah R.Civ.P. Rule 60(b), relieving the April 23, 2013 Order of Dismissal, without prejudice, and granted an extension of 20 days to serve Defendant the Summons and Complaint, Case Number 120907652. R.0016

(10) On May 8, 2014, the Summons and Complaint was personally served upon Defendant Autumn Hess, Case Number 120907652. R.0017

(11) Plaintiff commenced a new action, only once, in compliance with §78B-2-111, Utah Code Ann., Case Number 120907652. Plaintiff filed no other Complaints against Defendant, in violation of §78B-2-111(2). See Utah Courts Xchange search for personal injury actions filed by Plaintiff statewide; and search for personal for personal injury actions filed against Defendant statewide as Exhibit 3 to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, R.0042, and attached as Addendum "B".

(12) On May 25, 2014, Defendant filed Defendant's Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss and Memorandum in support, specifically on the basis the Court lacked subject matter jurisdiction because Plaintiff's claims were barred by the four year statute of limitation applicable to general negligence claims. R.0019-0022

(13) On June 25, 2014, Plaintiff filed a Memorandum in Opposition to Defendant's Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss. R.0042

(14) On July 3, 2014, Defendant filed a Reply Memorandum in Support of

Defendant's Motion to Dismiss. R.0066

(15) On July 9, 2014, the Court set oral argument for Defendant's Motion to Dismiss. R.0075-0077

(16) On October 9, 2014, oral arguments were heard before Judge Bean, on Defendant's Motion to Dismiss. R.0178

(17) On October 9, 2014, Defendant electronically submitted to Plaintiff, pursuant to Utah R.Civ.P. 7(f)(2), proposed Findings of Facts, Conclusions of Law and Order of Dismissal with Prejudice. See Plaintiff's first Objection to Proposed Findings of Facts, Conclusions of Law and Order of Dismissal with Prejudice and Motion for Extension to File Objections. R.0079

(18) On October 10, 2014, Plaintiff requested an audio tape of the oral arguments on Defendant's Motion to Dismiss. See Plaintiff's first Objection. R.0079

(19) On October 16, 2014, Defendant filed with the Court, the first proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice. R.0082

(20) On October 16, 2014, Plaintiff filed Objections to the Proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice, and a Motion to Extend Time to File Objections pending receipt of the audio tape of oral arguments. R.0079

(21) On October 29, 2014, a telephone conference was held, at the Court's request, to address Plaintiff's objections to the Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice, at which time the Court granted Plaintiff's Motion for

Extension of Time, set dates for briefing Plaintiff's Objections, and set oral arguments for December 18, 2014. R.0101

(22) On November 7, 2014, Plaintiff filed his Objections to Defendant's Proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice after reviewing the audio tape of oral arguments. R.0102

(23) On November 13, 2014, Defendant filed a Response to Plaintiff's Objections. R.0107

(24) On November 21, 2014, Plaintiff filed a Reply to Defendant's Response to Plaintiff's Objections. R.0112

(25) On December 18, 2014, oral arguments were held on Plaintiff's Objections to the proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice. R.0016

(26) On December 18, 2014, Defendant electronically submitted to Plaintiff, pursuant to Utah R.Civ.P. 7(f)(2), the second proposed Findings of Facts, Conclusions of Law and Order of Dismissal with Prejudice. See Certificate of Compliance attached to second proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice. R.0122

(27) On December 26, 2015, Plaintiff filed a Motion for Extension to File Objections to the second proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice, requesting the trial court grant an extension of 7 days from the

date of receipt of the hearing transcripts. R.0117

(28) On December 29, 2014, Defendant filed with the Court, the second proposed Findings of Facts, Conclusions of Law and Order of Dismissal with Prejudice. R.0122

(29) On January 26, 2015, the Court denied Plaintiff's Motion for Extension to File Objections to Second Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice. R.0137

(30) On February 18, 2015, transcripts for oral arguments were filed with the Court on Defendant's Motion to Dismiss held October 9, 2014, and oral arguments on Plaintiff's Objections to proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice held December 18, 2014. R.0178-0197

