2015

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

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

---

THOMAS L. NORTON, :

Plaintiff/Appellant, :

vs. :

AUTUMN M. HESS, :

Appellate Case No. 20150289 - CA

Defendant/Appellee. :

---

# REPLY 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

IN THE UTAH COURT OF APPEALS

---

THOMAS L. NORTON, :

Plaintiff/Appellant, :

vs. :

AUTUMN M. HESS, :

Appellate Case No. 20150289 - CA

Defendant/Appellee. :

---

# REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Cases**



**Rules**

IN THE UTAH COURT OF APPEALS

---

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

---

## 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.

The first issue presented on appeal, is 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.

Appellee frames the issue of appeal as whether the trial court correctly concluded that the second dismissal of Appellant's Complaint against Appellee for failure to timely serve Appellee

with a summons and complaint pursuant to Utah R.Civ.P.4 "should have been a dismissal *with* prejudice rather than *without* prejudice because Appellant's action had once before been dismissed without prejudice for failure to timely serve and the action was subsequently re-filed pursuant to Utah's Savings Statute (Utah Code Ann. §78B-2-111)."

The second issue on appeal is whether 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).

The third, and final issue on appeal, is whether the trial court erred in concluding, based upon the erroneous finding of Plaintiff's Motion for Relief from Order, previously ruled upon in the trial Court by an interim judge, prior to Judge Bean taking the bench, was brought pursuant to Utah R. Civ.P. 60(b)(1), 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, and improperly granted.

Appellee frames the issue of appeal as whether the trial court "abused its discretion in determining that Appellant's ex-parte Utah R.Civ.P. 60(b) Motion for Relief from Order was improperly granted because the motion was not properly presented or timely filed, *and* because Utah R.Civ.P. 60(b) is not intended to allow a plaintiff additional time to resuscitate an action beyond the time allowed by applicable statutes of limitation and the one year allowed by Utah's Savings Statute (Utah Code Ann. §78B-2-111)."

Further, Appellee asserts Judge Lyon's Order of Dismissal of April 18, 2013 was "mistakenly entered *without* prejudice".

## SUMMARY OF ARGUMENTS

Judge Lyon's Order of Dismissal, without prejudice, was not mistakenly entered.

The issue of whether the Trial Court's Order Granting Motion for Relief from Order Pursuant to Utah R.Civ.P. 60(b)(6) was properly granted is not an issue on appeal.

Appellee may not reach beyond and deem the Order setting aside and granting relief from order pursuant to Rule 60(b)(6) as commencement of a new action pursuant to Rule 3, Utah R.Civ.P., in violation of the Savings Statute, §78B-2-111, Utah Code Ann.

## ARGUMENT

### I. JUDGE LYON'S ORDER OF DISMISSAL, WITHOUT PREJUDICE, OF APRIL 23, 2013, WAS NOT MISTAKENLY ENTERED.

Judge Lyon signed the April 23, 2013, Order of Dismissal, *without* prejudice, noting "*Based on a review of this file* and Rule 4(b) Utah Rules of Civil Procedure, the Court orders this case be dismissed, *without prejudice...*". There is no relevant evidence in the record, which supports Judge Lyon's Order being a chorus generated, electronic form or entered mistakenly. Judge Lyon's words speak to the contrary. R.0010. See Addendum "B".

Appellee argues, referring to Judge Lyon's Order of Dismissal of April 23, 2013, as the second dismissal, that "The trial court correctly concluded that the second dismissal of Norton's complaint should have been a dismissal with prejudice rather than without..." Further, that said dismissal was "mistakenly entered without prejudice. Pursuant to §78B-2-111(2), *as a matter of law*, the dismissal had to be *with* prejudice."

Appellee's Statement of Facts Relevant to Issues Presented for Review, Facts Number 7

and 8, state:

"7. The Order of Dismissal was generated by the court's electronic system, which automatically reflected a dismissal without prejudice due to Norton's failure to timely serve Hess pursuant to Utah R.Civ.P. 4(b) despite the fact that Norton's complaint had once before been dismissed without prejudice. (R.10, 187)"

"8. 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." (R.10)"

Appellee raises, and relies upon, an inappropriate interjection by the trial court clerk during the October 9, 2014, hearing on Defendant Hess' Motion to Dismiss, stating:

"At the October 9, 2014 hearing on Hess' motion to dismiss, the trial court clerk informed the judge and counsel for both parties that when a complaint/case is dismissed for failure to timely serve pursuant to Utah R.Civ.P. 4, the Court's electronic system generates an order of dismissal that "automatically has the language without prejudice." (R.187)."

The trial court clerk's interjection during the proceedings, was unprompted, and inappropriate. The trial court clerk was not sworn in to testify pursuant to Rule 603, Utah Rules of Evidence, nor was there a foundational basis for her statement. See Addendum "A".

