1983

Wayne Garff Construction Company, Inc v. Maurice Richards And Mrs. Maurice Richards, Myrtle Bisel, Et Al. And Richards, Caine & Richards, A Law Partnership, And Maurice Richards v. Wayne Garff Constructicm Company, Inc., Wayne Garff, Individually, Northern Development Company, And Three Fountains of North Ogden, Inc. : Appellant's Brief On Appeal

IN THE SUPREME COURT OF THE

STATE OF UTAH

WAYNE GARFF CONSTRUCTION COMPANY, INC ,
a Utah Corporation,

Plaintiff and Appellant,

v

MAURICE RICHARDS AND MRS. MAURICE RICHARDS,
MYRTLE BISEL, et al,

Defendants and Respondents,

RICHARDS, CAINE & RICHARDS, A Law partnership,
and MAURICE RICHARDS,

Case No. 19278

Third-party Plaintiffs, Cross-Complainants,
and Respondents,

v.

WAYNE GARFF CONSTRUCTION COMPANY, INC.,
WAYNE GARFF, individually,
NORTHERN DEVELOPMENT COMPANY, and
THREE FOUNTAINS OF NORTH OGDEN, INC.,

Third-party Defendants, Cross-Defendants,
and Appellants.

APPELLANTS' BRIEF ON APPEAL

Appeal from a decision of the District Court for the
Second Judicial District, State of Utah,
Honorable VeNoy Christofferson, District Judge, Presiding

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Respondents

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Cross-Defendants and
Appellants

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APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

Appellants filed a Motion under Rule 60 (b) of the Utah Rules of Civil Procedure to set aside a judgment which was entered against them in their absence and after their then counsel had informed them that the matter had been fully settled by all parties dismissing all claims, counterclaims and cross-claims.

DISPOSITION IN LOWER COURT

The District Court denied Appellants' MOTION TO SET ASIDE JUDGMENT and Appellants' MOTION FOR REHEARING ON THIRD PARTY DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the decision of the District Court which denied Appellants' MOTION TO SET ASIDE JUDGMENT and Appellant's MOTION FOR REHEARING ON THIRD PARTY DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT.

STATEMENT OF FACTS

The adversaries in this matter are Maurice Richards, his present wife who is the former Myrtle (Susie) Bisel, (R. 353) and the legal firm of which he is a partner, Richards, Caine & Richards, as Respondents. The Appellants, Wayne Garff and Wayne Garff Construction Company, Inc., are former clients of Maurice Richards and his law firm. (R. 70, Defendant's Exhibit 1, 2 and 10) Named by Maurice Richards as Third-party Defendants and CrossDefendants are two other Companies, Northern Development Company and Three Fountains of North Ogden, Inc., that were, during the time in question, clients of Maurice Richards and his law firm. (R. 70, Defendant's Exhibit 2 and 10)

The Plaintiff/Appellant's Complaint in this case (R. 1-13) was filed on October 28, 1977 (R. 1), after having been served on Defendant Maurice Richards on October 21, 1977 (R. 15). A Default Certificate was entered against Defendant Maurice Richards on Monday, November 21, 1977 (R. 17), and a hearing was set for a Default Judgment to be taken the same day (R. 16, 300-308), as no responsive pleading had been filed. However, John

Caine, an associate of Defendant Maurice Richards, happened to be in Court at the time set for the Default hearing (R. 301) and upon his representations that he would see that responsive pleadings were filed by Wednesday, November 23, 1977 (R. 16, 302, 307) the Default Judgment was not granted (R. 307-308). Responsive pleadings were not filed until Tuesday, November 29, 1977 (R.18-37).

The first trial for this case was set for October 26, 1978. This was evidently a non-jury trial setting which was striken by the Court because a Jury Demand was filed by Appellants' then counsel on October 12, 1978. (R. 52, 113)

The second trial setting for January 22, 1979 (R. 278), and the third trial setting for April 26, 1979 (R. 278) were continued because of medical problems allegedly suffered by Respondent Maurice Richards (R. 58-59).

A fourth trial setting for September 17, 1979, was continued due to three criminal cases and two civil cases pending trial ahead of this case with only two judges being available for trial. (R. 62)

A fifth trial setting for January 7 1980, (R. 114 and 122) (R. 278 indicates January 17, 1979, but at least the year must be in error in that the prior trial setting was September 17, 1979) was continued due to the continuing medical problems of Respondent Maurice Richards (R. 114) or serious illness of Stan Adams (R. 122).

