1983

Joseph Mascaro And Shely Taylor v. John S. Davis, Charley Joseph, Curtis Baum, Individuals, and Chatillion Inc., A Utah Corporation : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH MASCARO and SHELBY TAYLOR, Plaintiffs-Appellants, vs. JOHN S. DAVIS, CHARLEY JOSEPH, CURTIS BAUM, individuals, and CHATTILLION, INC. a Utah Corporation, Defendants-Respondents.	Case No. 19024

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Fraud on the Court

On October 21, 1983, attorney John S. Davis was convicted for embezzling approximately $100,000.00 from his trust account, which money he was holding for the partnership comprised of Defendant-Respondent, Charley Joseph, and Plaintiff-Appellant, Joseph Mascaro. It was this act of embezzlement by the partnership's attorney, along with attorney Davis' unscrupulous manipulation, deceit and self dealing, which precipitated this lawsuit. Following attorney Davis' theft of the partnership's cash, attorney Davis embarked on a scheme to manipulate our judicial system through his superior skill, knowledge and training, and by the high position of trust he held as an officer of the court. The scheme to defraud the court, while not particularly sophisticated, was remarkably successful. For nearly a year and a half, he was able to fraudulently manipulate the court system to cover up his own felonious activities and deliberately prevent his own client, Defendant-Respondent, Joseph, from presenting meritorious defenses and counterclaims. Attorney Davis' actions, as an officer of the Court, constituted a deliberate fraud on the Court of the most egregious sort, was a tampering with the administration of justice, and is a wrong against the very institutions set up to protect and preserve society itself.

It is vitally important to the proper understanding of this case, and its convoluted procedural history in the lower court, to constantly keep in mind that Mr. Davis, from the day that Plaintiff's summons was served, used this lawsuit to attempt to keep his theft hidden. Like a house of mirrors, nothing is as it appears. What seems to be the simple failure to

respond to a summons was in fact the first step in a deliberate and intentional scheme to manipulate the judicial process. The procedural history of this case is sad testimony of what one unscrupulous and self-dealing attorney can do to abuse and disrupt the legal process to cover-up his own wrongdoing. A review of the record below clearly reveals attorney Davis' manipulation of the system to cover-up his theft of the partnership's funds.

In the early part of 1978, Plaintiff-Appellant, Joseph Mascaro, and Defendant-Respondent, Charley Joseph, formed a partnership for the purpose of real estate acquisition. There was no written partnership agreement. The agreement called for them to split partnership profits on a 50/50 basis after expenses had been reimbursed. (R. 298) The partnership then proceeded to attempt to find buyers for the now improved property with Defendant-Respondent, Joseph, manning the laboring oar, although he and Plaintiff-Appellant, Mascaro, did discuss strategy and make necessary decisions together. In fact, in 1977 and 1978 Defendant-Respondent, Joseph, expended over $10,000.00 in out-of-pocket expenses in this effort and diverted sufficient energies and attention from his trucking business so that from 1976 to 1978 gross receipts from his trucking business fell from $112,001.61 to $45,040.00, and net profits fell to $1,595.53. This compares to gross receipts of $124,696.00 and a net profit of $29,956.71 in 1979 after he was relieved of most of the partnership duties. (R. 301-303)

The year following the formation of the partnership, some buyers presented themselves but none could perform. Finally a deal was structured with a Mr. Paul Tanner, but it too stalled. (R. 300) That was

the fateful point at which attorney John S. Davis injected himself into the action. Even the manner in which attorney Davis injected himself into the affairs of the Mascaro/Joseph partnership was ethically appalling. His appearance in this matter was indicative of how he was to handle himself until the court below, by order, forced him to withdraw as counsel. However, at the time, Defendant-Respondent, Joseph, and Plaintiff-Appellant, Mascaro, thought they had found their savior. (R. 299,300,462)

Neither partner knew attorney Davis. In the course of his trucking business, Defendant-Respondent, Charley Joseph, had hired attorney Davis' father-in-law to do some work for him on a sub-contract basis. When Defendant-Respondent, Joseph, wasn't paid, he had a hard time paying Davis' father-in-law. Davis became involved in the collection. Defendant-Respondent, Joseph, paid most of the money owed and then described his real estate deal that was pending, for which the partnership had a buyer, one Paul Tanner, and asked attorney Davis to wait to collect the balance until the partnership real estate deal closed. (R. 299) When attorney Davis learned that Defendant-Respondent, Joseph, was involved in a good sized real estate deal that was about to close, he became very excited and strongly urged Joseph to let him (Davis) represent them in closing the deal with Tanner, the buyer. (R. 299,300,461) Davis claimed that he knew Tanner and could make him perform. Defendant-Respondent, Joseph, met with attorney Davis, and then both partners met with attorney Davis. At this second meeting, attorney Davis told them that he knew that Tanner was in financial trouble but that he (Davis) would get the money out of Tanner or help them find a new buyer, as he had a lot of contacts. (R.299) Based on these representations, the

partnership agreed to hire attorney Davis. (R. 299,300,461)

What happened over the course of the next three years becomes a case history in the abuse of the professional trust accorded an attorney by his clients and the trust accorded an attorney by the courts by reason of his oath, code of ethics and position as an officer of the court. Initially, attorney Davis appeared to work actively to bring to fruition the sale of the property. And, as the process drug on, the partners came to rely more and more on attorney Davis. (R.300,461-62) While the process continued to drag on, Defendant-Respondent, Joseph, continued to do virtually all of the leg work for the partnership, but relied more and more on attorney Davis' legal expertise and sophistication to control the transaction. (R. 299) Finally a closing with a certain Chatillion, Inc., a Utah corporation owned and operated by a Curtis Baum, was arranged. Within a few days of the closing, partial consideration in the amount of approximately $140,000.00 in cash was received by attorney Davis as a down payment. The balance of approximately $240,000.00 due the partnership was to be received in the form of eight lots in Weber County represented by Baum to have that value. (R. 300) The original $100,000.00 cash payment was placed by attorney Davis into his trust fund. (R. 300,450) Of that amount, Defendant-Respondent, Joseph, directed attorney Davis to give $40,000.00 to Taylor, $20,000.00 to Plaintiff-Appellant, Mascaro, $20,000.00 to himself (Joseph), and to retain the balance in trust in the event of potential legal disputes threatened by Tanner. (R. 300) Rather than doing as directed, attorney Davis issued $20,000.00 to Joseph, and unbeknownst to either Mascaro or Joseph, and without their permission, attorney Davis embezzled approximately $100,000.00 of the closing monies

to his own use. (R. 450-460) What then happened would make the most cynical critic of the legal system shudder with disbelief as attorney Davis called to himself his knowledge of the legal process to cover-up for as long as possible his own misconduct, while burying his client in a procedural quagmire.

To understand how he was able to so effectively prevent Defendant-Respondent, Joseph, from taking the steps that would force the issues to be examined on their merits, and necessarily reveal his own self-dealing, one must understand the emotional hold that attorney Davis had on Joseph.

Both Mascaro and Joseph had for the past year put complete trust and faith in Davis (R. 300,664) They had increasingly relied on him to handle what has become for them something that was too big and complex to understand. (R. 300) As the real estate transaction initiated by the Mascaro/Joseph partnership became increasingly complex, Mr. Joseph came to rely more and more on Attorney Davis' superior knowledge and training. (R. 300,462, & see pp. 22,29,35,37,40,41,45, Deposition of Charley Joseph, June 18, 1981.) Mr. Joseph was constantly in touch with Attorney Davis asking for advice and guidance. Eventually Mr. Joseph relied on Attorney Davis to personally handle the negotiations and other details as Attorney Davis saw fit. Additionally, Attorney Davis represented Mr. Joseph in other legal matters, in which Charley Joseph relied totally on Attorney Davis' legal expertise. (R. 300,462) The fiduciary nature of the relationship between Attorney Davis and Mr. Joseph was long term, total and complete: Mr. Joseph totally trusted and relied on Attorney Davis. When the present lawsuit was commenced, attorney Davis again persuade Defendant-Respondent Joseph that he was the only one who knew the facts

well enough to properly defend him. (R. 301,462,463) In response to his inquiries, Davis kept reassuring Joseph that everything was under control. It wasn't until actual proof of Davis' embezzlement of the trust funds that Joseph could emotionally accept that his attorney had embezzled the partnership money, and had buried him in a default judgment for over $300,000.00 in monies which he, Joseph, had never received. (R. 301,462-63)