(31) On March 5, 2015, Defendant filed with the court, the second proposed Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice, approved as to form. R.0153

(32) On March 9, 2015, the Court entered the second Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice, as the final Order, from which Plaintiff appeals. R.0159

(33) On April 8, 2015, Plaintiff filed his Notice of Appeal. R.0167

SUMMARY OF ARGUMENTS

Relief from an Order of Dismissal does not constitute commencement of a new action and Plaintiff's action should not have been dismissed, with prejudice, on the basis that Plaintiff's Relief from the Order of Dismissal, without prejudice, constituted a new action under §78B-2-111, Utah Code Ann., the savings statute.

Plaintiff's Motion for Relief from Order Pursuant to Rule 60(b) Utah R.Civ.P. was brought pursuant to Rule 60(b)(6) as specifically stated in Plaintiff's Motion and not pursuant to Rule 60(b)(1).

ARGUMENT

I. RELIEF FROM AN ORDER PURSUANT TO RULE 60(b)(6), Utah R.Civ.P. DOES NOT CONSTITUTE COMMENCEMENT OF A NEW ACTION

Relief from an Order pursuant to Rule 60(b)(6) does not constitute commencement of a new action. Defendant argues the Order Granting Motion for Relief from Order Pursuant to Rule 60(b) entered April 28, 2014, relieving the Order of Dismissal, without prejudice, signed April 18, 2013, by Honorable Michael D. Lyon, and entered April 23, 2013, is "the legal equivalent of a new action". See Defendant's Reply Memorandum to Plaintiff's Motion in Opposition to Motion to Dismiss, R.0066. Order Granting Motion for Relief from Order, R.0016; Order of Dismissal, without prejudice, R.0010.

Defendant argued in Defendant's Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss that Plaintiff's claims are barred by the four year statute of limitation applicable

to general negligence claims. See Defendant's Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss, R.0019. Defendant further argued in the Memorandum in Support of Defendant's Motion to Dismiss, that Utah's savings statute, §78B-2-111, Utah Code Ann.. "bars Plaintiff's claims against Defendant as a matter of law." Defendant argued Plaintiff's Complaint should be dismissed pursuant to Utah R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction and pursuant to Utah R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. See Defendant's Memorandum of Points and Authorities in Support of Defendants Utah R.Civ.P. 12(b)(1) and 12(b)(6), R. 0022.

Defendant further argued "Plaintiff's Motion for Relief from Dismissal is the Legal Equivalent of a New Action... When Plaintiff filed his Motion for Relief from the dismissal, it substantively "revived" a stale claim and acted as the legal equivalent as a new action... Plaintiff's Motion for Relief from Order substantively operates as a new action and consequently is barred by the Savings Statute which only allows one filing under the statute." Defendant cited, "The Court in *Moffitt v. Barr* explained that the savings statute "permits a plaintiff whose action has been dismissed on non-substantive ground to file new complaint within one year of the date of dismissal, if the dismissal has occurred after the statute of limitations, for plaintiff's action has run." *Moffitt v. Barr*, 837 P.2d 572, 573 (Utah App. 1992). This combined with subsection 2 of §78B-2-111 which states, "[o]n and after December 31, 2007, a new action may be commenced only once." allows Plaintiff to commence a new action only once, which he did and resulted in

a dismissal because of his failure to time serve.”

“The statute of limitations and the savings statute combine to create an equitable balance between allowing claims and providing finality and peace of mind to potential defendants. In this case, Plaintiff has failed twice, and is now attempting to commence a third new action through the Order for Relief from his second dismissal.”

See Defendant’s Reply Memorandum to Plaintiff’s Opposition to Motion to Dismiss, R.0066.

