

2004

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

Utah Court of Appeals

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MARLENE A. TERPENING,  
Plaintiff and Appellant,

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

**APPELLANT MARLENE A.  
TERPENING'S REPLY BRIEF**

App. No. 20040335-CA

Priority No. 15

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

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IN THE UTAH COURT OF APPEALS

MARLENE A. TERPENING,	)	
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	<b>APPELLANT MARLENE A.</b>
	)	<b>TERPENING'S REPLY BRIEF</b>
RTM RESTAURANT GROUP, a	)	
Georgia corporation; RTM	)	App. No. 20040335-CA
OPERATING COMPANY, a Delaware	)	
Corporation,	)	Priority No. 15
	)	
Defendants and Appellees.	)	

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**REPLY BRIEF OF APPELLANT MARLENE A. TERPENING**

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

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## ARGUMENT

### **I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TERPENING'S MOTION TO SET ASIDE DISMISSAL; THEREFORE, THIS COURT SHOULD REVERSE THE TRIAL COURT'S DENIAL OF HER MOTION.**

Upon examination of the record, the history, and the nature of this case, the motion of appellant Marlene A. Terpening ("Terpening") was proper; therefore, this Court should reverse the Trial Court's denial of her Motion to Set Aside Dismissal. In general, Utah courts maintain broad discretion in granting or denying motions to relieve parties from final judgments. *See Airkem Intermountain, Inc. v. Parker*, 513 P.2d 429, 430 (Utah 1973). However, such 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) (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 [a party'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.*

The facts surrounding this case indicate that the Trial Court abused its discretion in denying Terpening's Motion to Set Aside Dismissal. On June 17, 2000, both Terpening and appellees RTM Restaurant Group and RTM Operating Company (collectively, "RTM") received an Order to Show Cause from the Trial Court, demanding that the parties appear before the court to show "why this case should not be dismissed for failure to prosecute." (Record at 22.) At the Order to Show Cause Hearing held in July 2000, the Trial Court granted a thirty-day continuance and stated that it would dismiss the case if no pleadings were filed within the allotted time. (Record at 24.) While the only pleadings in the case (i.e. the Complaint and Answer) had already been filed, Terpening's counsel interpreted this directive to mean that the parties must take some action in furthering the case along.

Shortly after the Trial Court's directive from the Order to Show Cause Hearing, both parties began taking steps towards moving the case forward. For instance, approximately a week and a half after the hearing, RTM sent out an Amended Notice of Taking Deposition of Elizabeth Terpening. (Record at 91-93). Counsel for Terpening believed the deposition notice had been filed with the court and that the Court's order regarding a filing had been fulfilled. Moreover, neither Terpening nor RTM received any notice of dismissal from the Trial Court. Consequently, both parties continued the litigation process as if the lawsuit remained open and active. 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 108-47).

In short, all parties believed and acted as if the matter remained open. There was no contrary evidence to indicate otherwise. 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 the case, which until recently, was the belief of all parties. Once Terpening's counsel discovered that 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). In sum, the Trial Court abused its discretion in denying Terpening's Motion to Set Aside Dismissal, as both parties continued to litigate the pending claims due to the Trial Court's failure to notify them to the contrary. Furthermore, Terpening's motion was timely due to this lack of notification and the circumstances surrounding the case.

RTM's reliance on *West v. Grand County*, 942 P.2d 337, 341 (Utah 1997), for the proposition that a party maintains a "duty to check with the clerk periodically to determine whether orders have been entered" is misapplied in this case. In *West*, the plaintiff moved for an extension of time within which to file notice of appeal after learning that orders on post judgment motions, following the grant of defendant's summary judgment motion, had been entered but not sent to the plaintiff. *Id.* at 338-39. The *West* Court held that Utah Rule of Appellate Procedure 4(e), which allows courts to grant an extension of time for filing a notice of appeal upon a showing of excusable neglect or good cause, cannot overrule the express language of Utah Rule of Civil Procedure 77(d) which provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to

appeal within the time allowed.” *Id.* at 339-40. Therefore, the *West* Court believed that a clerk’s failure to send notice, combined with other factors, could lead to the conclusion that there was a showing of excusable neglect, which would allow for an extension of time. *Id.* The plaintiff in *West* claimed that she did not check with the clerk of the court for any new filings affecting her case because “she had been lulled into inaction by the general practice of the court in taking some six months to issue orders.” *Id.* Based on this extenuating factor, the *West* Court remanded the case back to the trial court to determine if the clerk’s lack of sending notice to the plaintiff, combined with this other factor, warranted a finding of excusable neglect to warrant an extension of time under Rule 4(e). *Id.* at 341. Similar to *West*, other factors, as outlined above, warrant this Court in reversing the Trial Court’s denial of Terpening’s Motion to Set Aside Dismissal. In short, because (1) neither Terpening nor RTM ever received notice of the dismissal; (2) both parties continued to litigate the case; and (3) Terpening filed her Motion to Set Aside Dismissal shortly after discovering the Trial Court’s dismissal of her case, this Court should reverse the Trial Court’s denial of her motion.