The record indicates that Attorney Davis and Mr. Joseph were both served on May 5, 1980. (r. 14-17) Attorney Davis had committed his embezzlement of the majority of the partnership funds in June, 1979, nearly one full year before the suit. (R. 450-460) The day following the service of summons, Mr. Joseph called Attorney Davis and requested that Davis take whatever steps were necessary and proper to represent him. (R. 301,702-03) Over the next several months Mr. Joseph spoke with Attorney Davis repeatedly and consistently about the status of the lawsuit and Attorney Davis told him not to worry and that everything was taken care of. (R. 704,462,301) Mr. Joseph in fact did believe that Attorney Davis was defending him and representing his interests. Mr. Joseph, who is a trucker and who has little education or sophistication in legal matters, did not personally know what was necessary and proper to defend and represent him, but he fully believed that his attorney had done and was doing whatever was proper and most advantageous in protecting his interest. (R. 300,462) Davis did subsequently tell Mr. Joseph's wife that he had in fact filed an answer. (R. 467-68)

In fact, Attorney Davis had not filed an answer on behalf of Mr. Joseph, nor made any other responsive pleading. Rather, Attorney Davis

had intentionally and deliberately allowed the entering of the default against Mr. Joseph and himself as the first step in an elaborate scheme. The purpose of the scheme was to avoid litigation on the merits, thus preventing, or at least delaying, the discovery process which would lead to the revelation of his embezzlement. Secondly, by procedurally side-stepping the merits and concentrating on motions and procedures tangential to the real issues, Attorney Davis hoped to "consume" enough time to hopefully structure a settlement with all parties, and in that manner avoid discovery of his embezzlement. Finally, in the event he was not successful in avoiding the discovery process long enough to effect a settlement, the fact that there was a judgment against him would render moot the question of what happened to the partnership funds in his trust account: i.e., the sole issue would be execution of the judgment.

Attorney Davis' scheme was, to a frightening degree, successful. He fraudulently used his position as an officer of the Court and fiduciary to his client to manipulate and pervert the process of justice to 1) effectively delay discovery of his own embezzlement for nearly two and one-half years, and, 2) to effectively manipulate the judicial process in such a way that the full weight of a default judgment in excess of $300,000 rests on Mr. Joseph. Argument I below closely examines the record before the Court. Such an examination clearly reveals Attorney Davis' scheme as outlined above, and how successful it has been.

B. Settlement Agreement

On May 4, 1982, one week prior to the time set for trial of Plaintiff-Appellants' claims and Defendant-Respondent's cross-claims against

Defendants Baum and Chatillion, Inc., a pre-trial conference was held. In conformance with the order of the court, each party was present personally and represented by counsel of record. With the help of the court, negotiations for settlement began. These negotiations took the pattern of meetings among the attorneys, followed by conferences of the attorneys with their respective clients, followed by further negotiations among the attorneys, and so on. After two hours, a stipulated settlement was achieved which compromised and settled a great many of the issues of dispute among the parties. Once the settlement amongst the parties had been achieved, a final conference was held in the court's chambers. Each party was present, with counsel, in the court's chambers. At that time, the terms of the settlement were read to and approved by the court. As a result, the trial date scheduled for the following week was struck. None of these facts are disputed. (R. 528,529,522,523) Counsel for Defendant-Respondent Joseph, immediately began work on the preparation of the written documents evidencing the agreement reached. (R. 531) After several consultations by telephone among the various counsel for the parties regarding the wording of the final documents, complete documents were forwarded to Joseph Rust and Charles Hanna, attorneys for Plaintiffs, Joseph Mascaro and Shelby Taylor, Duane Burnett, attorney for Defendants Curtis Baum and Chatillion, Inc., and to Attorney John Davis. These included a Settlement Agreement, a Stipulation and Motion to Dismiss, and an Order. (R. 532)

Within one or two days of mailing these documents to the above named respective counsel, telephone conversations were had with both Duane Burnett and Charles Hanna. Duane Burnett indicated that he approved the documents and that he and his clients were ready and willing to sign them as prepared. Mr. Charles Hanna, who along with Joseph Rust, were representing the Plaintiffs, indicated that the documents prepared were satisfactory with one exception: paragraph 2(b) of the Settlement Agreement provided that any excess in value represented by the lots transferred to Plaintiff, Shelby Taylor, which value was beyond $113,000, would pass to Defendant, Charley Joseph. Mr. Hanna argued that any excess should go to Plaintiff, Joseph Mascaro. (R. 532) A compromise was attempted but not successfully concluded. Note, however, that this dispute was not discussed and reduced to agreement at the pre-trial conference. It was not considered. It is only tangentially related to the main issues which were compromised and settled at the pre-trial conference.

In a letter dated June 3, 1982, (R. 555), attorney Joseph Rust, lead counsel for the Plaintiffs, acknowledged that the documents, as prepared and submitted for approval as to form, were reflective of the compromise and settlement successfully bargained for by the respective parties at the pre-trial conference. Subsequently, Defendant Curtis Baum, and his attorney, Mr. Burnett did supply financial information regarding lot sales in the Parkvale Subdivision. At about the same time, Defendant Baum, delivered to his attorney, Mr. Burnett, fully executed warranty deeds effecting the transfer of the specified lots to the parties as agreed.

Shortly thereafter, in a letter dated June 23, 1982, counsel for

Plaintiffs acknowledged the value of the subject lots, in Parkvale Subdivision, as represented by Defendant Baum and Chatillion, Inc. (R. 556) Nevertheless, Plaintiffs indicated in that same letter that they did not intend to honor the agreement reached through compromise and settlement.

A R G U M E N T

POINT I

ATTORNEY JOHN S. DAVIS, IN HIS CAPACITY AS AN OFFICER OF THE COURT AND AS A FIDUCIARY, DELIBERATELY PERPETRATED FRAUD ON THE COURT WHICH JUSTIFIES RELIEF UNDER RULE 60(b)(7), U.R.C.P.

A. The record and facts reveal a clear scheme of an officer of the court to intentionally defraud the court.

That Davis did in fact embezzle nearly $100,000 from the Joseph/Mascaro partnership is evident from the record before this Court. (R. 450-460) This embezzlement occurred between June, 1979 and October, 1979. (R. 450-460) Charley Joseph and attorney Davis were served on May 5, 1980 so the embezzlement had already occurred some time before. Attorney Davis' only concern was to keep hidden his embezzlement, and his representation of Charley Joseph would serve his purpose nicely. If he could arrange it so that a default judgment could be entered against Charley Joseph and himself, there would never be a confrontation on the issues raised by Plaintiff's Complaint. Without a confrontation on the issues there would be no need for discovery to occur, as the only relevant issue left would be execution on the judgment. Further, even if some discovery was pursued, he would assert the position that what he had done with his trust account and the partnership funds therein was moot.

That this was his motive in deliberately allowing the default to be entered without Charley Joseph's knowledge is abundantly clear even from the record before the Court. In Attorney Davis' deposition of June 18, 1981, when he was pressed about the status of his trust account, he refused to answer any questions about it. He refused to even reveal the name of the bank, on the basis that such an inquiry is irrelevant in that the issue had been reduced to judgment:

> Q. Which bank is that?
>
> A. I don't think I need to answer that one.
>
> Q. I think it is important, because, of course, it goes to records that would reflect any disbursements out of that account.
>
> A. How do you mean?
>
> Q. Well, in other words, to determine exactly the status of that account, it may become necessary to subpoena the bank records, as far as determining--
>
> A. I don't know that it is necessary at this point. You have got your judgment.
>
> (Davis Deposition, June 18, 1981, at p. 59)

Even more indicative of Attorney Davis' deliberate scheme to bring about the default against Charley Joseph and himself in an attempt to render moot any inquiry into the issues raised by Plaintiff's Complaint is the following from the deposition of Charley Joseph, September 23, 1981. This deposition occurred following the Plaintiff's gaining access to Attorney Davis' trust account records pursuant to Court Order. Charley Joseph was being deposed when Attorney Davis arrived late, realized that his trust account records had been discovered and were being examined by Charley Joseph; Attorney Davis objected:

Mr. Davis: I want to raise one other objection. How does this relate to the issues at hand that have not already been reduced to judgment?

Mr. Rust: Well, we have some questions as far as the involvement of Mr. Baum with Chatillion.

Mr. Davis: In the disbursements of my trust account?

****

Mr. Rust: Dale Potter, that he is preparing a motion to set aside our previous judgment against Mr. Joseph and so it would have relevance to any such motion that is contemplated in that area as well. So we think that the area is proper.