Plaintiff opposed Defendant’s Motion to Dismiss arguing Plaintiff’s claim was not time barred by the savings statute. “The Court’s Order granting relief from the Order of Dismissal, pursuant to Rule 60(b), does not constitute commencement of a new action under §78B-2-111, Utah Code Ann.” Plaintiff further argued that “Plaintiff has met the requirements of §78B-2-111, as is clearly established by the record. The savings statute is inapplicable to the facts of this case as it relates to the Court’s Order granting relief from the Order of Dismissal pursuant to Rule 60(b), Utah R.Civ.P. Plaintiff’s filing of the initial action and commencement of this action, as a matter of law, are not time barred.” Plaintiff’s Memorandum in Opposition to Defendant’s Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss, R.0042.

§78B-2-111, Utah Code Ann., Utah’s savings statute, states as follows:

78B-2-111 Failure of action -- Right to commence new action.

(1) If any action is timely filed and the judgment for the plaintiff is reversed, or if the plaintiff fails in the action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for

commencing the action has expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may *commence a new action* within one year after the reversal or failure.

(2) On and after December 31, 2007, *a new action* may be commenced under this section only once.

§78B-2-111, Utah Code Ann. (emphasis added)

Rule 3, Utah R.Civ.P. defines commencement of an action as “(1) by filing a complaint with the court”. See Rule 3 Utah R. Civ.P., in part. as follows:

Rule 3. Commencement of Action

(a) How commenced. A civil action is commenced (1) *by filing a complaint with the court*, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4...

Rule 3, Utah R.Civ.P.

Plaintiff has filed no other Complaints with the Court against Defendant, in violation of §78B-2-111, Utah Code Ann. See Xchange Court Case Search for personal injury actions filed by Plaintiff, statewide, and a search for personal actions filed against Defendant, statewide, Exhibit 3 to Plaintiff’s Memorandum in Opposition, R.0042, and attached as Addendum “B” hereto.

As Plaintiff stated at oral arguments on Defendant’s Motion to Dismiss, held October 9, 2014, Plaintiff’s action was not a new action, there’s no record of a third action filed against Defendant. There have been only two Complaint filings with the court, and the action within which the parties were operating prior to dismissal, was the second Complaint filed with the court, the second action, as defined by the savings statute and Rule 3, Utah R.Civ.P.

The Complaint personally served upon Defendant May 8, 2014, was the Complaint filed with the Court, in the second action, pursuant to §78B-2-111, Utah Code Ann. and as defined by Rule 3 Utah R.Civ.P.

The Order granting relief is not *commencement of a new action*, as set forth in the savings statute, or as defined by Rule 3 Utah R.Civ.P. The provisions of Rule 60 Utah R.Civ.P. do not define relief from an order or judgment as a new action. See §78B-2-111(1), Utah Code Ann.; Rule 3 Utah R.Civ.P.; Rule 60 Utah R.Civ.P.

Defendant offered no viable legal basis or authority to conclude granting of relief from an order is defined as commencement of a new action. Defendant/Appellee cannot show, in the plain reading of the savings statute, a provision that would provide a result different than what is plainly stated in the statute and rules.

Plaintiff's claims were legally viable within the system until the entry of the Order of Dismissal with prejudice.

At oral arguments, Plaintiff argued finding that the Order for relief constituted a new action would re-define Rule 3, Utah R.Civ.P. An excerpt of Plaintiff's arguments for this Court's reference follows:

MR. CARDON:

20 depth, this is not a new action in any way. There's not a third
21 action. There's no record of that. There's only two actions
22 filed. This is the second action and therefore per Rule 3,
23 which requires the initiation of a new action by what we all
24 traditionally know it as, I presume also that they're asking you
25 to re-define what that rule is, that this is a new action. It's
1 not a new action.

Transcript of oral arguments held on Motion to Dismiss October 9, 2014, R.0178, pg. 9, lines 20-25; pg. 10, line 1

MR. CARDON:

23 what is before the Court today is that there's only been two
24 complaints filed on this and so this is that complaint and it is
25 legally still within the system because of the order that Judge
1 Lyon signed and also the order that Judge DeCaria signed.
2 So I would submit it based on that Your Honor.

Transcript of oral arguments held October 9, 2014, R.0178, pg. 12, lines 23-25; pg. 13, lines 1-2.