Based on the circumstances of this case, Terpening’s Motion to Set Aside Dismissal was proper, and the Trial Court abused its discretion in denying her motion. Therefore, this Court should reverse the Trial Court’s denial of Terpening’s motion and remand the case back to the Trial Court for further proceedings.

## **II. UTAH RULE OF CIVIL PROCEDURE 60(b)(6) PROVIDES RELIEF FROM THE TRIAL COURT’S DENIAL OF TERPENING’S MOTION TO SET ASIDE DISMISSAL.**

Rule 60(b)(6) provides adequate grounds on which this Court should reverse the Trial Court’s decision, denying Terpening’s Motion to Set Aside Dismissal. To vacate a judgment, a movant must “show that the judgment was entered against [her] through...reason[s] specified in Rule 60(b).” *State v. Musselman*, 667 P.2d 1053, 1055-56 (Utah 1983). Specifically, under Rule 60(b)(6), which applies to this case:

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:...(6) any other reason justifying relief from the operation of the judgment.

Contrary to RTM’s contentions, as argued below, several reasons justify Terpening receiving relief from the Trial Court’s dismissal of her case: (A) a savings statute would have enabled Terpening to timely re-file her claims if the Trial Court gave proper notice of the dismissal; (B) Utah Rule of Civil Procedure 5(a)(2)(D) and 58A(d) required reversal of the dismissal; (C) Terpening was denied due process of law; (D) Terpening filed her motion in a timely manner given the circumstances; (E) the three-month limitation did not apply to her case; and (F) Terpening’s claims are meritorious and provide further support for this Court to reverse the Trial Court’s denial of her motion.

**A. But for Lack of Notice, Terpening Could Have Renewed Her Claims Under a Savings Statute.**

If Terpening had received proper notification of the Trial Court's dismissal of her case, she could have re-filed her claim within one year after the dismissal under a savings statute. The savings statute relevant to this case provides:

[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, 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.

Utah Code Ann. § 78-12-40 (2004). Because the Trial Court never provided any notice of dismissal, the one-year period for re-filing her claims lapsed, making it too late for Terpening to re-file under the savings statute. Therefore, the Trial Court's failure to give notice of the dismissal deprived her of her rights under Utah Code Ann. § 78-12-40. In sum, this inability for Terpening to utilize her rights under the savings statute provides yet another reason why this Court should reverse the Trial Court's denial of her Motion to Set Aside Dismissal.

**B. The Trial Court's Denial of Terpening's Motion to Set Aside Dismissal Should be Reversed Under the Guidelines of Utah Rule of Civil Procedure 5(a)(2)(D) and 58A(d).**

Utah Rules of Civil Procedure 5(a)(2)(D) and 58A(d) provide yet another justification for this Court to reverse the Trial Court's denial of Terpening's motion. Under 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) provides that "[a] copy of the signed judgment shall be promptly

served by the party preparing it....” Interpreting the notice requirements of Rule 5, the Utah Supreme Court held that “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 chooses later to default.” *Lund v. Brown*, 2000 UT 75, ¶ 26, 11 P.3d 277, 282 (citations omitted).

Similarly, in this case, Rule 5(a)(2)(D) was never followed, and consequently, Terpening has lost her cause of action. The actions of both Terpening and RTM indicate that neither had notice that the case had been dismissed and was no longer active. Accordingly, the Trial Court abused its discretion in not granting Terpening’s Motion to Set Aside Dismissal, when neither party received notice of the order dismissing the case as required by Utah Rule of Civil Procedure 5(a)(2)(D).

While Terpening concedes that the Trial Court acted on its own motion to dismiss Terpening’s case, and therefore was not a “party” for purposes of Rule 58A(d), Terpening still should have received proper notice of the dismissal from the Trial Court under Utah Rule of Civil Procedure 5(a)(2)(D). Failure of a court’s entry of judgment from being given its usual course of notice under the Utah Rules of Civil Procedure constitutes grounds for relief from judgment under Rule 60(b)(6). *See, e.g., Oseguera v. Farmers Ins. Exch.*, 2003 UT App 46, ¶¶ 10-12, 68 P.3d 1008, 1011-12 (holding trial court’s sua sponte entry of judgment, which was never received by plaintiff, constituted grounds for relief from judgment under Rule 60(b)(6)).

