

2015

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

Utah Court of Appeals

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THOMAS L. NORTON,

VS.

Appellee.

AUG 31 2015





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IN THE UTAH COURT OF APPEALS

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THOMAS L. NORTON,

Appellant,

vs.

AUTUMN M. HESS,

Appellee.

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Case No. 20150289 CA

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BRIEF OF APPELLEE, AUTUMN M. HESS

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Appeal from a Final Judgment of the Second District Court,  
Weber County, State of Utah, Honorable Joseph Bean  
Civil No. 120907652

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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court, pursuant to Utah Code Ann. § 78A-3-102(3)(j), had original jurisdiction over this appeal. The Utah Supreme Court, pursuant to its authority under Utah Code Ann. § 78A-3-102(4), transferred the appeal to this Court. This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Issue No. 1: Did the trial court correctly conclude 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)?

Standard of Review: This Court reviews a trial court's conclusions of law for correctness. Callahan v. Sheaffer, 877 P.2d 1259, 1260 (Ut. Ct. App. 1994).

Preservation of the Issue: The issue was briefed to the trial court and the trial court ruled on the issue in its Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice dated March 9, 2015.

Issue No. 2: Did the trial court abuse 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)?

Standard of Review: This Court reviews a trial court's ruling on a Utah R. Civ. P. 60(b) motion for abuse of discretion. Lund v. Brown, 2000 UT 75, ¶¶ 10–11, 11 P.3d 277. (“We will generally reverse a trial court's denial of a rule 60(b) motion only where the court has exceeded its discretion.” Id.)

Preservation of the Issue: The issue was briefed to the trial court and the trial court ruled on the issue in its Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice dated March 9, 2015.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,  
ORDINANCES, RULES, AND REGULATIONS**

Utah Code Ann. § 78B-2-111:

(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.

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

(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.

### **STATEMENT OF THE CASE**

#### **A. NATURE OF THE CASE**

This civil action arises out of an automobile accident that occurred on December 6, 2006 in Uintah, Utah. On December 3, 2010, plaintiff/appellant Thomas Norton (hereafter "Norton") filed a complaint in the Second District Court in and for Weber County alleging that defendant/appellee Autumn Hess (hereafter "Hess") negligently caused the accident and that Norton sustained personal injuries as a result. The trial court dismissed Norton's case without prejudice on November 22, 2011 because Norton failed to timely serve Hess with a summons and complaint pursuant to Utah R. Civ. P. 4(b).

The dismissal of Norton's complaint occurred after the statute of limitations had run on his negligence claim. Pursuant to Utah Code Ann. § 78B-2-111, Utah's Savings Statute, Norton could re-file his complaint within one year of the November 22, 2011 dismissal.

On November 21, 2012, Norton again filed a complaint in the Second District Court in and for Weber County asserting the same allegations against Hess that he asserted in his initial complaint. On April 18, 2013, the trial court dismissed Norton's complaint a second time because Norton again failed to timely serve Hess with a summons and complaint pursuant to Utah R. Civ. P. 4(b).

**B. COURSE OF THE PROCEEDINGS AND DISPOSITION**

Norton filed his first complaint three days before the expiration of the four-year statute of limitation applicable to negligence actions. (R. 160). The trial court dismissed that complaint, without prejudice, on November 22, 2011 because Norton failed to timely serve Hess with a summons and complaint pursuant to Utah R. Civ. P. 4(b). (R. 160). A year later, on November 21, 2012, Norton re-filed his complaint with the Second District Court. (R. 1). The trial court dismissed Norton's second complaint, without prejudice, on April 18, 2013 because Norton again failed to timely serve Hess with a summons and complaint pursuant to Utah R. Civ. P. 4(b). (R. 10). One year later, on April 18, 2014, Norton filed an ex parte Motion for Relief from Order Pursuant to Utah R. Civ. P. 60(b). (R. 11). On April 28, 2014, the trial court granted Norton's Rule 60(b) motion. (R. 16). On May 8, 2014, Norton served a summons and complaint to Hess. (R. 17). Hess then filed a Motion to Dismiss pursuant to Utah R. Civ. P. 12(b)(1) and 12(b)(6). (R. 19). Norton opposed Hess' motion and the trial court heard oral argument on Hess' motion on October 9, 2014. (R. 77, 178). After hearing oral argument on the motion to dismiss, the trial court granted Hess' motion and instructed Hess' counsel to prepare an order. (R. 194-195). Hess' counsel served a proposed Findings of Fact, Conclusions of Law and



Order to Norton's counsel, and on November 7, 2014, Norton's counsel filed Plaintiff's Objections to Defendant's Proposed Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice. (R. 102). Hess filed a response to Norton's objections, and Norton replied in support of the objections. (R. 107, 112). On December 18, 2014, the trial court heard oral argument on Norton's objections to the proposed Order. (R. 116, 197). Hess' counsel filed an amended proposed Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice on December 29, 2014. (R. 122). On March 9, 2015, the trial court signed and entered the amended proposed Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice. (R. 159). Norton filed a Notice of Appeal on April 8, 2015. (R. 167).