The trial court ultimately considered the Order Granting Plaintiff's Motion for Relief from Order Pursuant to Rule 60(b), as commencement of a new action, under §78B-2-111, the Savings Statute, as evidenced by the following Conclusions of Law:

a. Utah R.Civ.P. 60(b) is not intended to allow a Plaintiff additional time to resuscitate an action beyond that time allowed by the applicable statute of limitation and the one year allowed by Utah's Savings Statute.

b. Utah Code Ann. §78B-2-111 did not intend Utah R.Civ.P. 60(b) to add additional time onto a savings statute when there has already been one that was granted and the statute specifically limits the extension of time to one opportunity

c. Utah Code Ann. §78B-2-111 did not intend or was not passed with the intent that Utah R.Civ.P. 60(b) would be able to circumvent the limitations put specifically in that statute.

For this Court's reference, excerpts of the transcript of the Court's Ruling follow:

THE COURT:

7 I am granting the defendant's motion to dismiss in this
8 matter. I find that the intent of Rule 60(b) was not to add
9 additional time. Certainly under Rule 60(b)(1) it was not filed
10 within the 90 day or three month time period required under Rule
11 60(b)(1) and under Rule 60(b)(6) certainly Judge DeCaria had
12 that--you know could have taken that under consideration when he
13 granted the motion, but I am convinced that the statute, Section
14 78B-2-111, did not intend Rule 60(b) to add additional time onto
15 a savings statute especially when there's already been one that
16 was granted and the statute specifically limits the extension of
17 time to one bite at the apple. It says it's not--you can only
18 have one opportunity.

19 The deeper I've delved into this Mr. Cardon, the more
20 uncomfortable I've become and that's all I'm going to say on
21 that issue and I'm confident that definitely the Rule--sorry,
22 78B-2-111 did not intend or was not passed with the intent that
23 Rule 60(b) would be able to circumvent the limitations put
24 specifically into that statute.

Oral arguments held on Motion to Dismiss October 9, 2014, Transcript, pg. 17, lines 7-24

For this Court's reference, excerpts of the transcript regarding the Court's rulings
at oral arguments on Plaintiff's Objections to Findings of Fact, Conclusions of Law and

Order of Dismissal follow:

23 THE COURT: I said intent?

24 MR. CARDON: You said the intent of Utah Rule of Civil
25 Procedure 60(b) as it proposed to was not intended to.

1 THE COURT: Okay. Then it sounds to me like defendant's
2 version of 7 is accurate because they're using that language not
3 intended. Am I missing your argument Mr. Cardon?

4 MR. CARDON: Only that I think it's a broader statement by
5 the Court that the intent of--I'm sorry, of 60(b) is not to
6 allow a plaintiff additional time as opposed to it's not
7 intended to allow additional time. It's pretty close to what--

8 THE COURT: I'm going to stay with 7 as it is.

Transcript of oral arguments on Plaintiff's Objections held December 18, 2014, R.0197,

pg. 17, lines 14-25; pg. 18, lines 1-8

20 THE COURT: Okay. I think I have a little heartburn- -so 9
21 can go in. I think I had a little heartburn with 10. Let me
22 re-read that again because my notes indicate I wasn't
23 particularly thrilled about 10.

24 MR. CARDON: So Your Honor I guess I would just say that
25 the tape of the Court specifically shows that Your Honor said

1 that immediately following, what you said that was in number 9
2 and so I think that it's an appropriate conclusion as far as the
3 Court is concerned, not necessarily that it's correct or that I
4 agree with the Court, but I think it's appropriate to reflect
5 what the Court said and that did immediately follow. It's on
6 the tape. We both listened to it.

7 THE COURT: I tend to be somewhat redundant in my rulings
8 and it looks like that is really a redundancy of paragraph 9.
9 It's re-stating it, just in a different way.