Mr. Davis: Wait a minute though, the setting aside is a procedural matter. You don't argue the substance of the case on a setting aside. If you want to set aside the judgment, then you've got a whole different story. But right now you have represented to the Court that there was an express determination why you should take judgement immediately and you got that. And all of your claims which have been raised in your Complaint have been reduced to judgment and until the default is recovered, this is not relevant to the issues at hand. (Deposition of Charley Joseph, September 23, 1981 at 13 and 14, R. 657-58)

It is quite clear from the foregoing that Attorney Davis desperately wanted the issues raised in the Complaint reduced to judgment so that the status of his trust account would not come under the glaring light of judicial examination. In that way he hoped to avoid discovery altogether of his embezzlement.

The above is graphic evidence of Attorney Davis' motive for intentionally allowing the default to be entered. Further evidence of the fact that he intentionally allowed it to be entered, and that it was not an accident, comes from the fact that Charley Joseph repeatedly contacted

Attorney Davis about his failing to answer on his behalf. Charley Joseph's deposition of September 23, 1981, indicates Joseph was quite adamant that he wanted Attorney Davis to get the answer filed right away:

> Q. Charley, you earlier indicated that you recall being served with a Summons and a Complaint in this matter, is that correct?
>
> A. Yes.
>
> Q. Would you indicate again what you did upon receiving that Summons and Complaint?
>
> A. I couldn't get ahold of John the first evening. The next evening I called him and said, "Hey, I got a Summons here, did you get one?" And he said, "No, I haven't got mine yet." I said "Well, I got one today." And he said, "I'll probably be getting mine tonight or tomorrow." I said, "Okay." So the following day I called him and he said he got his. I said, "Do you want to do mine when you do yours or shall I get somebody else?" I said "Now, if you're not going to do it, you say so." He said, "No, I'll do it." My wife was sitting right there.

(Depo. of Joseph, Sept. 23, 1981, pp.58,59, R. 702-03)

Joseph then asked him several times over the next few days about the status of the Answer. In response to these several inquires, Attorney Davis led him to believe that he was working on the Answer and that it would be filed on time. Attorney Davis was well aware of the need to file the Answer. He was reminded of it several times.

> Q. Did you ask him to go ahead and send it in on your behalf?
>
> A. I said, "You go ahead and answer mine."
>
> Q. What did Mr. Davis reply?
>
> A. He said, "I'll get it." Then he took it to Provo

with him.

Q. Did you ever inquire of him if he had filed that answer?

A. Many a time. I called him and said, "How are you coming on that response? Are you going to get it in?" and he said, "Yes".

Q. Were these inquire made before the due date of the Answer?

A. Oh, yes. In fact, it was about seven or eight days before that I called his attention to it four or five times just in a couple or three days there.

Q. What was his response?

A. "We'll get it. I'm working on it and I'll get it." So I just assumed it was all done and mailed in to the Court or wherever it goes.

(Joseph Depo., Sept. 23, 1981 pp.60,61, R.704-05)

Knowing full well that he was not going to answer the Complaint and put at issue his trust account, he nevertheless led Charley Joseph to believe that the Answer would be filed and Joseph relied on him. Subsequently, Attorney Davis told Charley Joseph's wife that the Answer had been filed. (R. 467-68) The failure to file the Answer was intentional and not accidental.

Rule 60(b)(1) allows a judgment to be set aside for "mistake, inadvertence, surprise, or excusable neglect" if such motion is filed within three months of the entry of judgment. As defaults are not favored, Courts are generally favorably disposed to setting aside a default upon such a motion timely made. Attorney Davis was well aware that the default judgment had been taken. (Affidavit of Bert Waunacott R 64) Yet he made no effort to have the default set aside within the time limits

of Rule 60(b)(1). In view of his strong motive to avoid a trial on the merits, which would necessarily litigate the status of his trust account, the only reasonable explanation for his failure to make a motion under Rule 60(b)(1) is that he intentionally failed to do so. Only an officer of the court and a fiduciary having the trust of his client could be in a position to perpetrate such a fraud.

The second part of Attorney Davis' plan to use the judicial process to cover-up his embezzlement was that he would use his knowledge of legal procedure to "consume" as much time as possible by procedurally side-stepping the real issue. A look at the record will suffice to indicate how successful he was at this. The record before the Court is replete with procedural foot work, but there has never once been a hearing dealing with the merits of the case. Temporary Restraining Orders, Preliminary Injunctions, Motions to Stay, even a Motion to Alter or Amend a Written Order. Attorney Davis was attentive only when dealing with the side issues. In Charley Joseph's Deposition of September 23, 1981, Davis reveals his intention in this regard. As pointed out above, he (Davis) arrived late and found out to his surprise that all of his trust account records had been discovered and were being examined. He made several objections to the examination of these records based on the fact that a judgment had been entered and that the records were now irrelevant. Attorney Rust met some of these objections by asserting that Attorney Potter was preparing a motion to have the judgment set aside. Attorney Davis then asserted the position that on procedural matters one does not get to the substance of the case. In so arguing, Attorney Davis gives us a clear view of his scheme:

> Mr. Davis: Wait a minute though. The setting aside is a procedural matter. You don't argue the substance of the case on a setting aside. If you want to set aside the judgments, then we've got a whole different story. But right now you have represented to the Court that there was an expressed determination why you should take judgment immediately and you got that. And all of your claims which have been raised in your Complaint have been reduced to judgment and until that default is removed, this is not relevant to the issues at hand.
>
> (Joseph depo., Sept. 23, 1981, p.14, R.658)

Attorney Davis was delaying as long as possible any inquiry into the merits by diverting everyone's energy toward procedural matters that would not examine the merits. It is amazing that he was so successful for so long - it took nearly one and one-half years following the filing of the lawsuit to discover his trust account records. Attorney Davis was doing two things: burying his client so the default could never be set aside, and at the same time occupying everyone's energy with matters that would delay the discovery of his trust account.

Knowing now as we do that Attorney Davis in fact did embezzle nearly $100,000 from the Mascaro/Joseph partnership, the peculiar procedural posture of this case becomes easy to understand. Attorney Davis embarked on a scheme to intentionally manipulate the judicial machinery to keep the issues raised in the Plaintiff's Complaint from being litigated. As part of his scheme, he intentionally allowed a default judgment to be entered against himself and his client. He continued the perpetration of his scheme by energetically engaging in procedural efforts both to gain time to structure a settlement and to prevent his client from having the default set aside. Attorney Davis' fraud is fraud on the court, by an officer of the court. It is a most insidious violation of trust as an

officer of the court, and is fraud which defiles the court itself.

A scheme by an officer of the Court to defraud the Court is "fraud upon the Court" which justifies relief under Rule 60(b)(7) U.R.C.P.

Rule 60(b), Utah Rules of Civil Procedure governs motions for setting aside and vacating final judgments and orders. The Utah Rule is based on and patterned after Rule 60(b) Federal Rules of Civil Procedure. Both the Federal and Utah Rule 60(b) provide that:

> On motion and upon such terms as are just the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for...(emphasis added)

The Utah Rule 60(b) continues on to list several, specific, enumerated grounds for such a motion including subpart (7) (Utah 60(b)(7) corresponds to Federal 60(b)(6)) which provides as grounds: "...or (7) any other reason justifying relief from the operation of the judgment." This inherent power to set aside a judgment for any "reason justifying relief" included in both the Utah and Federal Rule 60(b), is not limited in any way by any other provision or time constraint contained in the rule. This inherent power was emphasized in a note by the Federal Rules Advisory Committee on Civil Rules:

> And the rule expressly does not limit the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an

illustration of this situation, see Hazel-Atlas Glass Co. v. Hartford Empire Co., (1944) 322 U.S. 238. (Committee Note 1946, cited in 6 Moores Section 60.33, n.15).

The case of Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed 1250 (1944), referred to in the above Advisory Committee Note, is the leading U.S. Supreme Court case dealing with the fraud contemplated in the "saving clause" of Federal Rule 60(b)(6). [Utah Rule 60(b)(7)]. In Hazel-Atlas, Hartford Empire Co. made application for a patent on a certain glass making process. The patent office let it be known that they were going to deny the patent. One of the attorneys for Hartford then wrote an article describing the product in glowing terms and lauding its public benefit. Hartford's attorneys persuaded a well-known labor leader in the industry to represent that he had written it; it was then published in a leading industry publication under the labor leader's name. The patent was issued based in part on the fraudulent article. Later Hartford brought an action for patent infringement against Hazel-Atlas Glass Company. The trial court dismissed Hartford's suit and Hartford appealed. Hartford then used the same fraudulent article to persuade the appellate court to reverse and order judgment for Hartford, and, relying on the article, it did so. In 1942, some 9 years after judgment had been entered against Hazel-Atlas, it made a motion in the original appellate court to have the judgment set aside. The appellate court felt it did not have the authority because of the time lapse and the expiration of the term in which the judgment was entered.

