

2004

# Marlene A. Terpening v. RTM Restaurant Group, a Georgia corporation; RTM Operating Company, a Delaware Corporation : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Wayne G. Petty; Moyle and Draper; H. Dennis Piercey; Attorneys for Appellee.

David N. Kelley; J. David Pearce; Fabian and Clendenin; Attorneys for Appellant.

---

## Recommended Citation

Brief of Appellant, *Terpening v. RTM Restaurant Group*, No. 20040335 (Utah Court of Appeals, 2004).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/4931](https://digitalcommons.law.byu.edu/byu_ca2/4931)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

BRIEF  
UTAH  
DOCUMENT  
K F U  
50  
.A10  
DOCKET NO. 2004 0335-CA

IN THE UTAH COURT OF APPEALS

MARLENE A. TERPENING,

Plaintiff and Appellant,

v.

RTM RESTAURANT GROUP, a  
Georgia corporation; RTM  
OPERATING COMPANY, a  
Delaware Corporation,

Defendant and Appellee.

APPELLANT MARLENE A.  
TERPENING'S BRIEF

App. No. 20040335-CA

Priority No. 15

---

BRIEF OF APPELLANT MARLENE A. TERPENING

---

Appeal from a Judgment of the Third Judicial District Court, Salt Lake County,  
Honorable William B. Bohling, Presiding

---

WAYNE G. PETTY  
MOYLE & DRAPER, P.C.  
City Centre I, Suite 900  
175 East 400 South  
Salt Lake City, Utah 84111

H. Dennis Piercey  
938 Greenwood Terrace  
Salt Lake City, Utah 84105

Attorneys for Appellee

DAVID N. KELLEY  
J. DAVID PEARCE  
FABIAN & CLENDENIN  
P.O. Box 510210  
Salt Lake City, Utah 84151-0210

Attorneys for Appellant

FILED  
UTAH APPELLATE COURTS  
OCT 22 2004

MARLENE A. TERPENING,  
  
Plaintiff and Appellant,  
  
v.  
  
RTM RESTAURANT GROUP, a  
Georgia corporation; RTM  
OPERATING COMPANY, a  
Delaware Corporation,  
  
Defendant and Appellee.

Appeal from a Judgment of the Third Judicial District Court, Salt Lake County,  
Honorable William B. Bohling, Presiding

Attorneys for Appellee

Attorneys for Appellant

## **PARTIES**

The Plaintiff/Appellant is Marlene A. Terpening (hereinafter “Terpening”).

The Defendant/Appellee is RTM Restaurant Group and RTM Operating Company (hereinafter “RTM”).

## **TABLE OF CONTENTS**

TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	v
STATEMENT OF JURISDICTION.....	vi
STATEMENT OF ISSUES AND STANDARD OF REVIEW .....	vi
Issues .....	vi
Standard of Review .....	vi
STATEMENT OF DETERMINATIVE LAWS.....	vii
STATEMENT OF THE CASE.....	ix
Nature of the Case .....	ix
Course of Proceedings/Disposition in Trial Court .....	ix
Statement of Facts .....	xi
SUMMARY OF THE ARGUMENT .....	xv
ARGUMENT .....	1
I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TERPENING’S MOTION TO SET ASIDE DISMISSAL BECAUSE TERPENING MAINTAINED LEGITIMATE REASONS JUSTIFYING RELIEF FROM THE JUDGMENT UNDER RULE 60(b)(6), HER MOTIOIN TO SET ASIDE THE DISMISSAL WAS TIMELY UNDER THE CIRCUMSTANCES, AND SHE MAINTAINED A MERITORIOUS CLAIM.....	1
A. There Are Reasonable Justifications To Set Aside Default.....	2
1. Rule 60(b)(6) Provides for Relief From Judgment Where Plaintiff is Deprived Due Process of Law. ....	3
2. Relief From Dismissal Should Have Been Granted by the Trial Court in the Furtherance of Justice. ....	5
3. Utah Rule of Civil Procedure 5(a) Required Reversal of the Dismissal. ....	7