10 MR. CARDON: Well--

11 THE COURT: Did you see any substantive difference Mr.
12 Cardon? It's a little bit more of a broader statement, but it
13 essentially says--

14 MR. CARDON: Well, other than--yeah, would be to
15 circumvent the limitations put specifically into that statute.

16 THE COURT: All right. Mr. Hitt you didn't necessarily
17 have any heartburn over it? It just seemed to me that it was
18 somewhat redundant when I'm talking about--

Transcript of oral arguments on Plaintiff's Objections held December 18, 2014, R.0197.

pg. 18, lines 20-25; pg. 19, lines 1-18

MR. HITT:

1 come back here to synthesize what the Court said and so I
2 suppose at this juncture it would be up to the Court. Are you
3 making that conclusion of law that the Legislature did not
4 attend and did not pass that section with the intent that Rule
5 60(b) would be able to circumvent that? I don't know that we

6 ever reached that and I don't know that it's necessary for the
7 Court's ruling on this particular--
8 THE COURT: I'm going to give Mr. Cardon the benefit of
9 the doubt that if he put it in there, I probably did say it and
10 it wouldn't be past me to make some comment like that but it
11 seems to me that that was just sort of a re-statement of what I
12 was getting to in number 9.

Transcript of oral arguments on Plaintiff's Objections held December 18, 2014, R.0197,
pg. 20, lines 1-12

Redefining relief from an order as "*commencement of an action*", requires
discarding Rule 3, Utah R.Civ.P. Doing so, would disrupt the foundation of civil actions,
and open the flood gates for interpretation of the definition of an "*action*", statute by
statute.

Rule 3 of the Utah Rules of Civil Procedure clarifies the meaning of the word
"action" when it states that "[a] civil action is commenced (1) by filing a complaint with
the court, or (2) by service of a summons together with a copy of the complaint [.]" Utah
R. Civ. P. 3(a). Thus, "action" is a term of art, basically meaning a lawsuit, and a
motion— an optional part of a lawsuit— clearly does not equate to an "action." *Dahl v.*
Harrison, 265 P.3d 139 (Utah 2011)

Rule 3 of the Utah Rules of Civil Procedure requires that a complaint be "filed" in
order to commence a civil action. The rule provides:

(a) How commenced. A civil action is commenced ... by *filing* a complaint with
the court....

(b) Time of jurisdiction. The court shall have jurisdiction from the time of filing of

the complaint....

Utah R. Civ. P. 3(a)-(b).

Rule 5 of the Utah Rules of Civil Procedure defines "filing." It states, in pertinent part, that "[t]he filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court." Utah R. Civ. P. 5(e).

Dipoma v. McPhie, 29 P.3d 1225, 2001 UT 61 Utah 2001)

Rule 60 is titled "*Relief from Judgment or Order*" and the provisions of the rule make no reference to relief under the Rule is considered or treated as the equivalent of a new action. for purposes of the savings statute, or any other statute. See Rule 60 Utah R.Civ.P.

When the provisions of the savings statute and Rule 60 are read in harmony with each other, the function of Rule 60 does not displace the provisions of the Savings Statute. It is important to maintain the integrity of the independent functioning of each.

Interjecting Rule 60 as part of the savings statute, or vice versa, would void the independent mechanism of each authority.

When a statute is clear and unambiguous, the statute is interpreted according to its plain language. In this instance, the language of the savings statute, Rule 3 Utah R.Civ.P. and Rule 60 Utah R.Civ.P. are very clear and had the legislature intended for relief from Orders to be considered new actions, under specific, or any statutes, it would have so specified. " Under our established rules of statutory construction, we look first to the

plain meaning of the pertinent language in interpreting [the statute]...." *Fla. Asset Fin. Corp. v. Utah Labor Comm'n*, 2006 UT 58, 147 P.3d 1189. " Our overall goal is to give effect to the legislative intent, as evidenced by the [statute's] plain language, in light of the purpose the statute was meant to achieve." *Id.* Further, we assume the legislative body " used each term advisedly and in accordance with its ordinary meaning." *State v. Jeffs*, 2010 UT 49, 243 P.3d 1250. Unless we find ambiguity in a statute, we do not look to legislative history or public policy to try to glean the statute's intent. See *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, 164 P.3d 384; *Fla. Asset Fin. Corp.*, 2006 UT 58, 147 P.3d 1189.