On appeal to the U.S. Supreme Court, the judgment against Hazel-

Atlas Company was set aside and the trial court was directed to re-enter its original order of dismissal against Hartford. In so doing, the Court considered the great need of finality of judgments and the necessity of putting an end to litigation. It also considered the time lapse of some 9 years between the judgment and the motion to have it set aside. Nevertheless, in spite of all of the persuasive arguments militating against setting aside the judgment, the Court declared that some frauds on the Court are "sufficiently gross" that the Court must take action to correct the injustice. The Supreme Court pointed out that this is an equitable power of ancient origin that the Courts exercise cautiously, "But where the occasion has demanded, where enforcement of the judgment is manifestly unconscionable, they have wielded the power without hesitation." 322 U.S. at 244, 45 (emphasis added). The Court also pointed out that in a case where it would be "manifestly unconscionable" to allow the enforcement of a judgment, the relief granted may take several different forms. But the Court emphasized that:

> "...whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the Court has in some manner, devitalized the judgment even though the term at which it was entered had long passed away." 322 U.S. at 245 (emphasis added).

It is quite clear from the holding in the Hazel-Atlas Glass Co. case that when a particularly "gross injustice" has occurred, or when the enforcement of a judgment would be manifestly unconscionable, Courts have the power to take whatever action is necessary to eliminate the injustice. In Hazel-Atlas Glass Co. the Supreme Court not only set aside the nine-year-old judgment, it ordered the trial court to enter a dismissal

against Hartford.

Having determined that Courts have the power to set aside a judgment or otherwise "devitalize" it, even in the face of the strong policy in favor of the finality of judgments, and even after a lapse of some 9 years, the question remains, when should this extraordinary equitable power be evoked; In Hazel-Atlas Glass Co. the Court exercised this equitable power to reverse the effects of a deliberate scheme to perpetrate a fraud on the Court itself by an attorney for one of the litigants. The very institution set up to administer justice was duped by an officer of the Court in a deliberate scheme, and as a result, the organ for the administration of justice was defrauded into working an injustice. The integrity of the judicial system itself was impeached. In speaking to this, the Court said:

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than in injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Hazel-Atlas Glass, supra at 246.

The present case is controlled by the principles of Hazel-Atlas Glass Co.; indeed the facts of the present case are even more aggravated. Attorney Davis, as an officer of the Court, undertook to represent Defendant Joseph. But instead of representing Charley Joseph, he intentionally embarked on a deliberate scheme to manipulate the judicial process to cover up his embezzlement and to insulate himself from the consequences thereof, while at the same time, causing the power of the judicial machinery to press its full weight against his client. In

retrospect, and now knowing that Attorney Davis had, in fact, embezzled the partnership funds a year before the commencement of this lawsuit, his deliberate scheme to pervert the judicial system for his own purpose is quite clear. He intentionally allowed the default judgment to be entered against Charley Joseph and himself and then embarked on a series of procedural maneuvers designed to avoid and delay a confrontation on the merits, at the same time attempting to exhaust all post judgment remedies normally available to a litigant, thus insuring that the default judgment against Charley Joseph would not be set aside.

The case of McKinney v. Boyle (9th Cir., 1968) 404 F. 2d 632, presents another factual situation quite similar to the present case. In McKinney, the Plaintiff's own attorney conspired with Plaintiff's estranged wife to settle, without his permission, his claims for personal injuries. He was out of the country when the settlement was made. He received nothing from the settlement. Upon returning to this country, some five years after the settlement was entered, he learned of the settlement. He moved under 60(b) to have the settlement set aside based on fraud and deceit by his own attorney. The District Court denied the motion, but on appeal, the denial was reversed. The appellate court in so ruling, pointed out this type of fraud was different than the type contemplated in Federal Rule 60(b)(3) which has a time limit. In differentiating between 60(b)(3) and 60(b)(6) [Utah 60(b)(7)] the Court said:

> But the main charge made by Plaintiff is fraud on the part of his own counsel and his former wife. This, we think brings him within ground (6), as to which there is no fixed time limit. McKinney, supra, at 624 (emphasis added).

What the Court in McKinney found so repugnant was the fact, as here, that a litigant's own attorney had manipulated the judicial system to defraud his own client. Not only was an officer of the court involved in the fraud itself, but as in the present case, it was the party's own attorney who perpetrated the fraud to compromise his client's rights. The Court emphasized that the tampering with the judicial process, by an attorney, to undermine one's own client's interests clearly amount to fraud on the Court. The Court did not need to engage in any semantic or legal gymnastics to grant relief to the petitioner.

> We need not perform a semantic tour-de-force to achieve the result we reach, as Judge Learned Hand did in United States v. Karachalis, (2 Cir., 1953) 205 F. 2d 331, 335. That case did not involve a charge of fraud directed at a party's own counsel or his wife; this one does.

In the case of Lockwood v. Boyles, (D.D.C., 1969) 46 FRD 625, the Court was asked to set aside a 14-year-old judgment based on allegations of perjury committed by a witness. In denying the motion, the Court enunciated the rule it felt was controlling in motions based on 60(b) [Utah 60(b)(7)- "any other relief"] "fraud on the Court". They stated the rule as follows:

> "Fraud upon the court" should, we believe embrace only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presently for adjudication. Fraud inter partes, without more, should not be fraud upon the court, but redress should be left to a motion under 60(b)(3)

> or to the independent action. 46 F.R.D. at 631 (emphasis added).

While the U.S. Supreme Court in Hazel-Atlas, supra, did not so restrict 60(b)(6) [Utah Rule 60(b)(7)] motions for "fraud on the Court", the present case easily fits into this more restrictive definition presented in Lockwood. Attorney Davis' scheme of pretending to represent defendant Joseph so he could cover-up his own embezzlement, is unquestionably fraud by an officer of the Court which "does attempt to defile the Court itself...so that the judicial machinery cannot perform in the usual manner its impartial task..." Lockwood, supra, at 631.

In Mallonee v. Grow, Alaska, 502 P. 2d 432 (1972), the court granted relief to a party moving to have a five-year-old judgment set aside on motion pursuant to 60(b)(6) [Utah 60(b)(7)] for fraud on the court. The fraud in Mallonee was not nearly so gross nor extensive as that in the Hazel-Atlas case, supra, or McKinney, supra. But in Mallonee, the Court found it significant that an attorney was involved in the fraud. The Mallonee court distinguished Lockwood v. Boyles on the grounds that in Lockwood, no attorney was involved in the fraud on the court:

> Lockwood involved an attempt to set aside a 14-year-old judgment based on allegations of perjury committed by a witness. The Court pointed out that there was no "involvement of an attorney, (an officer of the court)." Accordingly, the most that was claimed was the fraud of an adverse party.
>
> Mallonee was represented by counsel who participated in filing pleadings which grossly overstated the amount due, in levying on property not owned by the judgment debtor and in failing to serve notice of the motion to confirm sale. An attorney is an officer of the Court. Mallonnee, supra, at 438.

The Court went on to quote from 7 Moores Federal Practice, 60:33 at 613, defining types of conduct by an attorney, as an officer, which amounts to fraud on the Court:

> While he should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently: on the contrary his loyalty to the Court, as an officer thereof, demands integrity and honest dealing with the Court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the Court. Mallonee, supra, at 438.

Finally, the Alaska Court defined the type of conduct referred to by the Court in Lockwood v. Boyles, supra, in which an officer of the Court perpetrates fraud so that "the judicial machinery can not perform in the usual manner its impartial task of adjudging":

> Such fraud includes behavior which defiles the Court itself and which results in the inability of the judicial machinery to perform in the usual manner its impartial task of adjudicating cases. The adjudicative integrity of a Court may be defiled by the behavior of parties or attorneys which results in depriving adverse parties of substantive rights. mallonne, supra, at 438.

Certainly Attorney Davis' conduct in purposely manipulating the judicial machinery to prevent his client from asserting his meritorious defenses and counterclaims (which defenses would have quickly exposed Attorney Davis' embezzlement of partnership funds) deprived defendant Joseph of substantive rights. Such conduct was manifestly repugnant to the standards of "integrity" and "honest dealing with the Court" required of an attorney as an officer of the Court.

Sutter v. Easterly, Mo., 189 S.W. 2d 284 (1945) presents another case where an attorney, as an officer of the Court, conspired to defraud the Court. In Sutter, the attorney knowingly produced fabricated evidence in order to obtain a judgment. The Court, in setting aside the judgment, said:

> "Peters' scheme and conspiracy were such a violation of a lawyer's duty to the Court- a duty imposed not alone by principles of honesty and good morals but also by a code of ethics adopted as rules of court, as to amount to a fraud on the court for which equity will grant relief." Sutter, supra, at 289.