4.	Setting Aside the Dismissal Would be Proper Because Terpening Could Have Timely Refiled her Claims under a Savings Statute if the Trial Court Gave Notice of the Dismissal.....	9
B.	Based on the History and Nature of This Case, Terpening’s Motion to Set Aside Dismissal was Timely.....	10
C.	Terpening’s Claims are Meritorious and Warranted Granting Her Motion to Set Aside the Dismissal.....	12
CONCLUSION .....		14
CERTIFICATE OF SERVICE .....		15
STATEMENT REGARDING ADDENDUM .....		16

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

*New York Life Ins. Co. v. Brown*, 84 F.3d 137 (5th Cir. 1996)..... 7

### **STATE CASES**

*Airkem Intermountain Inc. v. Parker*, 513 P.2d 429 (Utah 1973) ..... vi, 1  
*Bish's Sheet Metal Co. v. Luras*, 359 P.2d 21 (Utah 1961)..... 3, 4  
*Classic Cabinets, Inc. v. All American Life Ins. Co.*, 1999 UT App 88, ¶ 14,  
978 P.2d 465 ..... 10  
*Helgesen v. Inyangumia*, 636 P.2d 1079 (Utah 1981) ..... 1, 5  
*Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986) ..... 2, 5  
*Lund v. Brown*, 2000 UT 75, ¶ 20, 11 P.3d 277..... 5, 7  
*Madsen v. Borthick*, 769 P.2d 245 (Utah 1988)..... 9  
*Merino v. Albertson's, Inc.*, 1999 UT 14, ¶¶ 5-6, 975 P.2d 467 ..... 12  
*Olsen v. Cummings*, 565 P.2d 1123 (Utah 1977)..... 1  
*State v. Musselman*, 667 P.2d 1053 (Utah 1983) ..... 2, 10, 12

### **STATE STATUTES**

Utah Code Ann. § 78-12-40 (2004) ..... vii, xv, 9  
Utah Code Ann. § 78-2a-3(2)(j) (2004) ..... vi

### **STATE RULES**

Utah Rule of Civil Procedure ..... xv, 3  
Utah Rule of Civil Procedure 5(a) ..... iii, 7, 8, 11  
Utah Rule of Civil Procedure 5(a)(2)(D) ..... vii  
Utah Rule of Civil Procedure 58A(d) ..... viii  
Utah Rule of Civil Procedure 60(b) ..... vi, vii, 10  
Utah Rule of Civil Procedure 60(b)(1-3) ..... 11, 13  
Utah Rule of Civil Procedure 60(b)(6) ..... xv

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2004).

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

### **Issues**

1. Did the trial court (the “Trial Court”) abuse its discretion in denying Terpening’s Motion to Set Aside Dismissal under Utah Rule of Civil Procedure 60(b) where: 1) neither party received proper notification of the Trial Court’s dismissal, 2) Terpening’s motion was timely under the circumstances, and 3) Terpening maintained a meritorious claim?

### **Standard of Review**

An appellate court will reverse a trial court’s decision regarding motions to relieve a party from a final judgment under Utah Rule of Civil Procedure 60(b) where an abuse of discretion is clearly established. *Airkem Intermountain Inc. v. Parker*, 513 P.2d 429, 431 (Utah 1973).

## **STATEMENT OF DETERMINATIVE LAWS**

### **Statutes:**

#### **Utah Code Ann. § 78-12-40 (2004):**

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

### **Court Rules:**

#### **Utah Rule of Civil Procedure 60(b):**

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding, for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not made more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation.

**Utah Rule of Civil Procedure 5(a)(2)(D):**

A party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d).

**Utah Rule of Civil Procedure 58A(d):**

A copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by the requirement of this provision.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

On November 20, 1997, Terpening entered an Arby's Restaurant, owned and operated by RTM, located in West Valley City, Utah. After ordering food, Terpening turned toward the dining room. Before walking towards the dining room, an employee of the restaurant assured Terpening that it was safe to walk across a tile floor that he had recently mopped. While attempting to walk across the tile floor, she fell face-first onto the hard tile and carpeted area of the dining room. As she fell, she put her arms out to brace herself, but the impact caused multiple injuries, including damage to her right arm and right wrist, tearing and detachment of her left and right rotator cuffs, a sprained left ankle, bruised ribs, and soft tissue damage to her right shoulder.

