

2017

**In Re Estate of Donald Bret Kouns, Decedent, Greg Torgerson,  
Plaintiff and Appellant, v. Estate of Donald Bret Kouns, Defendant  
and Appellee**

Utah Court of Appeals

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**Recommended Citation**

Reply Brief, *Torgerson v Estate of Kouns*, No. 20160758 (Utah Court of Appeals, 2017).  
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IN THE UTAH COURT OF APPEALS

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IN RE ESTATE OF DONALD BRET	)	
KOUNS,	)	
	)	
Decedent,	)	
	)	
GREG TORGERSON,	)	
	)	PUBLIC
Plaintiff and Appellant,	)	
v.	)	Case No. 20160758
	)	
ESTATE OF DONALD BRET KOUNS,	)	
	)	
Defendant and Appellee.	)	

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REPLY BRIEF OF APPELLANT

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Appeal from a Judgment of the Sixth District Court  
In and For Sevier County, State of Utah  
Honorable Wallace A. Lee

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UTAH APPELLATE COURTS

APR 13 2017

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## Argument

The sole issue in this appeal is whether the District Court erred when it denied Appellant's Rule 60 Motion for Relief from Judgment or Order. As stated in Appellant's Opening Brief, "[f]or a district court to set aside a default judgment pursuant to Rule 60(b), 'a defendant must show: (i) that the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)), (ii) that his motion to set aside the judgment was timely, and (iii) that he has a meritorious defense to the action.'" *Bodell Construction v. Robbins*, 2014 UT App. 203, 334 P.3d 1004, 1007 (Ut.Ct.App.2014). There is no dispute that Appellant's motion was timely. The only elements in contention are whether (1) there was excusable neglect; and (2) Appellant had a meritorious defense to the action.

"[T]here is no specific legal test for excusable neglect." *Jones v. Layton/Okland*, 2009 UT 39, 214 P.3d 859, 863 (Ut.2009). "The equitable nature of the excusable neglect determination requires that a district court be free to consider all facts it deems relevant to its decision and weigh them accordingly." *Id.* The excusable part of excusable negligence imposes upon the moving party "some evidence of diligence in order to justify relief." *Id.* The diligence required under Rule 60 does not, however, rise to the level of "due diligence" or "perfect diligence." All that is required is that the moving party show some diligence.

The question of diligence in this matter relates exclusively to Appellant and his attorney's failure to attend the April 18, 2016 hearing. It was at this hearing that the

default judgment in question was entered by the District Court. Appellant asserts that he was not given notice of this hearing until April 16, 2016 when Lloyd Rickenbach, Appellant's attorney at the time, entered an appearance in the case. (Record on Appeal "ROA" at #000301). Appellant further asserts that Mr. Rickenbach took immediate action by filing a Motion to Continue on the same date he discovered the existence of the hearing. It is Appellant's contention that the actions taken by Mr. Rickenbach constitute requisite diligence under Rule 60.

Appellee asserts that "Rickenbach was given actual notice of the April 18, 2016 hearing." (Appellee's Response Brief, at p. 14). In support of this assertion, Appellee relies solely on an after-the-fact and self-serving affidavit filed by Appellee's counsel's secretary, Jill Miles, stating that Ms. Miles mailed the Notice of Hearing to Mr. Rickenbach. The District Court accepted Appellee's assertion regarding actual notice of the hearing.

Specifically, the District Court made the following representations in its August 15, 2016 Memorandum Decision and Order:

At 1:30 P.M. on 18 April 2016, the Court convened probate case number 153600021 for oral argument on the Petition as scheduled. Only Olsen and Peterson appeared. Apparently presuming the Court would grant the motion to continue the hearing, neither Torgerson nor Rickenbach appeared. Olsen expressed surprise when the Court informed him of Torgerson's Motion to Continue Hearing, and objected to any continuance. Olsen explained to the Court that due to application of § 75-3-804(2), Torgerson no longer had a valid claim against the estate. *Olsen also explained that Torgerson had indeed been afforded proper notice of the hearing when Miles mailed the Court's notice to Rickenbach on 30 March 2016.*

(ROA, at #000315)(emphasis added). The District Court's statement regarding the issue of notice at the April 18, 2016 hearing is incorrect.