"COURT CLERK: I apologize. Can I interject? Just so you're aware, it's actually a Chorus generated order that automatically says that, just so you're aware. Those ones, when it's based off of the failure to serve, it automatically has the language without prejudice. So just to help you with your argument or question, it wasn't prepared by Judge Lyon." (R.187)

The issue of whether a provision in Judge Lyon's Order of Dismissal without prejudice, was mistakenly entered, was not before the trial court in Defendant's Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss, and is not properly before this court as an issue on appeal. (R0019)

**II. WHETHER THE TRIAL COURT'S ORDER GRANTING MOTION FOR RELIEF FROM ORDER PURSUANT TO UTAH R.Civ.P. 60(b)(6) WAS PROPERLY GRANTED IS NOT AN ISSUE ON APPEAL.**

On April 28, 2014, Judge Mark R. DeCaria, entered Norton's proposed Order Granting Motion for Relief from Order Pursuant to Utah R.Civ.P. 60(b)(6). (R.16).

Appellee argues that although the Order granting Motion for Relief Pursuant to Rule 60(b)(6) was initially granted by an interim judge, Judge Bean did not abuse his discretion in denying Norton's Motion for Relief because Judge Bean found that the motion was not properly presented and he concluded that Rule 60(b) was not intended to allow additional time to resuscitate an expired claim, and further, that Norton failed to provide the trial court justification for granting Norton relief from Judge Lyon's second order of dismissal. Therefore, Judge Bean "properly concluded that there was no reason to justify relief" from Judge Lyon's Order of Dismissal.

Judge DeCaria's justification for granting relief from Judge Lyon's Order of Dismissal without prejudice, was not brought before the trial Court by Appellee in Defendant's Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss, and is not properly before this court as an issue on appeal. (R0019)

The Utah Supreme Court has held that trial courts have broad discretion in ruling on Utah R.Civ.P. 60(b) motions. "We will generally reverse a trial court's denial of a rule 60(b) motion

only where the court has exceeded its discretion." Fisher v. Bybee, 2004 UT 92, 104 P.3d 1198 (citing Lund v. Brown, 200 UT 75, 11 P.3d 277).

As Appellee indicates, the Court further explained in Bybee:

> The outcome of rule 60(b) motions are rarely vulnerable to attack. We grant broad discretion to trial court's rule 69(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review.

Id. (citing Oseguera v. Farmers Ins. Exch., 2003 UT App 46, 68 P.3d 1008)

The issue of abuse of discretion as to Judge DeCaria's granting Appellant's Motion for Relief from Judge Lyon's Order of Dismissal without prejudice, was not brought before the trial court by Appellee in Defendant's Utah R.Civ.P. 12(b)(1) and 12(b)(6) Motion to Dismiss, and is not properly before this court as an issue on appeal. (R0019)

## III. APPELLEE MAY NOT REACH BEYOND AND DEEM THE ORDER SETTING ASIDE AND GRANTING RELIEF FROM ORDER PURSUANT TO RULE 60(b)(6) AS COMMENCEMENT OF A NEW ACTION IN VIOLATION OF THE SAVINGS STATUTE

Appellee attempts to circumvent the issue, however, Appellee cannot reach beyond, and deem, the Order setting aside and granting relief from Judge Lyon's Order of Dismissal pursuant to Rule 60(b) as commencement of a new action pursuant to Rule 3, Utah R.Civ.P. in order to apply the Savings Statute, §78B-2-111, Utah Code Ann. See Addendums "C" and "D".

## CONCLUSION

Appellant's claim was viable prior to the trial Court's final Order of Dismissal with Prejudice. Appellant did not violate the provisions of Utah's Savings Statute, §78B-2-111, Utah Code Ann. The trial Court erred in dismissing Plaintiff's action, causing irreparable harm to

Plaintiff. Appellee Defendant has not, and will not suffer incredible prejudice by this court's reversal of the trial court's final Order of Dismissal.

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 29th day of September, 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 Reply Brief, to The Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and two (2) copies to be mailed to H. Justin Hitt, Petersen & Associates, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, on the 30th day of September, 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 1,866 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 30th day of September, 2015.

## INDEX TO ADDENDA

# ADDENDUM "A"

## Rule 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

**2011 Advisory Committee Note.** – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim. The oath or affirmation need not be in any special form but only such as to awaken the conscience of the witness and impress the witness with the duty to testify truthfully. The rule is a modified version of Rule 18, Utah Rules of Evidence (1971).

# ADDENDUM "B"

SECOND DISTRICT COURT - OGDEN
WEBER COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| THOMAS L NORTON, Plaintiff, | : | ORDER OF DISMISSAL Rule 4(b) U.R.C.P. |
| VS. | : | Case No: 120907652 PI |
| AUTUMN N HESS, Defendant. | : | Judge: MICHAEL D LYON |
| | : | Date: April 16,2013 |

Based on a review of this file and Rule 4(b) Utah Rules of Civil Procedure, the Court orders this case be 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.

Date: 4-18-13

MICHAEL D LYON
District Court Judge

APR 23 2013

SECOND DISTRICT COURT
2013 APR 23 PM 12:17

# ADDENDUM "C"

**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 "D"

**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

# ADDENDUM "E"

**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