### **Course of Proceedings/Disposition in Trial Court**

Terpening filed a complaint against RTM on January 4, 1999. On July 7, 2000, the Trial Court held a hearing on an Order to Show Cause, at which Thomas Shaffer appeared as counsel for Terpening and Royal Hansen appeared as counsel for RTM. At the hearing, the Trial Court granted a thirty-day continuance, but stated that if no pleadings were filed within that period, the court would dismiss the case.

During the thirty-day period, the parties sent correspondence to each other. During July 2000, in order to conduct a deposition, RTM requested information from Terpening about her sister. This information was provided by Terpening through correspondence.

Without notice to the parties, on August 10, 2000, the Trial Court, acting on its own motion, dismissed Terpening's case without prejudice based on the Court's Order to Show Cause and the parties' failure to file any pleadings. Notice of the dismissal was never sent to, or received by, counsel for either party or the parties themselves. Therefore, both parties continued to act as if the matter was still pending. Throughout the rest of the year 2000, and early into 2001, both parties continued to conduct discovery. By March 2001, RTM requested a resolution of the matter, and Terpening responded by sending a settlement package to RTM's counsel in April 2001.

In March 2002, Thomas Shaffer left the law firm of Fabian & Clendenin and left the case with Todd Emerson. In September 2003, Todd Emerson left the law firm of Fabian & Clendenin and turned the file over to David Kelley. Shortly thereafter, Mr. Kelley learned that the case had been dismissed by the Trial Court in August 2000, but no notice of dismissal had ever been received by the parties or their counsels.

On October 14, 2003, Terpening filed a Motion to Set Aside Dismissal with the District Court, and RTM filed a Memorandum in Opposition. On March 24, 2004, the District Court denied Terpening's Motion to Set Aside Dismissal on the grounds set forth in RTM's Memorandum in Opposition. Terpening now appeals the Trial Court's refusal to set aside the dismissal of her case.

### **Statement of Facts**

1. On November 20, 1997, Terpening entered an Arby's Restaurant located at 3500 South 3215 West, West Valley City, Utah. (Record at 2).
2. As she entered the Arby's store she saw an employee mopping the tile floor between the service counter and dining room. She went to the service counter to order dinner. (Record at 46).
3. Terpening then turned toward the dining room and asked an Arby's employee whether it was safe to cross the floor, which then appeared to be dry. (Record at 41).
4. The employee assured Terpening that the floor was safe to cross, so she walked across the tile floor. (Record at 40-41).
5. At this point Terpening slipped on the floor and fell face-first on the hard tile and carpeted area of the dining room. (Record at 46-49).

6. Reflexively, she put her arms out to brace her fall. The impact broke her right arm and right wrist, tore and detached both her left and right rotator cuffs, sprained her left ankle, bruised her ribs, and caused soft tissue damage to her right shoulder. Terpening was in excruciating pain and was taken directly to the Pioneer Valley Hospital Emergency Room for treatment. (Record at 52-53, 54-57).

7. Terpening filed a complaint on or about January 4, 1999, thereby commencing the present action. (Record at 1-5).

8. On or about July 7, 2000, the Court held a hearing on an Order to Show Cause at which Thomas Schaffer appeared for and on behalf of Terpening, and Royal Hansen appeared on behalf of RTM. (Record at 24).

9. At the hearing, the Court granted a thirty-day continuance stating, “If no pleadings are filed within the allotted time, the Court will automatically dismiss this case.” *Id.*

10. On or about July 19, 2000, RTM served on Terpening an Amended Notice of Taking Deposition of Terpening’s sister. (Record at 91-93).

11. On or about July 19, 2000, Terpening further sent a letter to counsel for Terpening requesting contact information for Terpening’s sister. (Record at 95).

12. On or about July 21, 2000, counsel for Terpening sent a letter to counsel for RTM providing the requested information. (Record at 97).

13. On or about July 25, 2000, a subsequent letter containing further information was sent to counsel for RTM. (Record at 99).

14. On or about August 10, 2000, the Court, on its own motion, dismissed the case without prejudice based on the Court's Order to Show Cause for dismissal. (Record at 25).