Plaintiff was granted relief from the Order of Dismissal, did not file a new action in violation of the savings statute, and therefore, Plaintiff's second filing of an action correctly resumed.

**II. PLAINTIFF'S MOTION FOR RELIEF
FROM ORDER WAS BROUGHT BEFORE
THE TRIAL COURT PURSUANT TO
RULE 60(b)(6)**

Plaintiff's Motion for Relief from Order Pursuant to Rule 60(b) was proper and specifically brought pursuant to Rule 60(b)(6), as set forth in Plaintiff's Motion, R.0011, which states:

"Plaintiff, through counsel, Kelly G. Cardon, pursuant to Rule 60(b)(6), Utah Rules of Civil Procedure, moves this Court for an order relieving Plaintiff from the Order of Dismissal, without prejudice, filed by the Court." Motion for Relief from Order

Pursuant to Rule 60(b)(6). R.0011


“With respect to Finding of Fact No. 7, Plaintiff does not agree that Plaintiff's Motion for Relief from Order Pursuant to Rule 60(b) (filed on April 18, 2014) sought relief pursuant to Utah R.Civ.P. 60(b)(1). Plaintiff's Motion sought relief pursuant to Utah R.Civ.P. 60(b)(6). See Plaintiff's Motion, filed "pursuant to Rule 60(b)(6), Utah Rules of Civil Procedure".” See Plaintiff's Reply to Defendant's Response to Plaintiff's Objections to Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice, R.0112, pgs. 2, para. 4.

The trial court's errors in its determination of the law, resulting in dismissal of Plaintiff's claims, caused irreparable harm to Plaintiff.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court reverse the Order of Dismissal with Prejudice and remand this case to the trial court.

SUBMITTED this 25th day of July, 2015.


KELLY G. CARDON
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, Kelly G. Cardon, hereby certify that I caused to be hand delivered, an original and seven (7) copies of the foregoing Appellant's Brief, to The Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and two (2) copies to H. Justin Hitt, Petersen & Associates, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, on the 27th day of July, 2015.

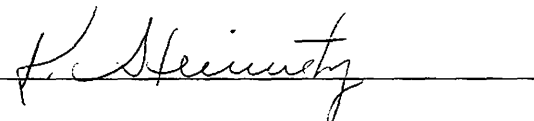

KELLY G. CARDON

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R.App.P. 24(f)(1), I certify that this brief contains 5,886 words, excluding the Table of Contents, Table of Authorities, Addenda, and Certificates of Compliance and Delivery. In compliance with the typeface requirements of Utah R.App.P. 27(b), I certify that this Brief has been prepared in a proportionally spaced font using Corel WordPerfect in Times New Roman 13 point.


KELLY G. CARDON

DELIVERED to The Utah Court of Appeals as indicated above this 27th day of July, 2015.



INDEX TO ADDENDA

- ADDENDUM "A":** Findings of Fact, Conclusions of Law and Order of Dismissal with Prejudice
- ADDENDUM "B":** Utah State Courts Xchange Case Search
- ADDENDUM "C":** §78b-22-111, Utah Code Ann.
- ADDENDUM "D":** Rule 3 Utah R.Civ.P.
- ADDENDUM "E":** Rule 60, Utah R.Civ.P.

ADDENDUM "A"

The Order of Court is stated below:

Dated: March 09, 2015
01:24:09 PM

/s/ Joseph M. Bean
District Court Judge



H. JUSTIN HITT, Bar # 8762
PETERSEN & ASSOCIATES
Attorneys for AUTUMN HESS
230 South 500 East, Suite 400
Salt Lake City, UT 84102
Telephone: (801) 328-5555
Facsimile: (801) 524-0998
justin.hitt@farmers.com

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

THOMAS L. NORTON,
Plaintiff,

vs.

AUTUMN M. HESS AND DOES I-V,
Defendant.