The Sutter court relied heavily on the Hazel-Atlas decision, supra, and after quoting extensively from Hazel-Atlas stated:

> "While the facts in the Hazel-Atlas case shows more extensive fraud, and one in which the client participated, the decision is authority for the principle that where a lawyer engages in a conspiracy to commit a fraud upon the Court by the production of fabricated evidence and by such means obtains a judgment then the enforcement of the judgment becomes "manifestly unconscionable" and a Court equity may devitalize the judgment. Sutter, supra, at 289.

This Court is presented with a very ugly and distressing set of circumstances. Attorney Davis, as a fiduciary to his client, occupied a position of trust which he violated. Attorney Davis was also an officer of the Court and held a position of trust with the Court. He purposely violated both of these trusts. He did so to cover-up his own fraud and embezzlement of his client's funds from his attorney's trust account. In so doing, Attorney Davis intentionally engaged in a scheme to tamper with the process of justice with the purpose of denying his client the

substantive right of a fair hearing on the merits of his case. The judicial machinery in this case has been prevented, by fraud, from administering justice in the usual way. The judgment by default entered herein should not be allowed to stand. By virtue of the Hazel-Atlas decision, and the law set forth in the cases cited above, the court below clearly had the authority pursuant to Rule 60(b)(7) to set aside the default judgment that has been entered, therefore acted properly in modifying and setting aside so much of said judgment as was necessary to devitalize that part of said judgment that was unconscionable.

C. Attorney Davis' fraud prevented Charley Joseph from having the opportunity to litigate his case on the merits, and was therefore extrinsic fraud and justified relief under Rule 60(b)(7).

The case of Hazel-Atlas Glass Company, supra, and the other cases examined above, all dealt with fraud perpetrated by an officer of the Court pursuant to a scheme to defraud. None of the cases considered it necessary to deal with the notions of extrinsic versus intrinsic fraud; the above Courts apparently felt no need to wrestle with the traditional distinction. The fact that the judicial system itself had been defiled by officers of the Court in such a way as to preclude the proper and normal administration of justice was enough in and of itself to justify granting relief under 60(b)(7) for "any other reason justifying relief" without submitting to the mental and legal gymnastics attendant to making a distinction between extrinsic and intrinsic fraud. Indeed many jurisdictions no longer follow the old extrinsic/intrinsic dichotomy and instead consider the seriousness of the fraud, the harshness of the result, and

intervening equities, if any. Nevertheless, even under the old notions of extrinsic versus intrinsic fraud, the default judgment entered herein would be set aside as the fraud involved was extrinsic.

Extrinsic fraud is defined in 7 Moores Federal Practice Section 60.37[1] at 613 as follows:

> "Fraud is extrinsic where a party is prevented by trick, artifice or other fraudulent conduct from fairly presenting his claim or defenses or introducing relevant or material evidence. Moores, supra, citing United States v. Throckmorton, 98 U.S. 61 (1878) and others.

The present case falls squarely within the above definition. Defendant Charley Joseph was prevented from "fairly presenting his defenses" by Attorney Davis' fraudulent conduct as set out above. In spite of Defendant Joseph's adamant exhortations and frequent reminders to file an appropriate answer, Attorney Davis did not. He intentionally did not do so. He purposely worked to his own client's defeat in order to protect himself.

The leading case on extrinsic fraud is United States v. Throckmorton, 98 U.S. 61 (1878). In Throckmorton, the Court emphasized that there needs to be an end to litigation; and when an issue has been fairly and openly litigated in Court, then a judgment on that issue should remain final even if based on perjured testimony or a fraudulent document. (Note that without specifically reversing Throckmorton, the United States Supreme Court has, to a significant degree, abandoned this rule (see Marshall v. Holmes, 141 U.S. 589 (1891); Hazel-Atlas Glass Company v. Hartford Empire Co., supra, and cases cited above in this Memorandum). Nonetheless, the rule set forth in Throckmorton clearly mandates the

judgment be set aside if there was in fact no real adversary trial or decision as a result of an attorney's fraudulent conduct:

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or...where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, - these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. 61 U.S. at 65, 66 (emphasis added).

While the facts in Throckmorton did not involve an attorney intentionally striving for his own client's demise, the Court was quite clear that such a case would mandate the setting aside of the judgment and allowing a new trial. In United States v. Aakenvik (D. Ore., 1910) 180 F. 137, the Court relied on the Throckmorton rule to set aside a judgment where an attorney did connive to lose. The case before this Court is exactly that contemplated by the U.S. Supreme Court in Throckmorton. Charley Joseph's regularly employed counsel connived at his defeat and intentionally and maliciously prevented Mr. Joseph from having a fair opportunity to present his defense.

In Rice v. Rice, 117 Utah 27, 212 P. 2d 685 (1949) our own Supreme Court relied on the Throckmorton rule, to amend a decree of distribution of probate. The facts in Rice, while not as egregious as the present case, are similar. In Rice the executrix, for her own gain, mislead the Court

with regard to the proper distribution of assets under the will in question. The Court held that the executrix had a duty to the beneficiaries under the will and also a duty to the Court as an officer of the Court similar to that of an attorney. The executrix had defrauded the Court, and that fraud was extrinsic in that the executrix's actions prevented a fair and full hearing on the issues.

More recently in Haner v. Haner, 13 Utah 2d 299, 373 P.2d 577 (1962) our State Supreme Court upheld its holding in Rice. Moreover, in Haner the Court indicated that it would not be bound by the traditional notions of extrinsic and intrinsic fraud. The Court said:

> "It seems more realistic to say that when it appears that the processes of justice have been so completely thwarted or distorted as to persuade the Court that in fairness and good conscience the judgment should not be permitted to stand, relief should be granted. Haner, supra, at 578.

And, in a very recent case, St. Pierre v. Edmonds, Utah, 656 P.2d 1009 (1982) this Court held that it would no longer be bound by the old notions of intrinsic and extrinsic fraud. Instead it would consider the seriousness of the fraud and the harshness of the result to determine whether relief was justified. Thus the Utah Court has now clearly and unequivocally declared its intention to follow the rule laid down in Marshall v. Holmes, 141 U.S. 589 (1891) and Hazel-Atlas Glass Co. v. Hartford Empire Co., supra. The real question is whether the fraud is of such a nature that it is "against conscience to execute a judgment." St. Pierre v. Edmonds, supra.

The present case is clearly one in which the very "processes of

justice have been so completely thwarted or distorted" by Attorney Davis, that the judgment in "fairness and good conscience" should not be permitted to stand. Haner, supra. Even under the old rule laid down in Throckmorton, supra, and adhered to in Rice v. Rice, supra, extrinsic fraud has been practiced in such a way as to deny defendant Charley Joseph the right to a full and fair hearing on the merits. A fortiori, under the more liberal view expressed in St. Pierre v. Edmonds, supra, and haner v. Haner, supra, which is consistent with the rule set forth in Marshall v. Holmes, 141 U.S. 589 (1891) and Hazel-Atlas Glass Company v. Hartford Empire Co., supra, (and other cases cited above) the default judgment in the present case, intentionally allowed to be entered by reason of the fraud practiced by Attorney Davis, and which prevented Defendant Joseph from litigating the issues raised in Plaintiff's Complaint, should be set aside.

POINT II

JUDGMENT IS FOR UNLIQUIDATED DAMAGES WHICH HAVE NOT BEEN PROVED AND WHICH ARE NOT SUPPORTED BY THE PLEADINGS; THE JUDGMENT IS MANIFESTLY UNJUST, IS VOIDABLE, AND SHOULD BE SET ASIDE.

The law is well settled that unless damages are for a sum certain (as in a promissory note) or are capable of calculation by a simple mathematical process (as in computing interest) a default judgment admits a plaintiff's right to recover something but does not admit the amount he is entitled to recover. 34 C.J. Judgments Section 176, 359; 49 C.J.S. Judgments Section 201 (c) Section 216; Hurd v. Ford, 78 Utah 49, 276 P.2d, 908 (1924); bayerle Sand and Gravel, Inc. v. Martinez, 118 Ariz.

60, 574 P.2d 853 (1978); Hallett Const. Co. v. Iowa Highway Comm. 258 [illegible] 520, 139 N.W. 2d 421 (1966); Becker v. Boothe, 184 Kan. 830, 339 P.2d 292 (1959); United National Indemnity Co. v. Zullo, 143 Conn. 124, 120 A.2d 73 (1956); Hatch v. Sugarhouse Finance Co., 20 Utah 2d 156, 434 P.2d 758 (1967).