15. Notice of the Court's dismissal was not sent to either party or their attorneys. *Id.*

16. There is no certificate of mailing by the court clerk that the order of dismissal was mailed to either of the parties. *Id.*

17. On September 22, 2000, Terpening sent a letter enclosing Terpening's medical records.

18. On March 21, 2001, RTM requested a demand for resolution of the matter. (Record at 101).

19. On April 19, 2001, Terpening sent a settlement package to counsel for RTM. (Record at 103-06).

20. The parties, without notice of the Court's dismissal, continued to conduct discovery throughout the remainder of 2000, as well as 2001. The following Subpoenas Duces Tecum were sent:

a. July 20, 2001 to Walgreen's Pharmacy

- b. July 20, 2001 to Pioneer Valley Hospital
- c. July 20, 2001 to John F. Berman, M.D.
- d. July 20, 2001 to Fremont Orthopedic Medical Group
- e. July 20, 2001 to Washington Hospital Health Care System
- f. July 20, 2001 to Kaiser Permanente
- g. July 20, 2001 to Highland General Hospital
- h. August 31, 2001 to Fremont Hospital
- i. August 31, 2001 to Rite-Aid Pharmacies
- j. September 12, 2001 to Rite-Aid Pharmacies

(Record at 108-47).

21. In March 2002, Mr. Schaffer left the firm of Fabian and Clendenin. At that time, Terpening's case was transferred to Todd Emerson.

22. In September 2003, then existing counsel for Terpening, Todd Emerson, left the law firm of Fabian and Clendenin and turned the file over to David N. Kelley.

23. Upon researching the status of the case, Mr. Kelley discovered that the case had been dismissed in August 2000, but that no notice had been provided to either of the parties or their counsel. (Record at 25).

24. On or about October 14, 2003, Terpening filed a Motion to Set Aside Dismissal. (Record at 148-50).

25. On or about March 24, 2004, the Trial Court denied Terpening's Motion to Set Aside Dismissal. (Record at 167-69).

### **SUMMARY OF THE ARGUMENT**

The Trial Court abused its discretion in denying Terpening's Motion to Set Aside Dismissal. To vacate a default judgment, a movant must show that she has reasons justifying the setting aside of the dismissal of her case under Utah Rule of Civil Procedure 60(b)(6), that her motion is timely, and that she maintains a meritorious claim. Terpening meets each of these requirements. Therefore, this Court should vacate the Trial Court's decision regarding dismissal and allow this case to proceed at the trial stage.

First, Terpening maintains valid, legitimate reasons for setting aside her dismissal under Rule 60(b)(6). By denying Terpening's motion, the Trial Court abused its discretion in not allowing justice to be served in allowing Terpening her day in court. Furthermore, the dismissal of her case without proper notification denied Terpening due process of law and the rights conferred upon her under Utah Rules of Civil Procedure 5 and 58A, which require reversal of her dismissal due to lack of notification. Also, without proper notice of the dismissal from the Trial Court, Terpening was not allowed an opportunity to refile her claims under Utah Code Ann. § 78-12-40. These reasons justified setting aside the dismissal under Rule 60(b)(6).

Second, without receiving notice of the Trial Court's dismissal of the case, both Terpening and RTM continued to litigate the case as if it was still active. Once Terpening's counsel learned of the Trial Court's dismissal, they quickly filed their motion to set the dismissal aside. Given the circumstances and nature of this case, the motion was timely. Third, Terpening has maintained at all times a meritorious claim. Under Utah's negligence theories, Terpening can show that RTM is liable for the injuries she received from her slip-and-fall accident in an Arby's Restaurant.

Because Terpening provided all the necessary requirements for vacating a default judgment, her Motion to Set Aside Dismissal should have been granted by the Trial Court. In sum, the Trial Court abused its discretion in denying her motion. Therefore, this Court should vacate the Trial Court's decision regarding the dismissal and remand the case back for further proceedings.