A sixth trial setting for April 10, 1980, was continued because "Gary Walker was not noticed for this trial, and the Court ruled that the case cannot proceed". (R. 50) Gary Walker was the President of Northern Development Company (R. 70, Defendant's Exhibit 4) and Three Fountains of

North Ogden, Inc. (R. 70, Defendant's Exhibit 7, ARTICLE VIII). He too had personally been a client of Maurice Richards. (R. 321, lines 24 and 25, and 322, lines 1-4) Respondent's Counsel also alleged that an additional objection to the trial proceeding on the sixth setting was that the Judge had played handball with Appellant Wayne Garff. (R. 123)

On July 22, 1980, Appellant sent a letter to his then attorney requesting him to settle the case, if Respondents would agree, by both parties dismissing their causes of action. (R. 108) This offer was conveyed to Respondent's attorney by a letter dated July 25, 1980. (R. 109)

Shortly after the above offer of settlement was made, the seventh trial setting for August 11, 1980, was continued indefinitely at the request of counsel for Respondents on the ground that Respondent Maurice Richards would be outside of the United States. (R. 65-66)

On February 10, 1982, (R. 278) nearly two years after the last continuance, notice of an eighth trial setting, for June 7, 1982, was sent to Appellants' then Counsel. On February 16, 1982, Appellants' then Counsel wrote to John Caine, one of the partners in the Respondent law firm of Richards, Caine & Richards and after noting receipt of the June 7, 1982 trial setting, asked:

> Should I prepare or should we dismiss. Please advise. (R. 110)

While no written response was received to this letter, according to the Affidavit of Appellants' then Counsel, he did have contact four or five times, both by telephone and in person, about Appellants' offer to dismiss. He was advised that if he did not hear to the contrary, he could consider the case would be dismissed. (R. 104) He heard nothing

to the contrary until Appellant called him on December 4, 1982, to ask about a garnishment that had been served on Pat Blair. (R. 155 and 243)

In the AFFIDAVIT OF JOHN T. CAINE, Mr. Caine denies discussing a settlement with Appellants' former Counsel or that he received the letter (R. 110) Mr. Adams sent to him. (R. 136) In his AFFIDAVIT OF COUNSEL IN OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT Respondent's Counsel neither acknowledges or denies receiving the letter (R. 109) Mr. Adams sent to him. He does state he received an "oral communication" of such an offer, communicated it to his clients who refused same and then so advised Mr. Adams by telephone. (R. 123)

The eighth trial setting on June 7, 1982, proceeded even though Mr. Garff had been informed by his then Counsel that the case had been settled by both parties dropping their claims and that there would be no trial. (R. 105, 152 and 244)

In order to make sure of his understanding, Mr. Garff personally asked his then Attorney, Stanley S. Adams, on the very day of the trial, June 7, 1982, if he was to go to trial. He was told not to worry, "I am sure it is settled and there will be no trial". (R. 152)

The FINDINGS OF FACT AND CONCLUSION OF LAW AND JUDGMENT were submitted to the Court in August, 1982, and signed on August 19, 1982. (R. 76 and 139) A copy of this JUDGMENT was not served upon Apellant or his attorney until September 21, 1982. (R. 125-126, ¶ 23) The copy mailed to Mr. Adams on September 21, 1982, was received by a Sylvia Martinez on September 23, 1982. (R. 127 and 139) Sylvia Martinez was a receptionist employee of Mr. Adams' landlord at the Valley Bank Towers Building and

not of Mr. Adams. She had no authority from Mr. Adams to accept certified mail for Mr. Adams. Mr. Adams was on vacation from September 20 until September 27, 1982, and had no knowledge that a Judgment had been entered in the matter until Mr. Garff called him about a Garnishment that had been served on Mrs. Patricia (Pat) Blair. (R. 78 and 243)

It was not until December 4, 1982, that Mr. Garff received his first hint that something was wrong when he was told by Mrs. Patricia Blair that she had received a writ of Garnishment against Wayne Garff Construction Co. He then called Mr. Adams and asked him to investigate. It was not until December 13, 1982, that he actually learned that a Judgment had been taken against him. (R. 155-156)

Appellants' MOTION TO SET ASIDE JUDGMENT (R. 79-80) was mailed December 21, 1982, and received by the Clerk of the Court on December 22, 1982. It was, therefore, received by the Clerk nine (9) days after Mr. Garff actually learned of the Judgment against him and only eighteen (18) days after receiving the first information that would even cause him to suspect there was a Judgment against him.

In the Court's March 24, 1983, MEMORANDUM DECISION, the Court noted that:

> . . .Under the facts as stated by plaintiffs affidavit, it could possibly be construed there was excusable neglect for not appearing at the time the trial was set. The problem with plaintiff's present motion is that judgment was entered on August 19, 1982, and filed with the clerk on August 23, 1982, and the plaintiff and his attorney received notice of judgment on September 23, 1982. However, they did not file the motion to set aside the judgment until December 22, 1982, some four months after the date of entry of judgment, even some thirty days after the writ of garnishment had been issued against the plaintiffs. Even though plaintiff had some cause for excusable neglect to set aside the judgment, and it appears there is possible grounds for the same if you rely upon their affidavits. They still fail to meet the requirements under Rule 60(b) of the Utah Rules of Civil procedure with (sic) provides that:

"The motion shall be made within a reasonable time... and not more than three months after the judment, order, proceeding (sic) was entered or taken".