The following exchange between the District Court and Appellee's attorney occurred at the April 18, 2016 hearing:

THE COURT: Okay. Well, it looks like one of the other things he points out in his motion is that apparently, the clerks gave notice only to you of the hearing, and didn't give notice to Mr. Torgerson, who had filed a claim and a demand for notice with the Court. So that mistake's happened too. I'm wondering—

MR. OLSEN: One additional problem with that, Your Honor, is in the estate, they've completely defaulted. No bonus was required.

(ROA, at #000405-406). It is Appellant's belief that the word "bonus" found in Mr. Olsen's statement should be "notice" as the word "bonus" is completely inapplicable to the proceeding and "notice" and "bonus" have similar sounds for court reporting purposes. Basically, Appellant believes that Mr. Olsen stated that "[n]o notice was required."

The significance of this exchange is that it contradicts the District Court's assertion that Mr. Olsen told the District Court at the April 18, 2016 hearing that his office had mailed a notice of the hearing to Mr. Rickenbach on March 30, 2016. There was no discussion between the District Court and Appellee's attorney regarding an alleged mailing of notice to Mr. Rickenbach. To the contrary, it appears to have been Appellee's attorney's position at the April 18, 2016 hearing that notice of the hearing was not required.

It would seem logical if Appellee's attorney had, in fact, mailed notice to Mr. Rickenbach on March 30, 2016, he would have said so at the April 18, 2016 hearing when the issue arose. He did not. This fact, along with the lack of a contemporaneous filing of a certificate of service for the mailing, calls into question the veracity of Ms. Miles' after-the-fact assertion.

It is undisputed that the District Court did not give statutory notice of the April 18, 2016 hearing to either Appellant or Mr. Rickenbach. It is also undisputed that there was no contemporaneously filed certificate of service evidencing the alleged March 30, 2016 mailing by Ms. Miles. It is further undisputed that Mr. Rickenbach filed a motion to continue the April 18, 2016 immediately upon entering his appearance in the case. Under these undisputed facts, Appellant acted with the requisite diligence for a Rule 60 motion.

The second issue in contention is whether Appellant sufficiently demonstrated that he had a meritorious defense to the action. The District Court acknowledged that Appellant did present evidence of a "paper trail, including the leases and check" as evidence of his entitlement to the property in question, but held that said evidence ignored "the elephant in the room," the failure on the part of Appellant to timely prosecute his claim under § 75-3-804(2). (ROA, at #000324-325).

There is no elephant in the room. Appellant's claim against the estate included the following assertions: (1) lease of real property between Appellant and the decedent; and (2) the right of first refusal to purchase the property in question. (ROA, at #000026). These claims, however unartfully made, are claims for specific performance.

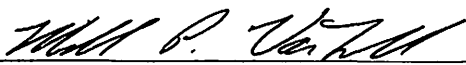


“The term ‘claim’ found in [the Probate Code] does not include a claim for specific performance. . . .” *In Re Estate of Sharp*, 537 P.2d 1034, 1037 (Ut.1975). Torgerson’s claim cannot, therefore, be time barred by the Probate Code.

**Conclusion**

For the reasons set forth herein and in Appellant’s Opening Brief, Appellant requests that the Court reverse the District Court’s decision denying Appellant’s Rule 60 motion, and remand the matter back to the District Court so that Appellant’s claims can be resolved on the merits.

Respectfully submitted by,

  
\_\_\_\_\_  
Michael P. Van Tassell  
Attorney for Plaintiff/Appellant

**Certificate of Compliance With Rule 24(f)(1)**

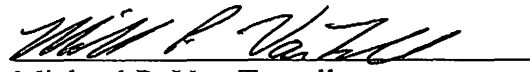
I, Michael P. Van Tassell, certify that this document, Brief of Appellant, complies with the Court’s type-volume limitations and contains 1480 words according to the word processing software used to prepare this document.

  
\_\_\_\_\_  
Michael P. Van Tassell

**CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of Plaintiff/Appellant's Brief was served on the attorney of the Defendant/Appellee by placing two copies in the U.S. Mail, first-class, postage prepaid, this 13<sup>th</sup> day of April, 2017 at the address listed below.

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