## ARGUMENT

### **I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TERPENING'S MOTION TO SET ASIDE DISMISSAL BECAUSE TERPENING MAINTAINED LEGITIMATE REASONS JUSTIFYING RELIEF FROM THE JUDGMENT UNDER RULE 60(b)(6), HER MOTIOIN TO SET ASIDE THE DISMISSAL WAS TIMELY UNDER THE CIRCUMSTANCES, AND SHE MAINTAINED A MERITORIOUS CLAIM.**

The Utah Supreme Court holds that the “trial court is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from a final judgment under [Rule 60(b)], and [an appellate court] will reverse the trial court only where an abuse of discretion is clearly established.” *Airkem Intermountain, Inc. v. Parker*, 513 P.2d 429, 430 (Utah 1973). However, Utah courts hold that a trial court’s discretion is not without limits. Specifically, a trial court’s discretion “should be exercised **in the furtherance of justice and should incline towards granting relief in a doubtful case** to the end that the party may have a hearing.” *Helgesen v. Inyangumia*, 636 P.2d 1079, 1081 (Utah 1981) (citing *Warren v. Dixon Ranch Co.*, 260 P.2d 741 (Utah 1953) (emphasis added)). Furthermore, as the Utah Supreme Court stated in *Olsen v. Cummings*, 565 P.2d 1123, 1124 (Utah 1977), “it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant’s failure to appear and timely application is made to set it aside.” Therefore, a “court should be generally indulgent toward setting a judgment aside where there is reasonable justification or excuse for the

defendant's failure to answer and when timely application is made.” *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986). Consequently, “[w]here there is doubt about whether a default should be set aside, that doubt should be resolved in favor of doing so.” *Id.*

To vacate a default judgment, a movant has to “not only show that the judgment was entered against [her] through excusable neglect (or any other reasons specified in Rule 60(b)), but [s]he must also show that [her] motion to set aside the judgment was timely, and that [s]he has a meritorious [claim] to the action.” *State v. Musselman*, 667 P.2d 1053, 1055-56 (Utah 1983). As shown below, the Trial Court abused its discretion in denying Terpening’s Motion to Set Aside Dismissal because: (A) Terpening maintained reasonable justifications under Rule 60(b)(6) to set aside dismissal, (B) her motion was timely given the nature and history of this case, and (C) she maintained a meritorious claim.

**A. There Are Reasonable Justifications To Set Aside Default.**

To vacate a default judgment, a movant must “show that the judgment was entered against [her] through...reason[s] specified in Rule 60(b).” *Musselman*, 667 P.2d at 1055. Rule 60(b) of the Utah Rules of Civil Procedure provides:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been

discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation.

In this matter, setting aside dismissal was justified because: (1) by not providing relief under Rule 60(b)(6), Terpening was denied due process of law; (2) relief should have been granted in the furtherance of justice in this case; (3) by denying relief from the judgment, a violation of Utah Rule of Civil Procedure 5 occurred by not providing both Terpening and RTM proper notice of the dismissal of the case; and (4) Terpening could have timely refiled her claim under a savings statute if the Trial Court had properly notified the parties of the dismissal.

**1. Rule 60(b)(6) Provides for Relief From Judgment Where Plaintiff is Deprived Due Process of Law.**

The Court's order dismissing the case, dated August 10, 2000, should be set aside as it deprives Terpening of her case without due process of the law. The Utah Supreme Court in *Bish's Sheet Metal Co. v. Luras*, 359 P.2d 21, 22 (Utah 1961), stated that one reason for justifying relief is not providing proper notice. As the court stated, "such a showing would establish lack of due process of law." *Id.*

Furthermore, the court held that such a showing would be entitled to relief from the judgment under what was then subsection (7), but is similar to the current subsection (6) providing for “any other reason justifying relief from the operation of the judgment.” *Id.*

At the hearing held on the Court’s Order to Show Cause, the Court ordered that the parties must file a pleading within thirty days or the case would be dismissed. (Record at 24). While the Complaint and Answer had already been filed, Terpening’s counsel understood this directive to mean that the parties must take some action in furthering the case along. Approximately a week and a half later, RTM sent out an Amended Notice of Taking Deposition of Elizabeth Terpening. (Record at 91-93). Terpening’s counsel believed that the Notice had been filed with the court and that the Court’s order regarding a filing had been fulfilled. Accordingly, the parties continued to go forward with the case without notice that the Court had dismissed the case. Terpening’s counsel prepared and delivered a settlement package regarding possible negotiations (Record at 103-06). Furthermore, RTM’s counsel continued to send out discovery requests (Record at 108-47).

At no time did the parties receive notice of any dismissal. The Court’s own record is devoid of such notice. Both parties’ actions demonstrate that no notice was given. Absent notice, the Trial Court’s failure to set aside the dismissal denied

Terpening's rights to due process of law; therefore, the Trial Court abused its discretion.