**C. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW**

1. Norton's action arises out of an automobile accident that occurred on December 6, 2006. Norton timely filed a complaint against Hess on December 3, 2010 (Second District Court civil case no. 100909529). (R. 31-32, 160).

2. Norton did not serve Hess with a summons and complaint within 120 days as required by Utah R. Civ. P. 4(b), and in April 2011, Norton's counsel requested from the trial court additional time to serve Hess. The trial court granted the request. (R. 160).

3. On November 22, 2011, the trial court dismissed Norton's Complaint without prejudice because Norton again failed to timely serve Hess with a summons and complaint. (R. 31-32, 160).

4. On November 21, 2012, Norton re-filed his Complaint against Hess (Second District Court civil case no. 120907652).<sup>1</sup> (R. 1).

5. Again, Norton did not timely serve Hess with a summons and complaint within 120 days. In March 2013, Norton's counsel requested from the trial court additional time to serve Hess. The trial court did not grant Norton's request for additional time. (R. 6, 9, 123).

6. On April 18, 2013, the trial court dismissed Norton's complaint due to his failure to timely serve Hess with a summons and complaint pursuant to Utah R. Civ. P. 4(b). (R. 10).

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).

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<sup>1</sup> Although the four-year statute of limitation applicable to Norton's claim ran on December 6, 2010, because Norton's first complaint failed other than upon the merits, Utah's Savings Statute, Utah Code Ann. § 78B-2-111, allowed him an additional year from the date of dismissal of the first complaint to re-file his complaint. Norton timely re-filed the complaint. (R. 192-193).

9. Between September 2013 and April 2014, the original judge assigned to the case, Judge Michael D. Lyon, retired and the case was re-assigned among other judges in the Second District Court. (R. 161, 193-194).

10. On April 18, 2014, one year after the second dismissal of his complaint, Norton filed an ex-parte Motion for Relief from Order Pursuant to Rule 60(b) together with a supporting memorandum and proposed Order. (R. 11-16).

11. 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). (R. 16).

12. Norton served Hess with a summons and complaint on May 8, 2014. (R. 17).

13. Hess filed a Utah R. Civ. P. 12(b)(1) and 12(b)(6) Motion to Dismiss on May 22, 2014 asserting that the second dismissal of Norton's complaint on April 18, 2013 should have been a dismissal *with* prejudice rather than *without* because the complaint had previously failed and Norton could only re-file his complaint once pursuant to Utah Code Ann. § 78B-2-111, Utah's Savings Statute. Hess argued that Norton's claims were time barred and therefore the trial court lacked subject matter jurisdiction and Norton's complaint failed to state a claim upon which relief could be granted. (R. 19-41).

14. Norton filed an opposing memorandum on June 25, 2014, and Hess filed a reply memorandum in support of her motion on July 3, 2014. (R. 42, 64).

15. On October 9, 2014, the trial court heard oral arguments on Hess' motion to dismiss. (R. 77, 178).



16. At the October 9, 2014 hearing, Judge Joseph Bean stated:

I am granting the defendant's motion to dismiss in this matter. I find that the intent of Rule 60(b) was not to add additional time. Certainly under Rule 60(b)(1) [Norton's Utah R. Civ. P. 60(b) Motion for Relief from Order] was not filed within the 90 day or three month time period required under Rule 60(b)(1) and under Rule 60(b)(6) certainly Judge DeCaria had that - - you know could have taken that under consideration when he granted the motion, but I am convinced that the statute, Section 78B-2-111, did not intend Rule 60(b) to add additional time onto a savings statute especially where there's already been one that was granted and the statute specifically limits the extension of time to one bite at the apple. It says it's not - - you can only have one opportunity.

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

That's the ruling of the Court and Mr. Hitt I'm going to ask you to draft the order.

(R. 194-195).

17. Hess' counsel prepared proposed Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice and served a copy to Norton's counsel. (R. 79, 82).

18. On November 7, 2014, Norton's counsel filed Plaintiff's Objections to Defendant's Proposed Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice. (R. 102).

