

2003

# Jerry Diane Borg v. Patricia Young and Connie J. Talbot: Brief of Appellant

Utah Court of Appeals

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Mitchell T. Rice; Morgan, Meyer and Rice; Bastiaan K. Coeberg; Richards, Brandy, Miller and Nelson; attorney for appellee.

Jay L. Kessler; attorney for appellant.

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**Paulette Stagg**  
**Clerk of the Court**

IN THE UTAH COURT OF APPEALS

JERRY DIANE BORG, :  
Plaintiff/Appellant, :

:  
:  
: **APPELLANT BRIEF**  
:

**V.** \_\_\_\_\_ :

PATRICIA YOUNG, and CONNIE J. :  
TALBOT, :  
Defendants/Appellees. :

: App. Case No. 20030325-CA

APPELLANT BRIEF

Appeal from the March 6, 2003, final decision  
of the Third District Trial Court's Order  
denying Plaintiff's Motion to Set Aside  
sua sponte November 14, 2003 judgment  
dismissing Plaintiff's Complaint against  
Defendant/Appellee Patricia Young and  
Connie J. Talbot.

(All parties contained in caption)

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IN THE UTAH COURT OF APPEALS

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JERRY DIANE BORG,  
Plaintiff/Appellant,

v.

PATRICIA YOUNG, and CONNIE J.  
TALBOT,  
Defendants/Appellees.

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**APPELLANT BRIEF**

App. Case No. 20030325-CA

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**APPELLANT BRIEF**

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**JURISDICTIONAL STATEMENT**

Jurisdiction is proper pursuant to §78-2a-3 et. seq. of the Utah Code Annotated, in that this is a case that was transferred from the Utah Supreme Court to the Utah Court of Appeals. This matter is an appeal from the District Court final order wherein the Supreme Court had original jurisdiction pursuant to §78-2-2 of the Utah Code Annotated.

## **ISSUES FOR REVIEW**

The District Court erred by sua sponte dismissing Ms. Borg's Complaint for failure to certify the matter for trial, and for failing to set aside the Court's Order when the Plaintiff filed a timely Motion to Set Aside.

The issue has been reserved for appeal because the Judge's sua sponte ruling dismissing the Plaintiff's Complaint took effect on November 14, 2002, a timely Motion to Set Aside was subsequently filed, the Court denied Plaintiff's Motion to Set Aside on March 6, 2003, and a timely appeal was filed on or about April 1, 2003.

## **STANDARD OF REVIEW**

The standard of review challenging the District Court's legal findings are reviewed "for correctness, according them [the District Court] no particular deference." Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989).

Findings of fact are reviewed by an appellate court under the clearly erroneous standard. For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination. See Wessel v. Erickson Landscaping Co., 711 P.2d 250, 252 (Utah 1985).

However the Utah Supreme Court has also stated that the nature of a default judgment and the equitable nature of rule 60 provide limits to its discretion. May v. Thompson, 677 P.2d 1109, 1110 (Utah 1984). see also Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974) (explaining limits to trial court's discretion under Federal Rule of Civil Procedure 60 (which is virtually identical Utah's Rule 60(b); 11 Charles Alan Wright et al., Federal Practice and Procedure § 2857, at 257-58 (2d ed. 1995) (stating that "based on the remedial nature of Rule 60(b), the discretion of the

district court to deny a motion for relief is limited").

### **STATUTORY PROVISIONS**

#### **RULE 60(b)(1)-Mistake, Inadvertence, Surprise, or Excusable Neglect.**

On motion and upon terms that are just, the court may in 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; ... This motion shall be made within ... three months after the judgment, order, or proceeding was entered or taken.

#### **Article I section 7 of the Utah Constitution**

No person shall be deprived of life, liberty or property, without due process of law."

#### **Article I, section 11 of the Utah Constitution**

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law..."

### **STATEMENT OF THE CASE**

Plaintiff's case was to be certified for trial by October 31, 2002, or be dismissed. Before the certification date, Defendant Talbot filed a Motion for More Time to conduct discovery. There was no opposition to the motion. The Court denied the motion as moot and dismissed Plaintiff's Complaint for failure to certify. Plaintiff filed a Motion To Set Aside claiming excusable neglect, surprise, inadvertence, or mistake, and a denial of procedural due process. The Court denied Plaintiff's Motion and this appeal ensued.



As a matter of law the Plaintiff has fulfilled all aspects of Rule 60(b) for the purpose of setting aside the sua sponte ruling. Also, because Talbot's Motion was not heard even though it was filed before the certification deadline, the Plaintiff was denied her procedural due process.

### **STATEMENT OF THE FACTS**

On or about June 5, 1997, the Plaintiff in this matter was a passenger in Defendant, Talbot's vehicle when an accident ensued with the vehicle driven by Defendant Young. (See Complaint, pg 2 – in court file)

Due to the aforesaid accident, the Plaintiff was injured and incurred medical bills of more than \$7,000.00, and lost wages and commissions as a real estate agent. (Id.)

