

1970

Brigham G Holbrook and Betty Holbrook v. William M. Hodson and Rose B. Hodson : Petition For Rehearing

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IN THE SUPREME COURT OF THE STATE OF UTAH

BRIGHAM G. HOLBROOK and
BETTY HOLBROOK, his wife,
Plaintiffs and Respondents,

vs.

WILLIAM M. HODSON and
ROSE B. HODSON, his wife,
Defendants and Appellants.

Case No.
11767

PETITION FOR REHEARING

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PETITION FOR REHEARING

The decision of the Court dated March 12, 1970, refers to the fact that on June 27, 1969 the Court denied the petition of plaintiffs for an extraordinary writ, but the decision gives no weight to that action. The matter was argued before several of the Justices and the writ was denied upon the stated reason that the District Court had jurisdiction to consider the motion for relief from late filing.

The dismissal of the appeal by the decision of March 12, 1970 is in error for these reasons:

1. Rule 60 (b) (1) provides relief after the time for motion for new trial has run.
2. The motion for relief from late filing was a 60 (b) (1) motion.
3. Denial of respondents' petition for extraordinary writ was proper.
4. Dismissal of the appeal in June, 1969 for lack of jurisdiction was not the order of the Court, and it would have been erroneous on that ground.

ARGUMENT

POINT 1. RULE 60 (b) (1) PROVIDES RELIEF AFTER THE TIME FOR MOTION FOR NEW TRIAL HAS RUN.

The Court holds that Rule 60 (b) (1) does not and cannot afford relief where the motion for new trial is not filed within ten days after entry of judgment. This is contrary to the language of 60 (b) (1) and to the prior holding of this Court in *Kettner v. Snow*, 13 U.2d 382, 375 P. 2d 28, and to the holdings of the United States Supreme Court under a similar rule in *Harris Truck Lines, Inc., v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217, 9 L.Ed. 2d 261, 263, S. Ct. 283; *Thompson v. Immigration and Naturalization Service*, 375 U.S. 389, 84 S. Ct. 397, 11 L.Ed. 2d 404; *Wolf-*

sohn v. Hankin, 376 U.S. 203, 84 S. Ct. 699, 11 L.Ed. 2d 636.

Rule 6 (b) (1) provides for relief before the expiration of prescribed time and 6 (b) (2) provides for relief *after expiration of the prescribed time*,

“ . . . but it may not extend the time for taking any action under Rules 25, 50 (b), 52 (b) (d) and (e), 60 (b) and 73 (a) and (g) except to the extent and under the conditions stated in them.”

Rule 60 (b) provides for relief from a final judgment for: “(1) Mistake, inadvertence, surprise, or excusable neglect.” which motion shall be made within a reasonable time “and for reasons (1), (2), (3), or (4) not more than three months after the judgment, order, or proceeding was entered or taken.”

In *Kettner v. Snow*, *supra*, the defendant filed a belated motion for new trial under Rule 60 (b). This Court held that in a proper case, and for the reasons stated in the rule such relief could be granted “and the burden of showing facts to justify doing so is upon him who seeks such relief.”

That the motion for new trial may be filed late for the reasons stated in Rule 60 (b) (1) of the Federal Rules, which is the same, is held by the Federal Courts. In *Thompson v. Immigration and Naturalization Service*, *supra*, the Court of Appeals dismissed the appeal because made outside the prescribed sixty-day period after entry of judgment. But the Supreme Court

granted certiorari, citing *Harris Truck Lines, supra*, because in the District Court the motion was treated as having been timely filed until after the time to appeal ran out. And this was done even though Rule 60 (b) (1) was not specifically relied on.

As being analogous to *Thompson*, appellants point out that their motion for new trial was filed February 6, 1969. The defendants' motion to strike because the motion for new trial was late was not filed until March 26, 1969, apparently calculated to be after time for appeal had run. In *Thompson* the Court had assumed that the appeal was timely and counsel on the other side had permitted that assumption. The Court felt that Thompson had been lulled into a false security. The Court and the defendants in the case at bar also believed the motion for new trial was timely and had the plaintiffs acted promptly to attack its timeliness the motion for new trial could have been abandoned as having been filed late and still there could have been a timely appeal.