19. Hess filed a response to Norton's objections, and Norton replied in support of the objections. (R. 107, 112).

20. On December 18, 2014, the trial court heard oral argument on Norton's objections to the proposed Order. (R. 116, 197).

21. Hess' counsel filed an amended proposed Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice on December 29, 2014. (R. 122).

22. On March 9, 2015, the trial court signed and entered the amended proposed Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice. (R. 159).

### **SUMMARY OF ARGUMENT**

The trial court correctly dismissed Norton's complaint with prejudice because Norton failed to timely serve Hess with a summons and complaint as required by Utah R. Civ. P. 4(b). Further, the trial court did not abuse its broad discretion in denying Norton relief from the Order of Dismissal pursuant to Utah R. Civ. P. 60(b) because the motion was not properly presented and that rule was not intended to allow a plaintiff additional time to resuscitate an expired claim.

### **ARGUMENT**

- I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE SECOND DISMISSAL OF NORTON'S COMPLAINT SHOULD HAVE BEEN A DISMISSAL WITH PREJUDICE RATHER THAN WITHOUT BECAUSE THE STATUTE OF LIMITATIONS HAD RUN ON NORTON'S NEGLIGENCE CLAIM AND HE HAD PREVIOUSLY RE-FILED HIS COMPLAINT PURSUANT TO UTAH'S SAVINGS STATUTE AND COULD NOT DO SO AGAIN.**

There is no dispute that Norton's complaint was twice dismissed for failure to timely serve Hess with a summons and complaint pursuant to Utah R. Civ. P. 4(b). There is no dispute that the statute of limitation applicable to Norton's negligence claim expired

on December 6, 2010, and the first dismissal of Norton's complaint occurred after the expiration of the statute of limitation. Consequently, pursuant to Utah Code Ann. § 78B-2-111 (Utah's Savings Statute), Norton could re-file his complaint within one year of the first dismissal. Section 78B-2-111 reads:

(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.

Norton then timely re-filed his action one year after the first dismissal pursuant to the Savings Statute. However, after Norton's complaint was dismissed a second time for failure to timely serve Hess with a summons and complaint pursuant to Utah R. Civ. P. 4(b), that second dismissal, as a matter of law, necessarily had to be a dismissal with prejudice because Norton was statutorily barred from filing his complaint a third time.

Id.

The trial court's second dismissal of Norton's complaint on April 18, 2013 was mistakenly entered *without* prejudice.<sup>2</sup> Pursuant to 78B-2-111(2), *as a matter of law*, the dismissal had to be *with* prejudice because the case had already been re-filed once after it

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<sup>2</sup> 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).



failed on non-substantive grounds. Norton's complaint could not again be re-filed because the savings statute allows for a new action to be commenced only once. Therefore, although the Court styled the April 2013 dismissal as a dismissal *without* prejudice, the second dismissal was effectively a dismissal *with* prejudice because the savings statute did not allow Norton to re-file his Complaint a third time. This issue is controlled directly by statute and legislative authority.

The trial court correctly concluded, as a matter of law, Norton's claims against Hess were time barred and his Complaint was properly dismissed with prejudice because the trial court lacked subject matter jurisdiction and Norton's complaint failed to state a claim upon which relief could be granted.

**II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING NORTON UTAH R. CIV. P. 60(b) RELIEF BECAUSE THAT RULE WAS NOT INTENDED TO ALLOW A PLAINTIFF TO CIRCUMVENT STATUTES OF LIMITATION AND THE PROVISIONS OF THE SAVINGS STATUTE.**

After the trial court dismissed Norton's complaint for the second time on April 18, 2013, Norton was statutorily barred from filing his complaint a third time. Consequently, on April 18, 2014 – an entire year after the second dismissal - Norton attempted to circumvent the statute of limitations and Utah's Savings Statute by filing an ex-parte Motion for Relief from Order Pursuant to Rule 60(b). Although 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. Further, Norton failed to provide the trial court justification for granting Norton relief from the second order of dismissal.

Because Norton did not seek relief from the second order of dismissal until a year after the order was entered, Norton was limited to seeking relief from the order pursuant to Utah R. Civ. P. 60(b)(6). Utah R. Civ. P. 60(b) states:

(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.

Norton could not seek relief under subsections (1), (2), or (3) when he filed his motion for relief because more than 90 days had passed since the trial court entered the order of dismissal. Further, subsections (4) and (5) did not apply to the trial court's April 18, 2013 order of dismissal. Therefore, Norton was limited to arguing subsection (6): "any other reason justifying relief from the operation of judgment." The trial court properly

concluded that there was no reason to justify relief from the order of dismissal and therefore dismissed Norton's complaint with prejudice.