The Plaintiff has not filed the motion timely under Rule 60(b) under the Rules of Civil Procedure, and this motion to set aside the default judgment will be denied. . .(R. 139)

Based on the Court's MEMORANDUM DECISION dated March 24, 1983, Counsel for Third-Party Plaintiffs filed their proposed FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING MOTION TO SET ASIDE JUDGMENT which was signed by the Court on April 11, 1983. (R. 146)

Appellant Wayne Garff first contacted his present Counsel on learning of the Court's decision on April 14, 1983. Counsel prepared his MOTION FOR REHEARING ON THIRD-PARTY DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT (R. 149-150), supporting AFFIDAVIT of Wayne B. Garff (R. 151-156), and ORDER STAYING EXECUTION (R. 179-180) on Saturday, April 16, 1983, in order to meet the 10 day deadline under Rule 59 (b) and (e) of the Utah Rules of Civil Procedure. Pursuant to Rule 62 (b) of the Utah Rules of Civil Procedure, the Court signed said ORDER STAYING EXECUTION and copies of said ORDER, MOTION, and AFFIDAVIT were served on opposing Counsel on Monday, April 18, 1983, by personal delivery to his office. (R. 150 and 180)

Counsel for Respondents served his MOTION IN OPPOSITION TO MOTION FOR REHEARING (R. 181-183), AFFIDAVIT IN OPPOSITION TO MOTION FOR REHEARING ON THIRD-PARTY DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT (R. 184-194), AFFIDAVIT OF COUNSEL (R.197-198), AFFIDAVIT OF LINDA MOORE (R. 199-200), and AFFIDAVIT of JAN CHASE (R. 195-196), by mail on Friday, May 6, 1983. (R. 183)

The District Court issued its MEMORANDUM DECISION denying Appellants'

MOTION FOR REHEARING ON THIRD-PARTY DEFENDANT'S MOTION TO SET ASIDE JUDGMENT on June 6, 1983, and copies were mailed to Counsel on June 7, 1983. (R. 223) Respondent's Counsel mailed a copy of the ORDER DENYING MOTION FOR REHEARING AND ORDER SETTING ASIDE STAY OF EXCUTION to Appellants' Counsel on June 8, 1983. (R. 281) Appellants' NOTICE OF APPEAL (R. 284-285) was filed on June 21, 1983.

ARGUMENT

POINT I

RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE MUST BE CORRELATED AND INTERPRETED IN CONTEXT WITH OTHER RULES OF PROCEDURE AND PRACTICE, PARTICULARLY RULE 2.9 WRITTEN ORDERS, JUDGMENTS, AND DECREES, OF THE RULES OF PRACTICE IN THE DISTRICT COURTS AND CIRCUIT COURTS OF THE STATE OF UTAH.

Paragraphs (a) and (b) of Rule 2.9 Written Orders, Judgments, and Decrees of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah provides:

> (a) In all rulings by a court, counsel for the parties obtaining the ruling shall within fifteen (15) days, or within shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.
>
> (b) Copies of the proposed Findings, Judgments, and/or Orders shall be served on opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections thereto shall be sumitted to the court and counsel within five (5) days after service. (Emphasis added)

It is absolutely clear in this case, both from Paragraph 23 of the February 2, 1983, AFFIDAVIT OF COUNSEL IN OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT (R. 125-126) and the Court's MEMORANDUM DECISION (R. 139), that both of the above cited sections of Rule 2.9 were flagrantly violated and/or ignored by Respondent's Counsel, Mr. Gale. The trial in this matter took place on June 7, 1982, and the proposed judgment should have been filed with

the court by June 22, 1982. Copies of the proposed Findings and Judgment should have been served on Mr. Adams before they were presented to the Court for signature. However, as can be seen from the signed FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT dated August 19, 1982 (R. 76), Mr. Gale did not file this document with the Court until August, some two (2) months after the trial. The Court signed the Judgment on August 19, 1982, but Mr. Gale waited more than another month, until September 21, 1982, after Mr. Garff's one month to appeal the Judgment under Rule 73(a) of the Utah Rules of Civil Procedure had expired, before mailing a copy to Mr. Adams. (R. 125-126)

The copy arrived on September 23, 1982, at the office building where Mr. Adams rents an office while Mr. Adams was on vacation. A receptionist for Mr. Adams landlord, without any authority from Mr. Adams signed for the copy but never personally brought the copy to Mr. Adams attention. Mr. Adams did not learn about the Judgment against Mr. Garff until Mr. Garff called him upon learning about the Garnishment on December 4, 1982. (R. 155, 156 and 243) Thereafter, on December 22, 1982, within 18 days of the date Mr. Garff first received information that would give him any reason to believe that there was a judgment against him, and within three (3) months of the date the copy of the judgment was signed for by an unauthorized person (R. 127 and 243, ¶ 4) Plaintiff filed his MOTION TO SET ASIDE JUDGMENT. (R. 79-80)

Under such circumstances, it should be obvious to the Court that had Mr. Gale served copies of his proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT upon Mr. Adams before he filed them with the Court and within fifteen (15) days of the June 7, 1982, trial, then Appellants'

MOTION TO SET ASIDE JUDGMENT would have been made in June rather than in December.