With regard to the necessity of proving unliquidated damages pursuant to a default judgment, the rule, as expressed in 34 C.J. Judgments Section 176, p. 389, is as follows:

> "Where the action is for an unliquidated claim or amount, a default admits plaintiff's right to recover something, but does not admit the amount to which he is entitled; this must be established by proof, on further proceedings to determine and assess the amount of the judgment, and there is no final judgment until the amount is ascertained.
>
> Where the cause of action is such that Plaintiff, if entitled to recover at all, is entitled to recover a fixed or liquidated amount, or where the amount of his damages is ascertainable by pure calculation, defendant's default admits Plaintiff's right to recover the sum demanded in the declaration or complaint, and judgment may be entered therefore, without further proof, and without an assessment of damages," 34 C.J. Judgments Section 176 at 389.
>
> "Where the amount of plaintiff's claim or demand is unliquidated, defendant's default does not admit the amount which plaintiff is entitled to recover, and it is incumbent upon plaintiff to prove the amount. Under some statutes, where the amount of plaintiff's claim is ascertainable by mere calculation, as in an action on a note, plaintiff is entitled to judgment for the amount claimed, without any other evidence thereof. But the instrument sued on must be produced or proof of its contents be offered."

34 C.J. Judgments Section 410, at 190 (emphasis added)

The rule is that only if the recovery by default is a "fixed or liquidated amount, or where the amount of his damages is ascertainable by pure calculation, defendants default admits plaintiff's right to recover..." 34 C.J. Section 176, Judgments p. 389. In all other instances, i.e., where damages are unliquidated there is no final judgment until the amount of damages are proved. 49 C.J.S. Judgments, Section 201(c) thus explains:

> "Where the action is in tort or for an unliquidated claim or amount, a default admits Plaintiff's right to recover something, at least nominal damages, but does not admit the amount to which he is entitled, and there is no final judgment until the amount is ascertained, as discussed infra Section 216.

In Hallett Const. Co. v. Iowa State Highway Comm., 258 Iowa 520, 139 N.W. 2d 421 (1966) defaults were entered against the State Highway Commission upon four separate petitions. The petitions included a computation of damages which listed some seven to ten items of damages (depending on which set of the several petitions were considered) and a computation of a final figure based on the itemization. There was also a statement from an officer of Hallett that the final figure was a "sum certain". The court held that the claims were not for a sum certain merely because it prayed for a specific amount for each alleged item of damage, and the amount thereof was largely a matter of opinion from which qualified persons might fairly and honestly differ.

In the case of Ace Grain Co., Inc. v. American Eagle Fire Insurance Co., (S.O.N.Y., 1951) 11 F.R.D. 364, the insurer of destroyed

cargo hired an independent surveyor to appraise the amount of the damage. The plaintiff contended that the appraisal by the surveyor was a sum certain. In rejecting this argument the Court said:

> "The surveyor's findings represent an opinion as to value and other factors which the defendant is not required to accept or it is concluded thereby even though it retained the surveyor. * * * The claimed cargo damage under an insurance policy, is unliquidated and is not converted into one for a liquidated amount or a "sum certain" by a surveyor's report intended for adjustment or trial purposes. The defendant has the right to a judicial determination of the extent of the damages claimed by plaintiff and the appropriate method for determining this issue is either by the Court or upon a reference in accordance with Rule 55(b)(2)" (emphasis added).

Similarly, in Melville v. Weybrew, 108 Colo. 520, 120 P.2d 189 (1941), a case involving the dissolution of a trust, the Court found that before an amount of damages could be assessed in the default, an accounting wa absolutely necessary. Finally, in Beyerle Sand and Gravel, Inc. v. Martinez, 118 Ariz. 60, 574 P.2d 853 (1978), in an action for breach of lease regarding the replacement of topsoil, the Court held that the plaintiffs were not entitled, by virtue of the default judgment, to entry of judgment for the amount prayed for in their complaint. The Court said:

> "A claim is not for a "sum certain" merely because it is for a specific amount. Hallett Construction Company v. Iowa State Highway Commission, 258 Iowa 520, 139 H.W.2d 421 (1966). A contrary holding would permit almost any unliquidated claim to be transformed into a claim for a sum certain merely by placing a monetary amount on the item claimed damaged even though such amount has not been fixed, settled or agreed upon by the parties and regardless of the value of the claim. Nor is

> the claim one which can by computation be made certain. Beyerle, supra, at 856.

See also Johanson v. United Truck Lines, 62 Wash. 2d 437, 383 P.2d 512 (1963) (a default admits plaintiff's right to recover, but does not admit the amount claimed where damages are unliquidated, and amount of recovery in such cases must be established by proof) and Kelly Broadcasting Co., Inc. v. Sovereign Broadcasting, Inc., Nev., 606 P.2d 1089 (1980) (where default judgment is neither for a sum certain, nor for a sum which can be made certain from computation, plaintiff must prove his damages).

In the instant case there was never a hearing as to damages and no proof was ever been offered to sustain damages in any amount. As a result, the default judgment, as entered, contains numerous errors. There is an admitted error in the amount of damages awarded in that the total award is over-stated by $83,000, plus interest. (Tesch Affidavit, February 16, 1982). The largest part of the remaining amount of damage was for prospective partnership profits: in affect an account receivable. Such prospective partnership profits constituted an asset of the partnership, and the partners each had the right to one-half of such an asset, when and if the partnership could successfully collect it. But the collection of such an asset was prospective, and indeed doubtful at that. certainly one partner was not liable to the other for such prospective, uncollected profits. Thus, in addition to the mathematical error, the amount of the judgment is further overstated by $120,000. Further, the judgment as entered made no provision for partnership expenses which had been incurred and which amounted to several thousand dollars.

Additionally, of the monies received by the partnership, and deposited in the trust account of the partnership's attorney, approximately $100,000 was embezzled by John Davis. The record before this Court reveals that of that $100,000, Charley Joseph did not receive any of it, nor was he benefitted in any way by it. (R. 450-60) It was embezzled from the partnership and each partner must sustain one-half of the loss. Thus, in addition to the $83,000 math error described above, the judgment was overstated by one-half the amount of money (approximately $100,000) embezzled by Attorney Davis.

In view of the fact that no hearing was held to determine the proper amount of damages as is required, that the judgment is not supported by the pleadings, that there is an obvious and gross mathematical error in the amount awarded by the default judgment in the approximate amount of $83,000, that the amount of damages awarded for partnership profits is without basis at law or in equity, the judgment is void, is manifestly unjust, and should be set aside.

POINT III
THE PLEADINGS DO NOT SUPPORT THE JUDGMENT.

An examination of Plaintiff's Complaint reveals that in the Plaintiff's first cause of action, each and every allegation contained therein is directed against Attorney John S. Davis. (Plaintiff's only other cause of action in the complaint is directed solely toward defendants Baum and Chatillion). There is only one allegation that is directed against Charley Joseph, and that is directed primarily at Attorney John Davis, and in the alternative, toward Charley Joseph. That said allegation is

Paragraph 31; it reads as follows:

> "Upon information and belief, defendant Davis has commingled his client's funds with his own and he alone or he and defendant Joseph have diverted the plaintiff's funds to his or their own use."

The above allegation deals only with the partnership funds received by the partnership and turned over to Attorney Davis to be placed in his trust account. It is not in dispute that the vast majority of the funds received by the partnership, and placed in the trust account, were embezzled by Attorney Davis for his own use.

Other than Paragraph 31 of Plaintiff's Complaint, not a single allegation is made against Charley Joseph. Each and every other allegation is directed solely and entirely against Attorney John S. Davis. Thus, there are two legal issues raised. The first is a question of a default judgment that is not supported by the plaintiff's complaint. The second is with regard to the one allegation against defendant Charley Joseph that is made, i.e., the misuse of the partnership funds received by Attorney Davis and placed in his trust account. This brief will first address the issue of the failure of the default judgment to be supported by the pleadings.

It is a fundamental rule that a default judgment, is limited to the allegations contained in the complaint. Thompson v. Wooster, 114 U.S. 104 (1884); Nishimatsu Construction Co., Ltd. v. Houston National Bank, (5th Cir., 1975), 515 F.2d 1200; Intermountain Food Equipment Co. v. Waller, Idaho, 383 P.2d 612; Southern Arizona School for Boys, Inc. v. Chery, 119 Ariz. App. 277, 580 P.2d 738 (1978). Furthermore, even though the prayer may ask for general relief, the judgment must rest on the

well pleaded facts of plaintiff's complaint. Intermountain Food Equipment Co. v. Waller, supra, Cobb v. Cobb, supra, Nishimatsu Const. Co., Ltd. v. Houston National Bank, supra.