The trial court specifically found that Norton had "numerous opportunities for alternative service" available to him, but he failed to pursue those. (R. 192-193). For example, Judge Bean questioned Norton's counsel as to why he had not sought to serve Hess through alternate means such as service by publication. (R. 188-190). Norton's counsel stated that his office typically avoids seeking to serve a defendant by publication and therefore did not in this case. (R. 188-190).

Ultimately, the only reason Norton offered to justify Rule 60(b) relief was the fact that he could not re-file his complaint a third time. (R. 13-15). The trial court rejected that basis for relief by correctly concluding that Utah R. Civ. P. 60(b) was not intended to be used a vehicle for circumventing statutes of limitation or the statutory provisions of Utah Code Ann. § 78B-2-111. (R. 159-163, 194-195). Judge Bean specifically concluded: "I'm confident that definitely . . . 78B-2-111 did not intend or was not passed with the intent that Rule 60(b) would be able to circumvent the limitations put specifically into that statute." (R. 194).

The Utah Supreme Court has held that trial courts have broad discretion in ruling upon 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, ¶7, 104 P.3d 1198 (citing Lund v. Brown, 200 UT 75, ¶¶ 10-11, 11 P.3d 277). In fact, 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 60(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. at ¶7 (citing Oseguera v. Farmers Ins. Exch., 2003 UT App 46, ¶¶ 9-10, 68 P.3d. 1008).

Here, the trial court properly exercised its broad discretion to deny Norton rule 60(b) relief after giving full consideration to the facts and events surrounding Norton's motion. These facts include: Norton waited to file his complaint until three days before the four year statute of limitation on his claim expired in December 2010. Norton failed to timely serve Hess, he requested an extension of time to serve Hess, and the request was granted. Norton again failed to timely serve Hess and the trial court dismissed his complaint without prejudice after the statute of limitation on the negligence claim had run. Norton then waited a year before re-filing his complaint against Hess pursuant to Utah Code Ann. §78B-2-111. Norton again failed to timely serve Hess and he requested additional time to serve Hess, but the request was not granted. Norton's complaint was dismissed a second time for failure to timely serve Hess pursuant to Utah R. Civ. P. 4(b). At no point did Norton seek to serve Hess by alternate means such as service by publication. Furthermore, the record is entirely void of evidence as to the efforts, if any, actually taken by Norton to attempt service on Hess prior to either the first or second dismissal of his complaints.

The record before this Court evidences that Norton was given ample opportunity to serve Hess and the trial court routinely granted Norton's requests for additional time to

serve. Nevertheless, for over three years, Norton failed to serve Hess pursuant to Utah R. Civ. P. 4. Norton allowed his claim to go stale, he failed to actively pursue it, and his complaint was twice dismissed. (The Court will note that after the second dismissal, Norton waited a whole year before seeking relief from the dismissal.) Norton received two bites of the proverbial apple, but repeatedly failed over the course of more than three years to timely serve a summons and complaint in both instances.

Given Norton's repeated failures to timely serve Hess, the trial court did not abuse its broad discretion in concluding that there was no justification for relieving Norton pursuant to rule 60(b)(6) from the second order dismissing his complaint.

### **CONCLUSION**

The trial court's dismissal of Norton's complaint with prejudice should be affirmed by this Court. The very essence in the application of Utah's Rules of Civil Procedure is "to achieve the just, speedy, and inexpensive determination of every action." Utah R. Civ. P. 1. Norton's attempts to manipulate the Rules run counter to those purposes and would work incredible prejudice against Hess due to the long delays caused by Norton's failure to actively pursue his claim. Moreover, it would also make the purpose of statutes of limitation null and gut the application of Utah's Savings Statute.

Respectfully submitted this 31<sup>st</sup> day of August, 2015.


PETERSEN & ASSOCIATES

  
H. JUSTIN HITT

Attorneys for Appellee Autumn Hess

**CERTIFICATE OF COMPLIANCE**

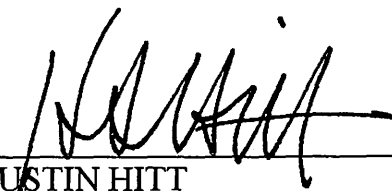
Pursuant to Utah R. App. P. 24(f)(1)(C), counsel for appellee certifies that appellee's brief contains 4,320 words and complies with Utah R. App. P. 24.

  
\_\_\_\_\_  
H. JUSTIN HITT  
Attorney for Appellee Autumn Hess

**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, 2015, two true and correct copies of the foregoing Appellee's Brief were mailed, postage prepaid, to:

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