The Plaintiff was able to serve Defendant Young promptly, but was unable to serve Defendant Talbot until September 23, 2002, when counsel for Talbot called the counsel for Plaintiff and stated that they were entering an appearance. The plaintiff and counsel did not know how counsel for the Talbot found out about this matter. (See Motion to Amend Scheduling Order– in court file)

After not being able to properly serve Talbot for many months, the Court wanted to move this matter forward and on June 5, 2002, the Court ruled that, "The certification of readiness for trial is to be filed no later than October 31, 2002, or the case will be dismissed." (See Minute Entry Ruling dated June 5, 2002– in court file)

On October 14, 2002, Defendant Talbot through counsel filed their Answer to Plaintiff's Complaint, and at some point between October 14, 2002 and October 30, 2002, counsel for Talbot and the Plaintiff agreed to extend time for certification for trial while Talbot's attorney conducted some discovery sharing with counsel for Young, and possibly to conduct their

own short discovery requests. Counsel for the Plaintiff agreed, and counsel for Talbot stated that he would file a motion to extend discovery period. (See Affidavit of Jay L. Kessler– in court file)

On October 30, 2002, Defendant Talbot through counsel filed a Motion to Amend Scheduling Order asking the court for ninety days to conduct discovery, and that they would be prejudiced if the case was certified for trial. (See Motion to Amend Scheduling Order– in court file)

On November 14, 2002, the Court denied Defendant Talbot's Motion to Amend Scheduling Order and sua sponte dismissed Plaintiff's Complaint by declaring it was moot because the case was not certified for trial by October 31, 2002. (See Minute Entry Ruling dated November 14, 2002– in court file)

On January 31, 2003, the Plaintiff file a Motion to Set Aside the sua sponte Order, which was subsequently denied by the trial court judge on March 6, 2003. A timely Notice of Appeal of this ruling followed. (See Motion to Set Aside filed January 31, 2003, and (See Minute Entry Ruling dated March 6, 2003– in court file)

The District Court abused it's discretion when it denied Plaintiff's Motion to Set Aside because of the nature of the remedy which limits the trial court's discretion; because the Appellant was denied her constitutional due process of law; and that equity should prevail for the case to be heard on its merits.

### **SUMMARY OF ARGUMENT**

The Appellant was severely injured as a passenger in the Defendant's vehicle and incurred more than \$7,000.00 in medical bills plus lost wages & commissions. Plaintiff easily served process upon Defendant Patricia Young but could not serve Defendant Connie Talbot. The Court

gave a deadline of October 31, 2002 to certify the case for trial, but somehow Defendant Connie Talbot's attorney contacted Plaintiff's counsel and accepted service. Talbot's counsel moved the trial court for more time to conduct discovery, and there were no objections to the motion. The court sua sponte denied Talbot's motion and dismissed Plaintiff's Complaint without hearing or notice. Plaintiff filed a Motion to Set Aside which was improperly denied. Plaintiff argues that the equitable nature of Rule 60(b) applied to the facts should have allowed the ruling to be set aside. Further, the Plaintiff argues that her constitutional rights were denied when the court did not rule on Defendant Talbot's Motion for more time, and not give her a small window of time to certify the matter for trial.

**ARGUMENT**  
**POINT I**  
**RULE 60(b) REQUIREMENTS WERE FULLILLED TO ALLOW THE**  
**TRIAL COURT'S RULING TO BE SET ASIDE.**

Rule 60(b) of the Utah Rules of Civil Procedure states that:

On motion and upon terms that are just, the court may in 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; ... This motion shall be made within ... three months after the judgment, order, or proceeding was entered or taken.

**A. TIMELINESS**

The Court's sua sponte ruling denying Defendant Talbot's Motion for more time as moot, and dismissing Plaintiff's Complaint occurred on November 14, 2002. Plaintiff's Motion to Set Aside was filed on January 31, 2003, clearly within the three month window as set by the Rule.

The Court denied Plaintiff's Motion on March 6, 2003, and the Plaintiff

appealed this ruling on or about April 1, 2003, also clearly within the 30 day period for appeals. As such, the Appellant has met all time requirements to have this matter heard by the Court and the Appellate Court.

**B. THE COURT'S RULING SHOULD HAVE BEEN SET ASIDE DUE TO MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT.**

The whole premise behind the dismissal of Plaintiff's complaint is that she did not certify the matter for trial by October 31, 2002, as ordered by the Court on June 5, 2002.