But most important, it should be clear to the Court that the requirement of Rule 60(b) of the Utah Rules of Civil Procedure that the motion be made within three months after the judgment was entered must be correlated and taken in context of section (b) of Rule 2.9, supra, which requires that the Findings and Judgment "shall be served on opposing counsel before being presented to the court for signature".

The whole notion, basis, foundation and reason for Rule 60(b) is to be able to challenge a Judgment, default or otherwise. How can one challenge a Judgment if one does not know about it! Therefore, notice of the Judgment must be the key date from which the three months required by Rule 60(b) is calculated, particularly where Counsel for the party who is awarded the Judgment fails to serve a copy of the Findings and Judgment on opposing Counsel as required by Rule 2.9, supra.

The failure of Respondent's Counsel to comply with Rule 2.9 cannot be excused on the grounds that this was a default Judgment as he himself noted in his MOTION IN OPOSITION TO MOTION FOR REHEARING that:

> Garff and his present attorney continue to designate the action taken as a default judgment, when in fact a judgment was taken after a trial on the issues and the merits of this case. (R. 182)

Unless copies of a judgment are served on opposing counsel, all counsel who obtains a judgment under circumstances such as existed in this case need do is wait over three months after he has obtained his judgment before he attempts to collect the judgment, as was done in this case. The party against whom the Judgment was taken will then be denied any relief. In other words, Rule 60(b) of the Utah Rules of Civil Proce-

dure contemplates that the party against whom the Judgment is taken has notice that Judgment was taken when it requires that a Motion to Set Aside the Judgment be brought within three months. When understood in this light, the requirement is that the motion be brought within three months of Notice, and has been met by Appellant in this case even if the court does impute the receipt of a copy of the Judgment by a receptionist of Mr. Adams' landlord to Mr. Adams and thus on to Mr. Adams' client, Mr. Garff. The receptionist signed for the copy on September 23, 1982. (R. 127) The Appellants' Motion was filed by mail on December 21, 1982. (R. 80)

POINT II

RESPONDENTS HAVE FAILED TO COMPLY WITH RULE 2.8 OF THE RULES OF PRACTICE IN THE DISTRICT COURTS AND CIRCUIT COURTS OF THE STATE OF UTAH .

Section (b) of Rule 2.8 of the RULES OF PRACTICE IN THE DISTRICT COURTS AND CIRCUIT COURTS OF THE STATE OF UTAH states:

> The responding party shall file and serve upon all parties within ten (10) days after service of the motion, a statement of answering points and authorities and counter affidavits.

In his MOTION IN OPPOSITION TO MOTION FOR REHEARING Counsel for the Respondents moved the District Court "...for an immediate dismissal of the Motion for Rehearing...and for $2,500.00 for their legal fees and costs incurred through the attempts of Wayne Garff to delay execution of the judgment heretofore entered by this Court." (R. 181-182) Thus Respondents and their counsel dramatically demostrated their propensity for outrageous over-reaching by seeking such substantial attorney's fees for their efforts in submitting a response that was filed on May 6, 1983, eight (8) days after it was due under said Rule 2.8.

The only reason cited by the District Court for denying Appellants' MOTION TO SET ASIDE JUDGMENT was that it was not filed within the time required by Rule 60 (b) and yet the Court accepted Respondent's MOTION IN OPPOSITION TO MOTION FOR REHEARING, AFFIDAVIT IN OPPOSITION TO MOTION FOR REHEARING ON THIRD-PARTY DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT, AFFIDAVIT OF COUNSEL, AFFIDAVIT OF LINDA MOORE, and AFFIDAVIT OF JAN CHASE eight (8) days after they were required by Rule 2.8. Fairness and equity demand that Respondents be held to the same technical compliance with the Rules of Procedure and Practice that are required of Appellant. In fact, Appellants should in fairness and equity be excused from the requirement of Rule 60(b) to file thier MOTION TO SET ASIDE JUDGMENT within three months of the date it was entered by the Court for the simple reason that they had no actual knowledge that there was a judgment against them until December 13, 1982, after the three months from the date of signing by the Court had passed.

Appellants did in fact make their motion within nine (9) days of receiving actual notice; whereas, the Respondents failed to respond to Appellants' MOTION TO SET ASIDE DEFAULT JUDGMENT within the ten (10) days required under Rule 2.8 even though Appellants' Motion was personally delivered to the office of Respondents' Counsel (R. 150 and 180). Respondents' MOTION IN OPPOSITION TO MOTION FOR REHEARING together with its accompanying affidavits should have, therefore, been striken and denied as untimely. Had the Court striken and denied Respondents' Motion, Appellants' Motion would have stood unopposed (just as Respondents were unopposed at the June 7, 1982 Trial) and would have necessarily been granted (just as Judgment was granted to Respondents' on June 7, 1982).