Rule 73 (a) provides specifically that relief from the passage of one month can be had only where the excusable neglect is based upon "failure of a party to learn of the judgment." There is no such limitation in Rule 60 (b) (1), which provides relief from final judgments generally within three months after the judgment was entered and thereafter for some reasons.

By advertng to *Anderson v. Anderson*, where no question of a motion for new trial was involved and there was simply a failure to take the appeal in time,

the Court in its decision has completely overlooked *Kettner v. Snow*, *supra*, and the many federal cases where relief has been given under 60 (b) (1) where motion for new trial has been filed after the time has run.

U.S. v. Wissohicken Tool Works (C. A. 2d 952), 200 F.2d 936; *Nicholson v. Allied Chemical Corp.* (Pa. 1961), 200 F. Supp. 206; *Minneapolis Brewing Co. v. Merritt* (Md. 1956), 143 F. Supp. 146; *U.S. v. Gould* (C. A. 5, 1962), 301 F.2d 353.

POINT 2. THE MOTION FOR RELIEF FROM LATE FILING WAS A 60 (b) (1) MOTION.

The Court suggests that because interlineation was made in the motion for relief from late filing on June 20, 1969, the motion then became for the first time a 60 (b) (1) motion.

The language of the motion for relief from late filing (R-39) is plainly the language only of Rule 60 (b) (1) supported by the affidavit of counsel, which plainly sets out the fact of inadvertence and excusable neglect appropriate only to Rule 60 (b) and not to Rule 59.

Furthermore, there is good authority that a motion made under Rule 59 will be treated by the Court as a motion under Rule 60 (b) where the facts are appropriate, consistent with a liberal interpretation and application of Rule 60 (b). These are the holdings in

U.S. v. Wissohicken Tool Works, supra; Columbia River Packers Association v. Hinton, 34 F. Supp. 970, reversed on other grounds 117 F.2d 310; *Walling v. Todd*, 3 F.D.R. 490.

This is also the language of *Moore's Federal Practice*, Vol. 6-A, page 3849, where it is stated:

"The court may, however, treat the untimely Rule 59 motion as a motion under Rule 60, in order to determine if the movant has made out a case for relief under the latter rule."

And again at pages 3851-3852 Moore states:

"A motion for new trial that is made within the ten day limit of Rule 59(b) invokes the obligatory discretion of the trial court, which must affirmatively exercise its discretion either to grant or deny the motion. If, however, the motion is not timely, the trial court may not exercise any discretion, but is obligated to deny the motion for lack of power to grant new trial relief, although the court may treat the untimely motion as one for relief under Rule 60, which has a much longer time limit, if the facts alleged in the motion warrant relief under the latter rule."

This statement from Moore also bears out the previous statement that *Anderson v. Anderson* cited by this Court in its decision is not analogous because there was no consideration of Rule 60 (b) in the *Anderson* case.

POINT 3. DENIAL OF RESPONDENTS' PETITION FOR EXTRAORDINARY WRIT WAS PROPER.

The chronology of the petition for extraordinary writ was as follows: The motion to strike because motion for new trial was late was filed March 26, 1969 (R-34); the motion for relief from late filing with accompanying affidavit was served March 31, 1969 (R-39-42); the Jay Holt affidavit was served April 2, 1969; and all were filed April 11, 1969 (R-39).

Judge Hanson then denied the motion to strike and denied the motion for new trial on April 14, 1969, in which he specifically found it "unnecessary to rule on the defendants' motion for relief from late filing." (R-43) The defendants then gave notice of appeal on April 16, 1969, which appeal was dismissed June 2, 1969, and a remittitur issued (R-53). The court's order recited "It is ordered that the same be granted and the appeal dismissed.", without any reference to the pendency of the motion for relief from late filing, although that was argued before this Court as Point 3 of a written memorandum of authorities filed with this Court in its case No. 11597.