In the case of Cobb v. Cobb, 233 P.2d 423 (Idaho, 1951), the Court stated the rule as follows:

> "A judgment for plaintiff by default must strictly conform to, and be supported by, the allegations of the petitioner complaint. Cobb, supra, at 424 (citing 49 C.J.S. Judgments, Section 214, p. 378)."

And in a more recent case, the Fifth Circuit Court of Appeals in Nishimatsu Const. Co., Ltd. v. Houston National Bank, supra, vacated a default judgment for the following reason:

> "There must be a sufficient basis in the pleadings for the judgment entered. As the Supreme Court stated in the "venerable but still definitive case" of Thompson v. Wooster: A default judgment may be lawfully entered only "according to what is proper to be decreed upon the statement of the bill, assumed to be true", and not "as of course according to the prayer of the bill", 114 U.S. at 113. The defendant is not held to admit facts that are not well pleaded or to admit conclusions of law. In short, despite occasional statements to the contrary, a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff's right to recover. Nishimatsu, supra, at 1206 (emphasis in original)".

The default judgment that is not supported by well pleaded factual allegations is thus void. In Price v. Sun Master, 27 Ariz. App. 771, 558 P.2d 966 (1976), the Court said:

> "If a complaint fails to state facts legally entitling plaintiff to recovery, a default judgment rendered thereon is void." (citing

Walls v. Stewart Building and Roofing Supply, Inc., 23 Ariz. App. 123, 521 P.2d 167 (1975)).

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> Even though two years have elapsed since the void judgment was entered, the judgment must be set aside and vacated. Price v. Sun Master, supra, at 969.

The fact that the plaintiff could have pleaded legally sufficien grounds in his complaint is not enough; the complaint must present a lega cause of action. This was the issue presented in Ness v. Greater Arizona Realty, Inc., 21 Ariz. App. 231, 517 P.2d 1278 (1974). In Ness the plaintiff alleged that a promissory note she signed was signed by her a an agent for and on behalf of the defendants. The defendant's names di not appear on the note. The Court stated that plaintiff could hav pleaded that defendants were liable to her on the underlying obligation fo which the note was given, but this she failed to do, and the Court set asid a default judgment entered in her favor.

While plaintiffs Taylor and Mascaro may have alleged sufficien facts to support the default judgment as against Attorney Davis, they mad no factual allegations against defendant Charley Joseph except as t the trust account funds (see below). Therefore, the default judgment a to the defendant Charley Joseph is void and should have been vacated an set aside.

With regard to the one allegation made in plaintiff's complai against defendant Charley joseph, i.e., paragraph 31 of Plaintiff Complaint, the allegation is directed primarily against Attorney Davis a only in the alternative against defendant Charley Joseph. The allegati refers primarily to funds that Attorney Davis deposited in his tru

account when acting as an attorney for the partnership. The record before this Court clearly reveals that Attorney Davis embezzled the largest part of those funds (nearly $100,000 for his own use).

POINT IV
THE AGREEMENT REACHED THROUGH
compromise AND SETTLEMENT SHOULD
BE ENFORCED

It is a basic rule that the law favors the settlement of disputes. Rio Algom Corporation v. Jimco, LTD., Utah, 618 P.2d 497 (1980), Tracey Collins Bank and Trust Co. v. Travelstead, Utah, 592 P.2d 605 (1979), International Motor Rebuilding Co. v. United Motor Exchange, Inc., 193 Kan. 497, 393 P.2d 992 (1964), Lomas & Nettleton Co. v. Tiger Enterprise, Inc., 99 Idaho 539, 585 P.2d 949 (1978), as a result, if a dispute is compromised and settled, such a settlement is binding upon the parties thereto and may be enforced by either party. Tracy Collins Bank and Trust Co. v. Travelstead, Utah, 592 P.2d 605 (1979); Flott v. Wenger Miser Mfg. Co., 189 Kan. 80, 367 P.2d 44 (1962); See also, 15A Am.Jur. 2d Compromise and Settlement Sections 7 & 25.

In the recent case of Tracy Collins Bank and Trust Co. v. Travelstead, Utah, 592 P.2d 605 (1979), the Utah Supreme Court upheld the trial court's summary enforcement of a settlement agreement. In strictly enforcing the terms of the settlement agreement, the Court clearly enunciated the proper rule regarding the enforcement of an agreement reached through compromise and settlement:

> Settlements are favored in the law, and should be encouraged, because of the obvious benefits accruing not only to the parties, but also to the judicial system. An ex-

> peditious means of enforcing a settlement agreement is conducive to this policy of law in that it adds the presence of judicial finality to the agreement, insuring that the goals of the parties as expressed in the agreement can be speedily attained. Travelstead, supra, 592 P.2d at 607.

The majority of the courts in our sister states also recognize such a rule of strictly and summarily enforcing agreements reached through compromise and settlement. In Lomas & Nettleton Co. v. Tiger Enterprise, Inc., 99 Idaho 359, 585 P.2d 949 (1978), the Idaho Supreme Court stated the rule as follows:

> Because there is an obvious public policy favoring the amicable settlement of litigation,...agreements accomplishing this will be disregarded only for the strangest of reasons. Furthermore, such reasons must be shown by clear and convincing evidence. Lomas, supra at 585 P.2d 952.

Similarly in Connor v. Hammer, 201 Kan. 22, 439 P.2d 116 (1968) that court states:

> The law favors the compromise and settlement of disputes and when parties, in the absence of an element of fraud or bad faith, enter into an agreement settling and adjusting a dispute, neither party is permitted to repudiate it. Connor, supra, 439 P.2d at 118 and 119.

And in Greater Anchorage Area Borough v. City of Anchorage, Alaska, 504 P.2d 1027 (1976) the Court ruled:

> Sound judicial policy dictates that private settlements and stipulations between the parties are to be favored

and should not be lightly set aside. Greater Anchorage, supra, 504 P.2d at 1031.

And for a particularly thorough discussion of the law of compromise and settlement see the case of International Motors Rebuilding Co. v. United Motor Exchange, Inc., 193 Kan. 497, 393 P.2d 992 (1964), in which case the court emphasized that absent a strong showing of fraud or bad faith, neither party may be allowed to repudiate an agreement reached through compromise and settlement. See also Service Oil Co. v. Coleman Oil Co., (1st Cir., 1972) 470 F.2d 925; Ranta v. Rake, 91 Idaho 376, 421 P.2d 747 (1966); Gordon H. Ball, Inc. v. Oregon Erecting Co., 273 Or. 179, 539 P.2d 1054 (1975); Snyder v. Tompkins, Wash. App., 579 P.2d 994 (1978); Feisner v. Stinnett, 212 Kan. 26, 509 P.2d 1156 (1975); 15A Am. Jur. 2d Compromise and Settlement Sections 5 and 25.

In this woefully long and disturbing case presently before the Court, a settlement agreement was finally successfully negotiated and agreed to by all parties. The terms of the agreement were presented to and approved by the Honorable Judge Sawaya in his chambers. All parties were present and represented by counsel. The terms of the agreement were reduced to written form and submitted to opposing counsel for approval of the form. As set forth above, approval was received from all parties as to the form with the exception of one small sub-paragraph which dealt with a tangential issue not discussed at the pre-trial settlement conference.

There was one condition precedent that remained unaccomplished: Defendants Baum and Chatillion needed to provide financial information to support their valuation of the lots. Counsel for Plaintiffs Mascaro and

Taylor acknowledged such a valuation in a letter dated June 23, 1982 as described above. (R.556) The condition precedent having been satisfied the terms of the agreement being quite clear, the lower court ordered that the settlement agreement previously reached be enforced as set forth in Defendant-Respondent's Motion to Enforce Settlement Agreement. (See Order and Judgment, dated November 5th, 1982, R.579) In so doing, all of the issues of this protracted and unfortunate case were resolved except for those issues related to Plaintiff-Appellant Mascaro's claims against Defendant-Respondent. All of the claims and issues involving Plaintiff-Appellant Taylor were resolved upon terms he had agreed to. Plaintiff-Appellant Mascaro received partial satisfaction of his claim against his former partner, Defendant-Respondent Joseph.

POINT V

A MOTION PURSUANT TO RULE 60(b)(7) MAY BE CONSTRUED AS AN INDEPENDENT ACTION.

A Motion pursuant to Rule 60(b)(7) for fraud on the Court is based on ancient principles of equity and rests in the Court's inherent equitable powers. (see cases cited in Point I) As such, in cases where none of the parties would be prejudiced, many courts take the position that it makes no difference whether the motion pursuant to Rule 60(b)(7) is construed as a motion in the same case or as an independent action in equity. In 7 Moores Federal Procedure, Section 60.38[3] at 650 the rule is thus stated:

> Where the adverse party is not prejudiced an independent action for relief from a federal judgment may be treated as a 60(b) motion (citing Bros. Inc. v. W.E. Grace Manufacturing Co., (5th Cir., 1963), 32f .2d 594); and, conversely; a 60(b) motion may be treated as the institution of an

independent action. (citing Hadden v. Rumsey Products, (2nd Cir., 1952) 196 F.2d 92; Nixon v. Brewer, (MD Ala., 1970) 49 FRD 122.