Appellants also note that at the November 21, 1977 hearing for a Default Judgment against Respondent Maurice Richards, the District Court granted said Respondent two (2) additional days in which to submit his responsive pleadings. (R. 16, 302, lines 7 and 8, and 307, lines 20-23) At that time his answer was already eleven (11) days late. Respondents then took eight (8) more days to file their responsive pleadings (R. 18-26), but the District Court still accepted them even though they were filed six (6) days beyond the two (2) day extension.

The great latitude the District Court gave Respondents to file their Answer and responsive pleadings nineteen (19) days late; to file their FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT approximately two (2) months after the June 7, 1982 hearing (when they should have been submitted within fifteen (15) days) without first submitting them to opposing counsel; and to file their MOTION IN OPPOSITION TO MOTION FOR REHEARING eight (8) days late, all without any explanation from Respondents for the late filings, stands in sharp contrast to the rigid application of the time limit under Rule 60(b) of the Utah Rules of Civil Procedure which the District Court applied against Appellants in spite of Appellants' explanations for filing their MOTION TO SET ASIDE JUDGMENT at the time they did and the Court's finding that the facts as stated in Appellants' affidavit "... could possibly be construed as excusable neglect..." (R. 139).

POINT III

RECEIPT OF A COPY OF THE JUDGMENT BY A RECEPTIONIST AT THE OFFICE BUILDING WHERE APPELLANTS' ATTORNEY HAD AN OFFICE SHOULD NOT BE IMPUTED TO APPELLANTS' COUNSEL AND CERTAINLY NOT TO APPELLANTS WHO IN FACT NEVER RECEIVED NOTICE OF THE JUDGMENT.

While Appellants acknowledge that notice to Appellants' counsel is

imputed to Appellants, Appellants submit that notice received by someone other than Appellants' counsel, such as a receptionist or secretary who does not then give that notice to the Attorney, should not be imputed to the Attorney's client, especially where the receptionist who signed for the document was not an agent of the Attorney and was not authorized to receive such documents for the Attorney. Central Trust Co. v. West India Improv. Co., 48 App. Div. 147, 63 N. Y. Supp. 853 (1900), reversed without reference to this point in 169 N.Y. 314, 62 N.E. 387 (1901); Brown v. Sweet, 7 Ont. App. Rep. 725 (1880); Re Ashton, 64 L. T. N. S. (Eng.) 28, 39 Week. Rep. 320, 8 Morrell 72 (1891).

In this case, the Court imputed the delivery of a copy of the Judgment to Appellants' former Counsel even though the person who received it was merely a receptionist in the office building where Appellants' former Counsel rented an office, had no authority to receive mail for Appellants' former Counsel, and did not deliver the Judgment to Appellants' former Counsel personally. (R. 243)

POINT IV

APPELLANTS HAVE A MERITORIOUS CASE WHICH SHOULD BE TRIED ON THE MERITS.

The Plaintiff/ Appellant commenced this case against Defendants/ Respondents Maurice Richards and Myrtle Bisel on the grounds that Defendant Richards had signed an OFFER TO PURCHASE AND EARNEST MONEY AGREEMENT (R. 6) and an AMENDMENT TO EARNEST MONEY AGREEMENT (R. 7) to purchase Unit 86 in building E-8 of the Three Fountains of North Ogden condominium complex from Plaintiff, but thereafter defaulted on said agreement. (R. 2) Defendant Myrtle Bisel, who subsequently married Defendant Maurice Richards (R. 353), signed a HOME OWNER'S ACCEPTANCE (R. 8-9) and thereafter

occupied the subject property. (R. 2) Both Defendants were given proper notice to vacate the premises and pay a fair and reasonable amount of rent during the term of occupancy but refused to do so. (R. 2) Without any contract with Plaintiff for either services or materials Defendant Myrtle Bisel filed a NOTICE OF LIEN against the subject property. (R. 4 and 12)

Defendants filed a late ANSWER and COUNTERCLAIM. The Law Partnership in which Defendant Maurice Richards is a Partner joined with said Defendant in filing a THIRD PARTY COMPLAINT. (R. 18-37) The ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT can be summarized as alleging that Plaintiff contracted to sell the Three fountains of North Ogden condominium complex to Northern Development Company on May 3, 1976 (R. 70, Defendant's Exhibit 4); that Defendant Maurice Richards entered into a Uniform Real Estate Contract respecting the above mentioned Unit 86 with Northern Development Company on May 8, 1976 which provided for Defendant Richards to utilize the services of Defendant Myrtle (Susie) Bisel (R. 23 and 28, ¶ 3) to complete and decorate the Unit at buyers expense but with the cost to be deducted from the selling price. Defendant Richards and his Law Partnership also claimed credit for legal services rendered to the Plaintiff, Northern Development Company, and Three Fountains of North Ogden, Inc. (R. 23-26 and 28)