)
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND ORDER OF DISMISSAL
) WITH PREJUDICE

)
) Case No. 120907652

)
) Judge Joseph Bean
)
)
)
)

This matter came regularly before the Court on October 9, 2014 for oral argument on Defendant Autumn Hess' Utah R. Civ. P. 12(b)(1) and 12(b)(6) Motion to Dismiss. Kelly G. Cardon appeared on behalf of Plaintiff and H. Justin Hitt appeared on behalf of Defendant. The Court having considered the parties' pleadings and arguments, hereby enters the following Findings of Fact, Conclusions of Law, and Order as follows:

FINDINGS OF FACT

1. Plaintiff's action arises out of an automobile accident that occurred on December 6, 2006. Plaintiff timely filed a Complaint against Defendant on December 3, 2010 (Second District Court civil case no. 100909529).

2. Plaintiff did not serve Defendant with a Summons and Complaint within 120 days, and in April 2011, Plaintiff's counsel requested from the Court additional time to serve Defendant. The Court granted the request.

3. On November 29, 2011, the Court dismissed Plaintiff's Complaint without prejudice because Plaintiff again failed to serve Defendant with a Summons and Complaint within 120 days. The Court finds that there are numerous opportunities for alternative service that were available.

4. On November 21, 2012, Plaintiff re-filed his Complaint against Defendant (Second District Court civil case no. 120907652).

5. Plaintiff did not serve Defendant with a Summons and Complaint within 120 days, and in March 2013, Plaintiff's counsel requested from the Court additional time to serve Defendant. The Court did not grant the request for additional time.

6. On April 18, 2013, the Court dismissed the case for Plaintiff's failure to timely serve Defendant with a Summons and Complaint. The Order of Dismissal was generated by the Court's electronic system which reflected a dismissal without prejudice. The Order of Dismissal reads: "Based on a review of this file and Rule 4(b) Utah Rules of Civil Procedure, the Court orders this case dismissed, without

prejudice, for failure to serve the defendant within 120 days of filing the Complaint. This is the final order of the court. No further order is required."

7. On April 18, 2014, Plaintiff's counsel filed an ex-parte Motion for Relief from Order Pursuant to Rule 60(b) together with a proposed Order. Plaintiff sought relief from the judgment pursuant to Utah R. Civ. P. 60(b)(1) and 60(b)(6).

8. Between September 2013 and April 2014, the original judge assigned to this case, Judge Michael D. Lyon, retired and the case was re-assigned among other judges.

9. On April 28, 2014, Judge Mark R. Decaria, signed Plaintiff's proposed Order Granting Motion for Relief from Order Pursuant to Utah R. Civ. P. 60(b).

CONCLUSIONS OF LAW

1. Plaintiff timely commenced his action when he filed his initial Complaint in December 2010.

2. After Plaintiff's Complaint was dismissed without prejudice for failure to timely serve Defendant with a Summons and Complaint, Plaintiff timely re-filed his action within one year pursuant to Utah Code Ann. § 78B-2-111 (Utah's "Savings Statute").

3. Plaintiff again failed to timely serve Defendant with a Summons and Complaint and the Court properly dismissed the action for failure of service on April 18, 2013.

4. Utah's Savings Statute, Utah Code Ann. § 78B-2-111, states:

(1) If any action is timely filed and the judgment for the plaintiff is reversed, or if the plaintiff fails in the action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the action has expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

(2) On and after December 31, 2007, a new action may be commenced under this section only once.

5. After Plaintiff's action failed the first time otherwise than upon the merits, Plaintiff could only commence the action one more time which he did when he filed the instant case.

6. As a matter of law, the Court concludes that the second dismissal of Plaintiff's action for failure to timely serve should have been a dismissal *with* prejudice rather than *without* prejudice because the case had once before been dismissed and re-filed pursuant to the Savings Statute and the case could not then again be re-filed.

7. The Court concludes that Utah R. Civ. P. 60(b) is not intended to allow a Plaintiff additional time to resuscitate an action beyond that time allowed by the applicable statute of limitation and the one year allowed by Utah's Savings Statute.