In the case of Selway v. Burns, 420 P.2d 640, the Montana Supreme Court interpreted its rule 60(b) [which in pertinent part is identical to the Federal Rule 60(b) as is Utah Rule 60(b)] in the same way. In a case that was bought by way of a 60(b) motion by a non-party, that Court upheld such a procedure, and in so doing held:

> Appellant's contention that Mrs. Suthard's standing before the court depends upon Rule 60(b) and the joinder requirements of Rule 19 is too narrow. It is not necessary for purposes of this appeal to construe Rule 60(b) to determine standing, because it has long been the rule in Montana that a Court of equity has inherent power, independent of statute, to grant relief from judgments gained by fraud. Bullard v. Zimmerman, 88 Mont. 271, 292 p.730. The Bullard case, supra, has since been followed many times by this Court. Most recently, in Cure v. Southwick, 137 Mont. 1, 349 P.2d 575, this Court added that the relief may be granted either on motion in the original action or in a separate equity suit. Rule 60(b) expressly preserved this inherent power in its last sentence which provides: "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 grant relief to a defendant not personally notified as may be provided by law, or to set aside a judgment for fraud upon the court."
>
> Our federal courts also recognize and use the historic equity power to set aside judgments gained by fraud. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 I., Ed. 1250. The only limitation that has been placed upon the exercise of this power is that the investigating court must observe the usual safeguards of the adversary process by granting notice to affected persons and by conducting a fair hearing on the exist-

ence of the fraud. Universal Oil Co. v. Root Refining Co., 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447 (emphasis added).

This Court has in the past adopted the position that where a judgment is attacked for fraud on the court under the provisions of Rule 60 (b)(7) U.R.C.P., such a proceeding must be pursued in an independent action by filing a separate suit, paying the statutory filing fee and requiring the statutory issuance and service of process. Shaw v. Pilcher, 9 Utah 2d 222, 341 P.2d 949 (1959). Respondent-Defendant suggests that the absolute requirement that the court may consider and resolve questions of fraud upon the court only if the form of the attack is an independent action is not supported by a majority of the recent decisions dealing with the problem, and is an elevation of form over substance. Based upon the U.S. Supreme Court's holding in Hazel-Atlas Glass Co. v. Hartford Empire Co., supra, and the cogent arguments in Selway v. Burns, supra, and Moores Federal Practice, supra, (and cases cited therein), Respondent-Defendant urges this Court to adopt the better reasoned rule, that as long as the inherent safeguard of due process, including notice and jurisdiction and opportunity to respond, are clearly met, the distinction between a motion 60(b) for fraud on the court and an independent action for the same is without significance.

It is not, however, necessary that that the Court adopt such a position in the present case. While Respondent attacked the Default Judgment in the original action by way of a motion pursuant to 60 (b)(7), U.R.C.P., in view of the Shaw v. Pilcher line of cases, Respondent-Defendant Joseph additionally attacked the Default Judgment in an independent action brought in equity. That case is was brought in Third

District Court, Salt Lake County, State of Utah, and is entitled Charley Joseph v. John S. Davis, et. al., Civil No. C-82- 3484. A filing fee was paid and all named defendants, which includes all parties in the original action, were properly served with process of the court. By order of the court, dated November 5th, 1982, and signed by Judge Dee (R.587), the new and independent suit in equity (Civil No. C-80-3484) was consolidated with the original action (Civil No. C-80-3305). Respondent- Defendant Joseph has thus complied with the requirements of this Court as set forth in Shaw and subsequent cases.

SUMMARY

The default judgment entered herein against Defendant-Respondent Joseph, was entered as a result of attorney Davis' scheme to intentionally and maliciously prevent Defendant-Respondent Joseph from responding to the issues raised in the Plaintiff-Appellants' complaint. Further, as a result of his special knowledge as a lawyer, attorney Davis was able to manipulate the judicial process in an attempt to prevent any post judgment relief that may have been available to his client: he failed to make a timely motion to have the default set aside pursuant to Rule 60(b)(1) even though he was well aware of the default; he intentionally lost a motion to have the default set aside by failing to present a real argument in support of the motion and presented no real defense against a motion to have the default made final. In both instances he resented no written briefs nor did he make an earnest oral argument on these respective motions. Attorney Davis' motive in purposely working at his own client's defeat was to prevent the discovery of his embezzlement of partnership funds from his

trust account by preventing litigation of the issues raised in the Plaintiff-Appellants' complaint. Defendant-Respondent Joseph, was thus denied his right of access to the court to assert his defenses and counterclaims. As a further result of Attorney Davis' fraud, a default judgment was entered and made final even though it was unsupported by the pleadings, and was clearly erroneous on its face. Said default judgment consisted of a money judgment in excess of $300,000.00, for unliquidated damages which had never been proved, and which contained an obvious mathematical error on its face.

Such a default judgment, obtained as the result of a massive fraud on the court by an officer of the court, and which was defective on its face, and was unsupported by the pleadings, was properly subject to being set aside in its entirety by the court below, either by way of motion in the original action or pursuant to an independent suit in equity. Defendant-Respondent Joseph brought a motion pursuant to Rule 60(b)(7), U.R.C.P., in the original action, and in addition, brought an independent suit in equity attacking the default judgment as having been obtained through fraud on the court pursuant to a scheme by an officer of the court to defraud and pervert the judicial process. The two actions were consolidated.

Prior to the lower court ruling on the two consolidated attacks on the default judgment, a settlement agreement was reached among the parties to this appeal which discharged all of Defendant-Respondent Joseph's liability to Plaintiff-Appellant Taylor, and satisfied the first $60,000.00 of any liability which might ultimately be enforced against Defendant-Respondent Joseph and in favor of Plaintiff-Appellant Mascaro.

Plaintiff-Appellants attempted to repudiate the settlement agreement, but the lower court found that a settlement had in fact been reached, and enforced the same. Subsequent to the enforcement of the settlement agreement, the lower court held a hearing on Defendant-Respondent Joseph's motion, pursuant to Rule 60(b)(7), as consolidated with Defendant-Respondent Joseph's independent suit in equity, to set aside the default judgment based on fraud on the court. The court found that the default judgment had been obtained as a direct result of attorney Davis' scheme to defraud the court. However, rather than set aside the entire default judgment, the court set aside so much of the judgment as had not already been satisfied by the settlement agreement. The court's action in so doing was proper, and is supported by the facts of this case, both as regards Attorney Davis' embezzlement and subsequent clear scheme to defraud the court, and the settlement agreement which was reached. The applicable law also clearly supports the court's action. The court's order of February 8, 1983, modifying in part and setting aside in part the previously entered default judgment, should be upheld in its entirety. However, in the event this Court determines that the lower court's order is in some manner unsupportable, this Court should set aside the default judgment altogether, and allow a trial on the merits to proceed.

Submitted this 25th day of ~~September~~ October, 1983.

M. Shane Smith

Joseph E. Tesch
Attorneys for Defendant
CHARLEY JOSEPH

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a copy of the foregoing Memorandum this 24th day of ~~August~~ October, Nineteen Hundred and Eighty-Three, to the following:

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CASES

Marshall v. Holmes, 141 U.S. 589 (1891)

McKinney v. Boyle (9th Cir., 1968) 404 F. 2d 632

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United States v. Throckmorton, 98 U.S. 61 (1878)

Universal Oil Co. v. Root Refining Co., 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447

TREATISES AND STATUTES

5A Am. Jur. 2d Compromise and Settlement, Section 5 & 25

5A Am. Jur. 2d Compromise and Settlement Sections 7 & 25

[illegible] C.J. Judgments Section 176

[illegible] C.J. Judgments Section 410

49 C.J.S. Judgments, Section 201(c)

49 C.J.S. Judgments, Section 214

49 C.J.S. Judgments Section 216

Federal Rules of Civil Procedure, Rule 60(b)

Federal Rules Advisory Committee on Civil Rules, Federal Rules of Civil Procedure (Committee Note 1946, cited in 6 Moores Federal Practice Section 60.33, n.15)

7 Moores Federal Practice, 60:33 at 613

7 Moores Federal Practice Section 60.37[1] at 613

7 Moores Federal Procedure, Section 60.38[3] at 650

Utah Rules of Civil Procedure, Rule 60(b),