If the Judgment against Appellants is set aside and Appellants are thus given the opportunity to go to trial on the merits, Appellants will show that Appellant Wayne Garff told Defendant Maurice Richards that he (Garff) desired to sell the Three Fountains of North Ogden condominium complex and would pay for his services in helping to locate qualified

buyers, ect. (R. 153-154) Mr. Richards never did find qualified buyers. None of the parties he recommended proved to be financially qualified. (R. 154) Although he did spend considerable time negotiating and drafting various agreements and other legal documents for which he now seeks to collect legal fees from Appellants Wayne Garff and Wayne Garff Construction Company, Inc., said Appellants never received any billing statements from Defendant Maurice Richards or Third Party Plaintiff, Richards, Caine and Richards. (R. 155) Appellants were unaware of any such claims for legal services until they received Respondent's ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT. It should be noted that the billing statement dated January 13, 1977 was allegedly received by Gary Walker on January 13, 1977. (R. 70, Defendant's Exhibit 10) The statement is "FOR PERIOD: May through November 1979". Thus it appears this document was specially contrived as an exhibit for trial. Defendant's Exhibits 1 and 2 also appear to have been contrived. Although Defendant's Exhibit 1 is purportedly a time sheet for hours worked from January 5, 1976 through April 17, 1976, it appears that all the entries were made in the same handwriting in the same ink thus raising a suspicion that the entries were all made at the same time. The same can be said for the entries from May 4, 1976 to November 5, 1976 on Defendant's Exhibit 2.

It is noted that Defendant Maurice Richards was attorney for Gary Walker and Gus Janis prior to becoming attorney for Appellants. (R. 322) Thus Defendant Richards had a serious conflict of interest in trying to represent all parties but he has presented no document or agreement of any kind whereby Appellants were put on notice of his conflict of interest or where they agreed to Richards or his Law Firm continuing to repre-

sent them under such circumstances. REVISED RULES OF PROFESSIONAL CONDUCT OF THE UTAH STATE BAR, DISCIPLINARY RULES, DR 5-105.

Defendant Richards had signed an OFFER TO PURCHASE AND EARNEST MONEY AGREEMENT (R. 6) with Wayne Garff Construction, Inc. on December 31, 1975, which provided for Richards to pay $34,900 for Unit 86. On May 3, 1976, Wayne Garff Construction, Inc. sold the entire condominium complex to Northern Development Company under a Real Estate Contract (R. 70, Defendant's Exhibit 4) drafted by Defendant Maurice Richards (R. 322-323). Five days later, on May 8, 1976, Defendant Maurice Richards completed the purchase of Unit 86 by a Uniform Real Estate Contract (R. 10-11) with Northern Development Company on substantially more favorable terms than provided in the December 31, 1975 OFFER TO PURCHASE AND EARNEST MONEY AGREEMENT. The purchase price is reduced to $34,000.00 and buyer is given the opportunity to complete the Unit at his expense and deduct his costs from the purchase price. (R. 10, ¶ 3) At the time Northern Development Company purchased the condominium complex from Wayne Garff Construction, Inc. and completed the sale of Unit 86 to Defendant Maurice Richards on such favorable terms, its President, Gary Walker knew it did not have the capacity to fulfill its contractual obligations to Wayne Garff Construction, Inc. (R. 204)

Defendant Maurice Richards knew Appellants were seeking $100,000.00 for their equity in the Three Fountains of North Ogden condominium complex (R. 335) but the parties (his clients, Gary Walker and Gus Janis) that he recommended to Appellants breached their contract with Appellants and ran up debts against the project which Appellants had to satisfy after they regained possession of the project with the assistance of other counsel.

(R. 154-155)

The Hold Harmless Agreement between Appellants and Northern Development Company (R. 70, Defendant's Exhibit 13) provides in part that:

> Gary Walker ...[and] ...Northern Development...hereby agree that they will not settle, compromise, stipulate to or negotiate any liability or cause of action they wish protection or indemnification from by virtue of this Agreement unless Wayne Garff and Wayne Garff Construction Company, Inc. have been notified of such liability or cause of action and have given written authority for involvement with the settlement or compromise of such liability or cause of action.
>
> It is mutually understood and agreed that such notification to Wayne Garff and Wayne Garff Construction Company, Inc. shall be given by sending such to Stanley S. Adams, Attorney at Law, at Arrow Press Square, Glass Factory, Suite 200, Salt Lake City, Utah 84101.