It is appellants' position that this simply returned the case to the District Court, which was then confronted with the undisposed of "motion for relief from late filing." This was noticed up for hearing on June 14, 1969 to be heard June 20, 1969, which was granted June 23, 1969 (R-57, 58, 59).

The plaintiffs then filed a petition for extraordinary relief on June 27, 1969 as case No. 11713. The Court may recall that in denying this petition it was

stated by one of the Justices that the basis of the denial of the petition was that the District Court had jurisdiction to determine the motion for relief from late filing.

The District Court then proceeded to take jurisdiction of the motion for relief of late filing which it granted (R-58) and denied the motion for new trial on July 23, 1969 (R-73), and in the same order granted a further hearing on the plaintiff's motion for order in supplemental proceeding. Notice of appeal was then taken on July 30, 1969 (R-75).

The rationale of the denial of the petition for extraordinary writ seems to be as follows: After the motion to strike the motion for new trial was filed defendants scrutinized the pleadings and recognized the possibility that the motion for new trial was filed late and therefore filed a motion for relief from late filing under Rule 60 (b). The District Court erroneously concluded that the judgment was entered on the day it was received and docketed in the Clerk's office and failed to dispose of the motion for relief from late filing. This Court reversed the District Judge as to when the judgment is entered by dismissing the appeal and without giving a written decision. This Court could have passed on the pendency of the motion for relief from late filing, but instead seemed to refer the matter to the District Court which has discretion as to disposition of an application for relief under Rule 60 (b). *Wolfsohn v. Raab* (E.D.Pa.), 11 F.R.D. 254; *Brest v. Philadelphia Transportation*

Co. (E.D.Pa. 1959), 273 F. 2d 22; *John E. Smith's Sons v. Lattimer Foundry & Machine Co.*, 19 F.R.D. 379, affirmed 239 F. 2d 815; *Nugent v. Yellow Cab Co.* (C.A. 7, 1961) 295 F.2d 794, cert. den. 369 U.S. 828.

The merits of the motion for relief from late filing under Rule 60 (b) (1) were before this Court on cross-appeal (R-79, 80), and it is submitted that there is ample support for Judge Hanson's ruling in the cases cited herein. Also, if Judge Hanson was of the opinion that the judgment was not entered until it was recorded by the Clerk's office, it seems reasonable that counsel could take the same view in examining the judgment of the Court showing it to have been in the Clerk's office on January 27.

POINT 4. DISMISSAL OF THE APPEAL IN JUNE, 1969 FOR LACK OF JURISDICTION WAS NOT THE ORDER OF THE COURT, AND IT WOULD HAVE BEEN ERRONEOUS ON THAT GROUND.

The language of the decision is:

"Plaintiffs contend that this appeal should be dismissed. We agree; when this court initially dismissed the appeal in June of 1969 for lack of jurisdiction, the matter became final."

As above stated in the chronological statement, when this case was first appealed there was pending in the District Court the motion for relief from late filing and

the only order made by this Court was that the appeal should be dismissed, with no statement as to lack of jurisdiction and no statement as to finality. It was the dismissal of the appeal which brought before the District Court as a matter of required consideration the motion for relief from late filing, which the court had specifically ruled was not previously considered by it.

Appellants submit that the ruling of the Court on July 14, 1969 was sound and recognized the jurisdiction of the District Court to consider the motion for relief from late filing, which the District Court did with ample support for its action.

Appellants submit that the Court should grant a rehearing before holding that the denial of the petition for extraordinary writ was a nullity, or should grant a rehearing on the merits of this appeal, so that the defendants, who certainly were not guilty of any inadvertance, can have the merits of their defense considered by this Honorable Court.

Respectfully submitted,

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