In sum, Rule 5 and Rule 58A require this Court to reverse the Trial Court’s denial of Terpening’s Motion to Set Aside Dismissal.

**C. Lack of Notice of the Trial Court's Dismissal Deprived Terpening of Due Process of Law.**

RTM attempts to argue that the holding in *Bish's Sheet Metal Co. v. Luras*, 359 P.2d 21, 22 (Utah 1961), is not controlling in this case. This argument proves unpersuasive. In *Bish's Sheet Metal Co.*, 359 P.2d at 22, the Utah Supreme Court held that if "the district court reversed the decision of the city court on an appeal without due notice or knowledge of such appeal or the proceedings in the district court to the party who prevailed in the city court, such a showing would establish a lack of due process of law." If such a showing were made, the court held that the aggrieved party would be relieved from the judgment under what was then subsection (7), but is similar to the current subsection (6) of Rule 60(b). *Id.*

As indicated in Part I *supra*, neither Terpening nor RTM received notice of the Trial Court's dismissal of the case. After the Court's Order to Show Cause Hearing, both parties continued to litigate the case and move it forward. For example, approximately a week and a half after the hearing, RTM sent out an Amended Notice of Taking Deposition of Elizabeth Terpening. (Record at 91-93). Terpening's counsel acted under the assumption that the deposition notice was filed with the court and that the Court's order regarding a filing had been fulfilled. Consequently, both parties continued to go forward with the case. Terpening's counsel prepared and delivered a settlement package regarding possible negotiations (Record at 103-06), while RTM's counsel continued to send out discovery requests. (Record at 108-47). At no time did the parties receive notice of the dismissal, and the Trial Court's record is devoid of such notice.

The above-described scenario is clearly within the situation contemplated by the Utah Supreme Court in *Bish's Sheet Metal Co.*, which allows for relief due to lack of due process; therefore, under the guidelines of Rule 60(b)(6), this Court should reverse the denial of Terpening's Motion to Set Aside Dismissal as an abuse of discretion.

**D. Given the Unusual Nature and Circumstances of This Case, Terpening Litigated Her Case and Timely Filed Her Motion to Set Aside Dismissal.**

RTM's claim that Terpening's lack of advocacy of her client's case precludes reversing the Trial Court's denial of her Motion to Set Aside Dismissal proves unwarranted. Specifically, RTM argues that Terpening failed to follow the overriding requirements of Rule 60(b) that call for her motion to be filed timely. *See* RTM Brief at 14-15. However, this argument is without merit, given the unusual nature and history of this case.

After the Trial Court's Order to Show Cause Hearing, both parties continued to carry the case forward. As neither party received notice of the dismissal from the Trial Court, *both* Terpening and RTM continued to litigate the case. Once Terpening's counsel discovered in September 2003 that the case was dismissed, they quickly filed a Motion to Set Aside Dismissal with the Trial Court in October 2004. (Record at 148-50.)

As the above chronology indicates, between 2000, when the hearing on the Trial Court's Order to Show Cause took place, and 2003, when Terpening's counsel discovered that the Trial Court dismissed the case, both parties continued to act on the case and to move it forward. Terpening's counsel acted to set aside the Trial Court's

ruling by filing their motion upon discovery of the dismissal. Therefore, RTM's assertion that "Terpening offer[ed] no justification whatsoever for her utter failure to prosecute her claim," (*see* RTM Brief at 16), ignores the evidence provided in the record that both parties continued to act upon the case due to the failure of the Trial Court to notify them to the contrary.

**E. Terpening's Motion Satisfied the Requirements of Rule 60(b)(6) and was Not Time-Barred Under the Three-Month Limitations.**

RTM argues that Terpening attempts "to circumvent the three-month requirement applicable to motions fairly within the scope of Rule 60(b)(1)," which governs motions to set aside final judgments based on mistake, inadvertence, or excusable neglect. *See* RTM Brief at 20. However, as argued above and in Terpening's original appellate brief submitted before this Court, under Rule 60(b)(6), other reasons justify this Court in reversing the Trial Court's decision to deny her motion. For instance, lack of notice of the dismissal deprived Terpening of due process of law and the relief from dismissal should have been granted by the Trial Court in the furtherance of justice. In addition, as argued herein, Utah Rules of Civil Procedure 5(a)(2)(D) and 58A(d) require reversal of the dismissal; setting aside the dismissal would be proper because Terpening could have timely re-filed her claims under a savings statute; and Terpening maintains meritorious claims in her case. In sum, all of these reasons constitute "other reason[s] [which] justify relief from the operation of the judgment." Utah Rule of Civil Procedure 60(b)(6). Therefore, they are not governed by the three-month time limitation for motions based on the reasons enumerated in Rule 60(b)(1).