**2. Relief From Dismissal Should Have Been Granted by the Trial Court in the Furtherance of Justice.**

The Trial Court abused its discretion by not setting aside the dismissal of Terpening's case, which would have been in the furtherance of justice. Utah courts have held that "discretion should be exercised in furtherance of justice and should incline towards granting relief in a doubtful case to the end that the party may have a hearing." *Helgesen*, 636 P.2d at 1081. In *Olsen*, the Utah Supreme Court stated, "it is quite uniformly regarded as an abuse of discretion where there is reasonable justification or excuse for the defendant's failure to appear and timely application is made to set it aside." 566 P.2d at 1124.

Furthermore, the court in *Katz*, 732 P.2d at 93, held that a "court should be generally indulgent toward setting a judgment aside where there is reasonable justification or excuse...[and w]here there is doubt about whether a default should be set aside, that doubt should be resolved in favor of doing so." In putting these legal doctrines into context, the Utah Supreme Court in *Lund v. Brown*, 2000 UT 75, ¶ 20, 11 P.3d 277, 281, concluded that plaintiff's failure to provide notice of the default judgment proceedings justified the trial court's grant of defendant's motion to set aside the judgment.

Similarly, there was reasonable justification and excuse as neither Terpening nor her counsel ever received notice of the dismissal. At the hearing held on the Court's Order to Show Cause, the Court ordered that the parties must file a pleading within thirty days or the case would be dismissed. (Record at 24). While the pleadings (i.e. the Complaint and Answer) had already been filed, Terpening's counsel understood this directive to mean that the parties must take some action in furthering the case along.

Approximately a week and a half later, defendants sent out an Amended Notice of Taking Deposition of Elizabeth Terpening. (Record at 91-93). Counsel for the plaintiff believed that the Notice had been filed with the court and that the Court's order regarding a filing had been fulfilled. Moreover, there had been no notice of a dismissal. Thus, the parties continued with the litigation as if the lawsuit remained active. For example, counsel for Terpening prepared and delivered a settlement package to open up negotiations (Record at 103-06), and counsel for RTM continued to send out discovery requests (Record at 108-147).

In short, all parties believed and acted as if the matter remained open. There was no contrary notice. Each of the parties continued to seek additional evidence to bolster their case. Each party continued to advocate its own clients' position. In essence, each party acted as if there had been no dismissal in this case (which until recently was the belief of the parties). Consequently, the Trial Court abused its

discretion in denying Terpening's Motion to Set Aside Dismissal by not allowing justice to be carried out, as both parties continued to litigate the pending claims due to the Trial Court's failure to notify them to the contrary.

**3. Utah Rule of Civil Procedure 5(a) Required Reversal of the Dismissal.**

Failure by the Trial Court to abide by Rule 5(a) constituted an additional reason justifying relief from the operation of the judgment, as Rule 60(b)(6) provides. Rule 5(a)(2)(D) states that a party in default for any reason shall be served with notice of entry of a judgment under Rule 58A(d). While interpreting the notice requirements of Rule 5, the Utah Supreme Court stated, "by appearing at any time in the action, a party becomes entitled to have his attorney notified of all subsequent proceedings and receive copies of all papers, even if he later chooses to default." *Lund*, 2000 UT 75, ¶ 26, 11 P.3d at 282 (citing *Wright et al.*, supra P11, § 1144, at 416 (footnotes omitted)); see also *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 142 (5th Cir. 1996) (stating that defendants' appearance entitled him to service of all papers, including the summary judgment motion made and granted after defendants had been defaulted).

Similarly, in the present case, Rule 5(a)(2)(D) was not followed, and because it was not followed, Terpening has lost her cause of action. It is clear from the actions of each of the parties that neither had notice of the dismissal, and

each believed that the case was progressing. For over a year after the Court's dismissal, the parties continued to conduct discovery, subpoena medical records, and conduct negotiations for possible settlement. Thus, it is evident that there was no notice of the dismissal, which Terpening and RTM both should have received from the Trial Court once the August 10, 2000 order dismissed the case.