It is noted that the ANSWER-TO THIRD PARTY COMPLAINT (R. 41) filed by Gary Walker in behalf of Northern Development Co. and Three Fountains of North Ogden states in part:

> We deny all allegations. We do not owe Mr. Richards any money. We no longer have anything to do with Northern Development or Three Fountains. We sold the Three Fountains back to Wayne Garff and have A Held (sic) Harmless Agreement with him. (Emphasis added)

There is no Certificate of Service or Mailing or Return with said Answer showing the same to have been served on Wayne Garff or Wayne Garff Construction Company, Inc. or their then Attorney, Stanley S. Adams. Wayne Garff never knew such an answer had been filed by Mr. Walker until he saw it in the Court file on May 18, 1983. Thus Appellants never received notice that Northern Development Company claimed protection under the Hold Harmless Agreement and therefore should not be held liable by reason of said agreement.

It is noted that although Gary Walker denied all allegations and denied owing Defendant Richards any money in his answer, he appeared at trial and testified that Northern Development Company did owe legal fees

to Mr. Richards and his firm. (R. 345-346) He had no written authority from Appellants to either file an answer or appear in Court for Northern Development Company. Indeed, inasmuch as he is not an attorney, he had no legal authority or right to represent any Corporation in Court.

If Gary Walker wished protection under the Hold Harmless Agreement he was required by its terms to notify Wayne Garff and Wayne Garff Construction Company, Inc. This he failed to do and thus he can claim no protection under the terms of said agreement. The Respondents are not parties to the Hold Harmless Agreement and therefore can claim no rights by reason of said agreement. Although Gary Walker and Defendant Maurice Richards repeatedly claim throughout the record that Three Fountains of North Ogden, Inc. is a party to the Hold Harmless Agreement, said document speaks for itself. Three Fountains of North Ogden, Inc. is nowhere mentioned therein. (R. 24 ¶ 8, 41, 334, 70 Defendant's Exhibit 13) Therefore, no valid claim can be made by Respondents against Appellants under the Hold Harmless Agreement for legal services rendered to Three Fountains of North Ogden, Inc. Nevertheless, the District Court awarded Respondents Judgment against Appellants for services rendered to Three Fountains of North Ogden Inc. because of said Hold Harmless Agreement. (R. 73 ¶ 7, 8, 10, 11)

It is further noted that both Northern Development Company and Three Fountains of North Ogden, Inc. were involuntarily dissolved by the Lt. Gov./Sec. of State of the State of Utah on December 29, 1978. (R. 157-158) It is also noted that in his Answer, Gary Walker stated he no longer had "...anything to do with Northern Development or Three Fountains." (R. 41) Under such circumstances, it is difficult to understand

Gary Walker's interest in being in Court in this matter on June 7, 1982, some 3 1/2 years after the Corporations had been dissolved and 4 1/2 years after filing his Answer stating he had nothing to do with the Corporations other than to assist his attorney, Defendant Maurice Richards to obtain a judgment against Appellants for services actually rendered to Walker.

It is also noted that Respondent's Counterclaim only asked for $7,409.78 for Myrtle Bisel (R. 24 ¶ 1) but the District Court erroneously awarded her Judgment for $18,771.78 (R. 76), or $11,362 more than she asked for in the complaint even after her attorney conceded that she received $2,638.00 which was to be deducted from the total judgment. (R. 358, line 17-19)

POINT V

SUBSTANTIAL, IRREPARABLE DAMAGE WILL BE DONE TO APPELLANTS IF THE JUDGMENT IS ALLOWED TO STAND, WHILE SETTING ASIDE THE JUDGMENT WOULD MERELY RESTORE THE PREVIOUSLY EXISTING STATUS, PERMITTING PROPER PROCEEDINGS ON THE MERITS.

The court should note that this case was tried nearly 5 years after it was filed. The delays in bringing this case to trial were largely caused by the Repondents who requested five continuances of trial settings. The case then went to trial when Appellants were not present solely because they had been assured that the case was settled and would be dismissed. Judgment of $36,931.78 has been taken against Appellants. If the court allows this Judgment to stand, Appellants only recourse would be against their former counsel on the grounds that he assured them that the case was settled and failed to properly represent them. However, such a claim against Appellants' former counsel would be a grave injustice to him in light of the District Court's statement in its

MEMORANDUM DECISION that:

> Under the facts as stated by plaintiffs affidavit, it could possibly be construed there was excusable neglect for not appearing at the time the trial was set. (R. 139)

On the other hand, what damage will be done to Respondents if this Judgment is set aside? They will simply be returned to the same position they were in prior to trial on June 7, 1982. They are still in a position to assert every claim they asserted on June 7, 1982.

> The general rule is that when an order or judgment is vacated the previously existing status is restored and the situation is the same as though the order or judgment had never been made. The matters in controversy are left open for future determination. The action is not thereby discontinued or abated, but is subject to further proceedings in regular course. The party in whose favor a judgment has been entered irregularly may, after it has been vacated, proceed as if it had never been rendered, and in due time and upon proper proceedings obtain a valid judgment. 1 Freeman On Judgments (5th Ed.) §302, pp. 594-595; also see Wrang v. Spencer, 4 Conn. Cir. 473, 235 A.2d 861 (1967); 4 Am. Jur. 2d, Appeal and Error, §126, p. 641.