8. The Court concludes that Plaintiff's Utah R. Civ. P. 60(b) motion was improperly granted because the motion was not timely filed within ninety days of the entry of the April 18, 2013 Order of Dismissal and the motion was not properly presented to the Court.

9. Utah Code Ann. § 78B-2-111 did not intend Utah R. Civ. P. 60(b) to add additional time onto a savings statute when there has already been one that was granted and the statute specifically limits the extension of time to one opportunity.

10. Utah Code Ann. § 78B-2-111 did not intend or was not passed with the intent that Utah R. Civ. P. 60(b) would be able to circumvent the limitations put specifically in that statute.

Accordingly, the Court hereby ORDERS that Defendant's Utah R. Civ. P. 12(b)(1) and 12(b)(6) Motion to Dismiss is granted and Plaintiff's Complaint is hereby dismissed with prejudice.

The Order is entered by the Court as evidenced by the dated electronic signature at the top of this document.

APPROVED AS TO FORM

/s/ Kelly G. Cardon

*(document bearing original signature of Kelly G. Cardon
will be maintained at office of filing attorney)*

Kelly G. Cardon
Attorney for Plaintiff

CERTIFICATION OF COMPLIANCE WITH UTAH R. CIV. P. 7(f)(2)

I hereby certify that on December 18, 2014 and again on December 29, 2014, I served, by electronic mail to the addresses below, a true and correct copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice to opposing counsel, Kelly G. Cardon, in accordance with the requirements of Utah R. Civ. P. 7(f)(2). Furthermore, I hereby certify that I did not receive from Plaintiff's counsel any objections to the foregoing proposed Order.

cardonlaw@gmail.com

kellycardonatty@gmail.com

/s/ H. Justin Hitt
H. Justin Hitt
Attorney for Defendant

ADDENDUM "B"

Utah Court Case Search

Jurisdiction ☐ Show Date Range Panel

Search Type Search Scope

Case Number Case Type Citation Number

Last Name / Company First Name Birth Date

1

County	Court Location	Case Type	Filing Date	First Name	Last Name	Birth Date	Party Code	Case History / Documents
WEBER	Ogden District	PI	100909529	2010-12-06	THOMAS L	NORTON	PLA	View
WEBER	Ogden District	PI	120907652	2012-11-21	THOMAS L	NORTON	PLA	View

Utah Court Case Search

Jurisdiction ☐ Show Date Range Panel

Search Type Search Scope

Case Number Case Type Citation Number

Last Name / Company First Name Birth Date

1

County	Court Location	Case Type	Case Number	Filing Date	First Name	Last Name	Birth Date	Party Code	Case History / Documents
WEBER	Ogden District	PI	100909529	2010-12-06	AUTUMN M	HESS		DEF	View
WEBER	Ogden District	PI	120907652	2012-11-21	AUTUMN N	HESS		DEF	View

ADDENDUM "C"

78B-2-111 Failure of action -- Right to commence new action.

- (1) If any action is timely filed and the judgment for the plaintiff is reversed, or if the plaintiff fails in the action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the action has expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.
- (2) On and after December 31, 2007, a new action may be commenced under this section only once.

Renumbered and Amended by Chapter 3, 2008 General Session

ADDENDUM "D"

Rule 3. Commencement of action.

(a) How commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4. If the action is commenced by the service of a summons and a copy of the complaint, then the complaint, the summons and proof of service, must be filed within ten days of such service. If, in a case commenced under paragraph (a)(2) of this rule, the complaint, summons and proof of service are not filed within ten days of service, the action commenced shall be deemed dismissed and the court shall have no further jurisdiction thereof. If a check or other form of payment tendered as a filing fee is dishonored, the party shall pay the fee by cash or cashier's check within 10 days after notification by the court. Dishonor of a check or other form of payment does not affect the validity of the filing, but may be grounds for such sanctions as the court deems appropriate, which may include dismissal of the action and the award of costs and attorney fees.

(b) Time of jurisdiction. The court shall have jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint.

Advisory Committee Notes

ADDENDUM "E"

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 90 days 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.

Advisory Committee Notes