The reason the case was not certified for trial is outlined in previous pleadings, but includes: Talbot's counsel and Plaintiff's counsel agreeing that Plaintiff's counsel would not certify for trial until some further discovery was held by the Defendant. (See Affidavit of Jay L. Kessler, in file), and Defendants Motion to Amend Scheduling Order to obtain at least 90 days to share and conduct discovery, filed before the certification cutoff date of October 31, 2002. There was no objection filed by any party to the motion. The request was reasonable, the Plaintiff's reliance upon the motion was reasonable, and the fact that the case was not certified for trial on October 31, 2002, by the Plaintiff is clearly excusable neglect.

As stated in previous pleadings, The Utah Supreme Court has held that a party with a "good faith, legitimate belief that no action would or could be taken ... constitutes a "reasonable justification or excuse" for their failure to reply to the counterclaim." Lund v. Brown, 11 P.3d 277, 281 (2000).

In the present case, Plaintiff's counsel had a reasonable belief that the Court would either grant Talbot's request for more time to conduct discovery, or if the request was denied, that a small window of time would

be afforded to file a certificate of readiness for trial. The fact that there were no objections by any party for the extra time to conduct discovery, evidences Plaintiff's counsel's reasonable belief.

Having proven mistake, inadvertence, surprise, or excusable neglect, this matter should be reversed and remanded back to the trial court to be heard on the merits.

**C. THE PLAINTIFF HAS MERITORIOUS CLAIMS WHICH SHOULD BE HEARD BY A JURY.**

In order for Rule 60(b) to apply, a showing of meritorious claims are "to prevent the necessity of judicial review of questions which, on the face of the pleadings, are frivolous." State ex rel. Dept of Soc. Servs. v. Musselman, 667 P.2d 1053, 1060 (1983).

In the present case, the Plaintiff has a prima facie case of negligence against the Defendants. The Plaintiff was a passenger in Defendant Talbot's car. Defendant Talbot had a car accident with Defendant Young, and Ms. Borg was injured. Ms. Borg was not negligent, and took no part in the accident at all except that she was injured. As such, the Plaintiff has a meritorious claim of negligence against the Defendants which should be heard by a jury.

**POINT II  
THE PLAINTIFF WAS DENIED HER CONSTITUTIONAL RIGHT OF DUE  
PROCESS WHEN THE MATTER WAS DISMISSED WITHOUT A  
HEARING OR DISPOSITION ON DEFENDANT TALBOT'S MOTION FOR  
MORE TIME.**

On November 14, 2002, the Plaintiff was denied due process of law when her case was dismissed sua sponte by the District Court, with a pending Motion to Amend Scheduling Order asking for more time.

The Utah Supreme Court has held:

Parties to a suit, subject to all valid claims and defenses, are constitutionally entitled to litigate any justiciable controversy between them, i.e., they are entitled to their day in court. Both the due process clause of article I, section 7 and the open courts provision of article I, section 11 of the Utah Constitution guarantee that litigants will have this "day in court." Miller v. USAA Casualty Insurance Company, 44 P.3d 663, 673 (2002).

Article I section 7 of the Utah Constitution specifically provides, "No person shall be deprived of life, liberty or property, without due process of law."

Article I, section 11 provides in pertinent part that, " All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law..."

In the present case, when the court denied Talbot's Motion for More Time as moot and dismissed the Plaintiff's Complaint, the Plaintiff was deprived of her right to due process of the law. Counsel for Defendants argue that the order stating that if the matter is not certified for trial by October 31, 2002, the matter would be dismissed, should stand.

The fact that there was a pending Motion before the court before the expiration of the certification period should have delayed the trial court's sua sponte ruling to dismiss the case. The court should have ruled on the pending motion before sua sponte dismissing Plaintiff's case for failure to certify. If the Court would have denied the Defendant's motion for more time, surely the Court would have granted the Plaintiff 24 hours to file a Certificate for Readiness for Trial. Even one hour would have sufficed. Instead, the Plaintiff had her case dismissed for failure to certify, and the court sua sponte declared the Defendant's motion moot. A clear violation of the Plaintiff's constitutional rights, and specifically her due process rights.

Wherefore a violation of the Plaintiff's constitutional rights, should

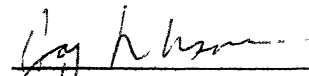
also clearly fit within the realm of Rule 60(b)(6) of the Utah Rules of Civil Procedure for the purpose of setting aside the dismissal of Plaintiff's complaint.

### **CONCLUSION**

Given that the Plaintiff has meritorious claims; made either a mistake, inadvertence, surprise, or excusable neglect; timely moved to set aside the sua sponte judgment; and was denied an opportunity to certify her case for trial because the court would not rule on Talbot's Motion for More Time; and because courts look toward the citizens being "entitled to their day in court"; and because the Defendants are not prejudiced in any way in ruling otherwise; the Plaintiff respectfully requests that the Trial Court's ruling dismissing her case is reversed, and that she be granted a short but reasonable period of time to certify the matter for trial.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of October, 2003.