Accordingly, the Trial Court abused its discretion in not granting Terpening's Motion to Set Aside Dismissal, since neither party received notice of the order dismissing the case as is required by Rule 5 of the Utah Rules of Civil Procedure.

RTM argued at the Trial Court that these rules of civil procedure did not apply, because notice of the entry of judgment was only required to be given "by the party preparing [the judgment]." Utah Rules of Civil Procedure 58A(d). Therefore, because the Trial Court acted on its own motion to dismiss Terpening's case, RTM argued that the Trial Court was not a "party" for purposes of Rule 58A(d). (Record at 157 n. 7). Even though RTM was not the "party" preparing the judgment due to the Trial Court's action on its own motion, Terpening still should have received proper notice of the dismissal from the Trial Court under the Utah Rules of Civil Procedure 5(a). In sum, the Trial Court abused its discretion in not granting Terpening's motion because Utah Rule of Civil Procedure 5(a) required a reversal of the dismissal for lack of proper notification.

**4. Setting Aside the Dismissal Would be Proper Because Terpening Could Have Timely Refiled her Claims under a Savings Statute if the Trial Court Gave Notice of the Dismissal.**

Utah law affords plaintiffs the opportunity to timely re-file their action within one year if the action fails for any reason not on the merits of the claims.

Under Utah Code Ann. § 78-12-40 (2004) (the “Savings Statute”):

[I]f the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff...may commence a new action within one year after the reversal or failure.

*See also Madsen v. Borthick*, 769 P.2d 245, 254 (Utah 1988) (holding investors’ suit not time-barred when original suit was dismissed and new suit was re-filed within one year under the savings statute). The Trial Court dismissed Terpening’s claims without prejudice due to the failure of any of the parties to file any pleadings within 30 days after the Court’s Order to Show Cause. (Record at 24-25). Neither Terpening nor RTM received notice of the dismissal. If Terpening had received proper notice, she could have re-filed her claim within one year after the dismissal under the Savings Statute. Because the Trial Court never provided any notice of dismissal, the one year period for re-filing Terpening’s claims lapsed, making it too late for Terpening to re-file. Therefore, the Trial Court’s failure to give notice of the dismissal to Terpening, deprived her of the right to re-file within one year as provided by the Savings Statute.

**B. Based on the History and Nature of This Case, Terpening's Motion to Set Aside Dismissal was Timely.**

Once Terpening's counsel discovered the case had been dismissed in September 2003, Terpening's counsel quickly filed a Motion to Set Aside Dismissal in October 2003 (Record at 148-50); therefore, the motion was timely and the Trial Court abused its discretion in denying the motion partly on the grounds that Terpening was not diligent in "mov[ing] the case forward." (Record at 167-69) To vacate a judgment, a movant "must also show that his motion to set aside the judgment was timely." *Musselman*, 667 P.2d at 1056. Under Utah Rule of Civil Procedure 60(b), a "motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken." The Utah Court of Appeals held that "[s]ubsection [(6)] may not be employed for relief when the grounds asserted are encompassed within subsection (1)...[o]therwise, the three-month time limitation for filing motions pursuant to subsection (1) would be circumvented." *Classic Cabinets, Inc. v. All American Life Ins. Co.*, 1999 UT App 88, ¶ 14, 978 P.2d 465, 469 (citing *Lincoln Benefit Life Ins. Co. v. D.T.S. Properties*, 838 P.2d 672, 674-75 (Utah Ct. App. 1992)).

Terpening's Motion to Set Aside Dismissal was not based on any of the reasons enumerated in the first three parts of Rule 60(b); therefore, the three month time limit did not apply to her motion. As argued above and at trial, Terpening and

RTM never received notification from the Trial Court about the dismissal of the case. Both parties continued to act as if the case remained open and actively litigated it by conducting discovery, by supplying and requesting information to the respective counsels, and by offering settlement proposals. Once Terpening's counsel learned that the Trial Court dismissed the case on its own motion, Terpening filed a Motion to Set Aside Dismissal shortly afterward; hence, it was timely given the circumstances and nature of the case.