In Interstate Excavating v. Agla Development, Utah, 611 P. 2d 369 (1980), this Court, after noting that this was a perplexing case in that the plaintiff and its counsel had "proceeded without any impropriety, including appearing on the trial date and presenting their case" stated:

> The uniformally acknowledged policy of the law is to accord litigants the opportunity for a hearing on the merits, where that can be done without serious injustice to the other party. [Locke v. Peterson, 3 Utah 2d 415, 285 P.2d 1111 (1955)] To that end, the courts are generally indulgent toward the setting aside of default judgments where there is a reasonable justification or excuse for the defendant's failure to appear, and where timely application is made to set it aside. [See Mayhew v. Standard Gilsonite Company, 14 Utah 2d 52, 376 P.2d 951 (1962).] Consistent with the objective just stated, where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so, to the end that each party may have an opportunity to present his side of the controversy and that there be a resolution in accordance with law and justice. [See Cutler v. Haycock, 32 Utah 354, 90 P. 897 (1907); Locke v. Peterson, supra.]

> Application of the principles discussed herein to the instant situation leads to the conclusion that the interests of justice will best be served by setting aside the default judgment and giving the parties that opportunity. In that connection, we call attention to the prefatory clause of Rule 60(b) that "upon such terms as are just" a party may be relieved from a judgment. This authorizes the trial court to impose such terms as may be just as a condition to setting aside the default.

In its MEMORANDUM DECISION, the District Court noted the ". . .plaintiff had some cause for excusable neglect to set aside the judgment. . ." (R. 139) Therefore, consistent with the policy stated by this Court in the above case, this Court should resolve any doubt in favor of reversing the decision of setting aside the judgment in this case. As was noted by this Court, the Court has authority to impose such terms as may be just as a condition to setting aside the default. Appellants acknowledge that their former counsel was guilty of a degree of negligence in handling Appellants' case and therefore the Court may choose to impose appropriate sanctions on Appellants' former counsel. However, surely the Court will agree that allowing a Judgment of $36,931.78 to stand against Appellants leaving them no recourse except against their former counsel is a grossly disproportionate penalty for the negligence of their former counsel.

CONCLUSION

Where Counsel for Respondents has entirely ignored the requirements of Rule 2.9 of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah by failing to serve the proposed Findings and Judgment on Appellants' counsel before filing with the court for signature and took over two months rather than the required 15 days to file the Findings and Judgment with the court, substantial grounds exist on which to set aside the Judgement. Where Counsel has thus ignored the

requirements of Rule 2.9, this court should hold that the three months requirement of Rule 60(b) does not begin to run until the Findings and Judgment have been served on opposing counsel.

Inasmuch as the Respondent's MOTION IN OPPOSITION TO MOTION FOR REHEARING together with its supporting affidavits was filed untimely under Rule 2.8 of the RULES OF PRACTICE IN THE DISTRICT AND CIRCUIT COURTS OF THE STATE OF UTAH, this Court should hold that it was improper to deny Appellants' MOTION FOR REHEARING ON THIRD-PARTY DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT solely on the ground that Appellants' initial MOTION TO SET ASIDE JUDGMENT was filed untimely. Litigants should be treated equally in such matters.

This Court should find that Sylvia Martinez was not an authorized agent of Counsel for Appellants and did not have authority to accept service for said Counsel. But even if this Court does find Sylvia Martinez was Mr. Adams authorized agent, she did not receive service until September 23, 1982. Mr. Adams filed his Motion to Set Aside by mail on December 21, 1982, a date within the three month requirement of Rule 60 (b).

The Appellants have a meritorious case on the merits and should be given the opportunity for a full hearing on the merits.

Consistent with the purpose of Rule 60(b) and the uniformally acknowledged policy of the law as stated by this Court in Interstate Excavating v. Agla Development, supra, this Court should resolve any doubt in favor of setting aside the judgment on such terms as are just and allowing Appellants the opportunity to have their side of the case heard on the merits. Allowing this Judgment to stand under all the

facts of this case would perpetrate an egregious miscarraige of justice.

Appellants plea for Rhadamanthine justice: Defendant Maurice Richards should be disciplined for the conflicts of interest and self-dealing evident throughout the record of this case, rather than being allowed to maintain the $36,931.78 judgment that was awarded to him, his wife and his law firm.

Respectfully submitted this 20th day of September, 1983.

Lorin R. Blauer
Attorney for Appellants

Certificate of Service

I certify that I delivered a copy of the foregoing APPELLANTS' BRIEF to the attorney for Respondents, Gary Gale, Suite 205, Legal Arts Building, 2568 Washington Blvd., Ogden, Utah 84401 this 20th day of September, 1983.