KESSLER LAW OFFICE

  
\_\_\_\_\_  
Jay L. Kessler, Attorney for Appellant  
V

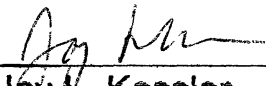
## CERTIFICATE OF SERVICE

I hereby certify that on this 14<sup>th</sup> day of October, 2003, I

hand-delivered the foregoing Appellant Brief to the following:

Mitchel T. Rice, Esq., Attorney for Defendant Patricia Young  
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Bastiaan K. Coeberg, Esq., Attorney for Defendant Connie Talbot  
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50 S. Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110-2465

  
\_\_\_\_\_  
Jay L. Kessler



# ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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JERRY DIANE BORG,	:	MINUTE ENTRY RULING
Plaintiff(s),	:	CASE NO. 010904803 MI
vs.	:	Judge J. Dennis Frederick
PATRICIA YOUNG, and	:	Date: March 6, 2003
CONNIE J. TALBOT,	:	
Defendant(s),	:	

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After review of the pleadings and upon receipt of the Notice to Submit for Decision filed March 4, 2003 and Notice to Submit filed March 4, 2003, the Court rules as follows:

1. Plaintiff's Motion to Set Aside, etc. is declined for the reasons specified in the opposing memoranda. Counsel for defendant Young prepare the order.

Case No. 010904803 MI

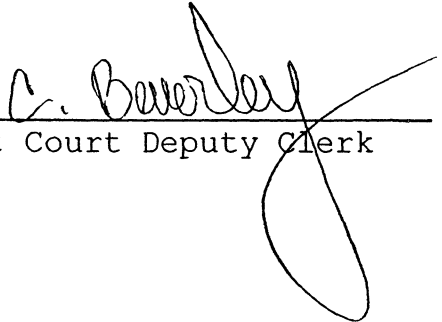
**CERTIFICATE OF MAILING**

I certify that on the 6th day of March, 2003, I sent by first class mail, a true and correct copy of the attached document to the following:

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\_\_\_\_\_  
District Court Deputy Clerk

MITCHEL T. RICE, No. 6022  
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Salt Lake City, Utah 84101  
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Attorneys for Defendant Patricia Young

---

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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JERRY DIANE BORG,	:	
	:	ORDER DENYING PLAINTIFF'S
Plaintiff,	:	MOTION TO SET ASIDE ORDER
	:	DATED NOVEMBER 14, 2002
vs.	:	
	:	
	:	
	:	
PATRICIA YOUNG, and CONNIE J.	:	Case No. 010904803
TALBOT,	:	
	:	Judge: J. Dennis Fredrick
Defendants	:	

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This matter is before the Court on the Motion to Set Aside Order Dated November 14, 2002, of Jerry Diane Borg, Plaintiff in the above entitled action; with Jay L. Kessler appearing as attorney for Plaintiff, Mitchel T. Rice appearing as attorney for Defendant Patricia Young, and Bastiaan K. Coebergh appearing as attorney for Defendant Connie J. Talbot; and

After reading the Motion to Set Aside Order, Memorandum in support thereof, the Memoranda of Defendants in opposition thereto, and being fully advised on the matter,

IT IS HEREBY ORDERED THAT Plaintiff's Motion to Set Aside Order Dated November 14, 2002, is denied for the reasons set forth in Defendant Patricia Young and Defendant Connie J. Talbot's Memorandum in Opposition to said Motion

DATED this \_\_\_\_ day of March, 2003

THIRD JUDICIAL DISTRICT COURT

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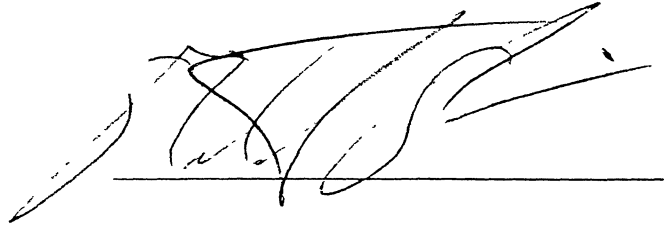
Judge J Dennis Frederick

CERTIFICATE OF MAILING

I hereby certify that on this 12 day of March, 2003, I caused a true and correct copy of the foregoing ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE ORDER DATE NOVEMBER 14, 2002 to be mailed via first-class mail, postage prepaid, to the following:

Jay L. Kessler  
KESSLER LAW OFFICE  
3335 South 900 East, Suite 120  
Salt Lake City, Utah 84106

Bastiaan K. Coebergh  
50 South Main Street  
Key Bank Tower, 7<sup>th</sup> Floor  
P.O. Box 2465  
Salt Lake City, UT 84110-2465

A handwritten signature in black ink, appearing to be "Bastiaan K. Coebergh", written over a horizontal line.