Furthermore, as argued above, Terpening's motion was based largely on the fact that other reasons justified the Trial Court in setting aside the dismissal of her case under Rule 60(b)(6). Because she never received proper notification of the dismissal, Terpening, along with RTM, continued to pursue the case. Therefore, in denying her motion, Terpening was denied a hearing on her claims in the furtherance of justice. Furthermore, the fact that she never received proper notification of the dismissal was a violation of due process and Utah Rules of Civil Procedure 5(a). All of these reasons justified setting aside the dismissal of Terpening's case under 60(b)(6), and they were not reasons enumerated in Utah Rules of Civil Procedure 60(b)(1-3), which only allow for motions filed within three months. In sum, the reasons for setting aside dismissal of Terpening's case were properly governed under Rule 60(b)(6), and her motion was not limited by a

three-month time limitation. Therefore, the Trial Court abused its discretion in holding that Terpening's motion should fail due to untimeliness.

**C. Terpening's Claims are Meritorious and Warranted Granting Her Motion to Set Aside the Dismissal.**

At all times during the course of this litigation, Terpening has maintained legitimate and meritorious claims in her case, which warrant this Court in granting her appeal to set aside the dismissal. To vacate a judgment, a movant must show that there is a meritorious claim in her action. *Musselman*, 667 P.2d at 1056. Terpening was an invitee of RTM's restaurant, and therein encountered a potentially dangerous condition. When she questioned an employee of RTM about the potentially dangerous condition, the employee assured her that it was safe to walk across. As plaintiff walked across the tile floor, she slipped and fell. The fall resulted in severe injuries for which RTM is clearly liable.

In *Merino v. Albertson's, Inc.*, 1999 UT 14, ¶¶ 5-6, 975 P.2d 467, 478, the court indicated that there were two theories under which a plaintiff may recover against a business owner for injuries arising from a slip-and-fall accident. Under the one theory, liability may be established where two conditions are met. "First, a plaintiff must show that the business owner knew or should have known of the hazardous condition. Second, a plaintiff must show that the business owner had enough time to remedy the unsafe condition had the owner exercised reasonable

care, and that the owner failed to do so.” *Id.* at ¶ 5. Here, the hazardous condition was clearly known, and in fact created by the business owner and/or his employee. Mopping the floor with either just water, or soap and water, created a hazardous condition, as the area on which guests walked became wet tile. Furthermore, the owner knew about and should have warned Terpening not to cross the wet tile area. However, through its agent, the owner assured Terpening that there was no unsafe condition. Relying on the employee’s assurances, Terpening crossed the wet tile floor, and slipped and fell. The impact resulted in severe injuries and substantial medical needs.

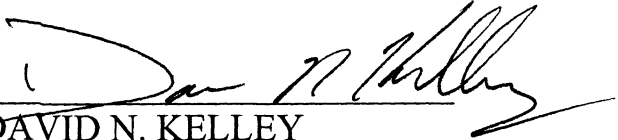
RTM’s argument that Terpening’s claims are of questionable merit is baseless. Regardless of whether Terpening saw the employee mopping the floor or whether she walked over the floor under the assumption that the floor was wet, Terpening established that she has a valid claim for her slip-and-fall accident under the guidelines of *Merino*. She can show that the business owner knew or should have known of the hazardous condition of the floor and maintained enough time to remedy the situation.

In sum, Terpening’s claim has merit. She was injured as the result of RTM’s negligence. As a result, justice dictates that this Court set aside the dismissal and reopen this matter for adjudication in the Trial Court.

### CONCLUSION

For the foregoing reasons, this Court should vacate the Trial Court's Minute Entry and Decision of Order, which upheld the dismissal of Terpening's case, and remand the case for further proceedings with the Trial Court.

DATED this 22<sup>nd</sup> day of October 2004.


  
\_\_\_\_\_  
DAVID N. KELLEY  
J. DAVID PEARCE  
FABIAN & CLENDENIN  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of October, 2004, I caused to be mailed a true and correct copy of the foregoing **APPELANT MARLENE A. TERPENING'S BRIEF** by first-class mail, postage prepaid, to:

Wayne G. Petty  
Moyle & Draper, P.C.  
City Centre I, Suite 900  
175 East 400 South  
Salt Lake City, Utah 84111

H. Dennis Pearcey  
938 Greenwood Terrace  
Salt Lake City, Utah 84105

  
\_\_\_\_\_

## **STATEMENT REGARDING ADDENDUM**

No addendum is necessary.