Furthermore, RTM argues that relief found under Rule 60(b)(6) “should be very cautiously and sparingly invoked by the Court only in unusual and exceptional circumstances.” See RTM Brief at 21; *Lincoln Benefit Life Insurance Co. v. D.T. Southern Properties*, 838 P.2d 672, 674 (Utah Ct. App. 1992) (citations omitted). The proceedings in this case provide the very backdrop of “unusual and exceptional circumstances,” which enable this Court to grant relief from the dismissal of Terpening’s case. After the Order to Show Cause Hearing, both parties continued to pursue the case. Without notice of the dismissal, both parties continued to advocate the interests of their clients, believing that the matter remained active and open. A showing of “unique factual circumstances” has been held to constitute the type of exceptional circumstances which justify relief from final judgment under Rule 60(b)(6). See *Artis v. United States Industry*, 805 F.Supp. 609, 610 (N.D. Ill. 1992) (interpreting federal version of Rule 60(b)).

Ultimately, Terpening’s Motion to Set Aside Dismissal is not barred by a three-month time limitation, and her reasons for overturning the dismissal fall under the type of “exceptional circumstances” that allow for such relief under Rule 60(b)(6).

**F. Terpening Maintains Meritorious Claims, Which Warrant this Court in Reversing the Trial Court’s Denial of her Motion to Set Aside Dismissal.**

RTM’s final contention that Terpening maintains claims that are “of questionable merit,” see RTM Brief at 25-27, is unsubstantiated under Utah law. In *Merino v. Albertson’s, Inc.*, 1999 UT 14, ¶ 5, 975 P.2d 467, 468, the Utah Supreme Court held that

a business owner may be liable for slip-and-fall accidents caused by an unsafe condition of a temporary nature when: (1) “the business owner knew or should have known of the hazardous condition” and (2) “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.”

In this case, these two *Merino* factors existed, which makes RTM liable for Terpening’s injuries sustained from the slip-and-fall accident. RTM, through one of its employees mopping the floor, created a hazardous condition of wet tiles, which customers had to walk over in order to enter the dining area of the restaurant. The owner, through its employee, knew of this hazardous condition and should have warned Terpening not to walk across the wet tiled area. Instead, the employee assured Terpening that there was no unsafe condition and it was safe to walk across the mopped area. As Terpening walked across the floor, she slipped and fell. This fall resulted in severe injuries to Terpening for which RTM is liable.

RTM’s reliance on *Massey v. Utah Power & Light*, 609 P.2d 937 (Utah 1980) and *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (Utah 1995) does not support its argument that Terpening’s claims are without merit. In *Massey*, 609 P.2d at 938, the court held that the defendant power company could not be held liable for plaintiff’s injuries, where the plaintiff neither notified the power company of the work being performed under the power lines nor requested that the power company de-energize the lines. In contrast to *Massey*, Terpening refused to walk across the wet tile floor until she received confirmation by an employee of RTM that such a course of action would be safe. Therefore, unlike the plaintiff in *Massey*, Terpening took affirmative steps to try to

avoid an accident; therefore, she should not be held liable for RTM's negligence. In *Lawson*, 901 P.2d at 1014-16, the court held that a six-year-old that was struck by a baseball could not hold the baseball franchise liable where she assumed the risk of injury by never requesting to be seated in a screened-in area. Unlike *Lawson*, Terpening never assumed the risk of injury. She affirmatively asked an employee of RTM if it was safe to walk across the wet tile floor. Only after receiving assurances by RTM's employee that she could walk across the floor did Terpening attempt to do so.

In sum, the demands of justice are further served by this Court reversing the Trial Court's denial of Terpening's Motion to Set Aside Dismissal. See *Helgesen*, 636 P.2d at 1081 (holding a court's discretion in awarding relief from judgment "should be exercised in the furtherance of justice....").

### **CONCLUSION**

For the reasons argued above and in Terpening's original appellate brief, this Court should reverse the Trial Court's Minute Entry and Decision of Order, which upheld the dismissal of Terpening's case, and remand her case back to the Trial Court for further proceedings.

DATED this 21<sup>st</sup> day of January 2005.



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**CERTIFICATE OF SERVICE**

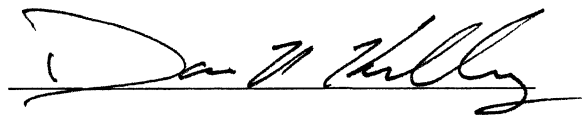
I hereby certify that on this 21<sup>st</sup> day of January, 2005, I caused to be filed the original of the foregoing and seven copies with the Clerk of the Utah Court of Appeals:

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Salt Lake City, Utah 84111

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A handwritten signature in black ink, appearing to read "David W. Kelly", is written over a horizontal line.