1992

Boyle v. National Union Fire Insurance : Unknown

Utah Court of Appeals

Scott W. Christensen, Theodore E. Kanell; Hanson, Epperson & Smith; attorneys for appellee.
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September 24, 1993

David E Leta (801) 237-1928

Ms. Mary T. Noonan, Court Clerk
Utah Court of Appeals
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

RE: Supplemental Authority -- Boyle et al. v. National Union Fire Insurance Company, Case No. ~~920192~~ 920760-CA

Dear Ms. Noonan:

Pursuant to Rule 24(j), Utah Rules of Appellate Procedure, Appellants in the above-referenced case supplement their Brief and the record by reference to the case of Barnard v. Wassermann, 215 Ut. Adv. Rpt. 14 (Sup. Ct. Utah, June 17, 1993) on the issue of the appropriate standard of review from a dismissal of a Complaint for failure to state a claim. This issue is an aspect of the above Appeal. The portion of the Barnard decision which is relevant to this issue appears on page 15 as follows:

> In reviewing this dismissal, we give no deference to the trial court's ruling and apply a correctness standard. St. Benedict's Dev. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah, 1991). In so doing, we must construe the Complaint in the light most favorable to plaintiff and indulge all reasonable inferences in plaintiff's favor. Id.

Pursuant to Rule 24(j), seven copies of this letter are enclosed.

Sincerely,

SNELL & WILMER

David E. Leta

:ET NO. 920760

DEL:djr
cc: Scott W. Christensen, Esq.
Jaryl L. Rencher, Esq.
Gary Anderson, Esq.

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PALMER DePAULIS
Director of Public Policy & Communications

January 13, 1994

Mary T. Noonan, Clerk
Utah Court of Appeals
230 South 500 East #400
Salt Lake City, Utah 84102

Re: State v. Todd Allen Parker
Court of Appeals No. 920732-CA
Set for Oral Argument January 19, 1994

Dear Ms. Noonan:

Pursuant to Rule 24(j), Utah Rules of Appellate Procedure, appellee State of Utah submits the following supplemental authorities in support of its position:

Supporting the State's Brief of Appellee at 8-9, arguing that the Utah R. Crim. P. 22(e) authority to correct an illegal sentence does not apply to Parker's post-dismissal motion, see Hill v. United States, 368 U.S. 424, 430 (1962), interpreting the substantively identical Fed. R. Crim. P. 35: "[T]he narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to imposition of sentence." (Emphasis in original, footnote omitted).

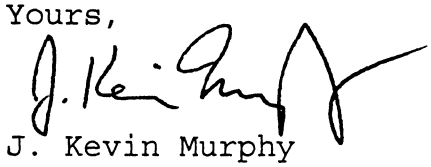
In support of Brief of Appellee at 10-14, arguing that appellant's failure to timely move to amend the judgment of dismissal, per Utah R. Civ. P. 59(e), divested the trial court of subject matter jurisdiction, see Hulson v. Atchison, T. & S. F. Ry. Co., 289 F.2d 726 (7th Cir. 1961) (cited in Burgers v. Maiben, 652 P.2d 1320, 1321 (Utah 1982) (Reply Br. of Appellant at 5)), explaining the interaction of the parallel federal civil procedure Rules 59, 60, and 6(b); Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970) (also cited in Burgers), explaining the same rules: "The overriding principle of all the aforementioned rules is to assure the finality of judgments" (dismissing appeal, and rejecting attempt to convert, by interlineation, untimely Rule 59(b) new trial motion to a Rule 60(b)(1) "inadvertence"-based motion for relief); Kruse v. Zenith Radio Corp., 82 F.R.D. 66, 68 (W.D. Pa. 1979) (trial court lacked power to consider meritorious arguments

for new trial, where Rule 59(b) new trial motion was not served within ten days after entry of judgment).

In response to appellant's effort, in his reply brief at 3-6, to invoke Utah R. Civ. P. 60(b) for the first time in this proceeding, see Labuguen v. Carlin, 792 F.2d 708, 709 (7th Cir. 1986) (trial court not obliged to treat untimely Rule 59(e) motion as a timely Rule 60(b) motion); Howard v. Burlington Northern, Inc., 75 F.R.D. 644 (D. Ore. 1977), aff'd without op., 588 F.2d 842 (9th Cir. 1978) (60(b) motion does not excuse failure to meet ten-day Rule 59(b) time limit). See also United States v. One Hundred Nineteen Thousand Nine Hundred Eighty Dollars, 680 F.2d 106, 107 (11th Cir. 1982), and United States v. One 1961 Red Chev. Impala, 457 F.2d 1353, 1356 (5th Cir. 1972) (Rule 60(b) is available only to set aside prior order or judgment, and cannot be used to impose additional relief); Hough v. Local 134, Internat'l Brotherhood of Electrical Workers, 867 F.2d 1018, 1022 (7th Cir. 1989) (attorney carelessness or ignorance does not provide grounds for relief under Rule 60(b)); Silk v. Sandoval, 435 F.2d 1266, 1268 (1st Cir. 1971) (relief from judicial "mistakes" of law must be sought under Rule 59(e), not Rule 60(b)).

Thank you for your attention.

Yours,



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