

2004

L. Earl Hawley v. Union Pacific Railroad Company, a Delaware Corporation : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: 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.

Kent W. Hansen; Attorney for Appellee.

Richard Ranney; Ranney and Peatross; Attorneys for Appellant.

Recommended Citation

Brief of Appellee, *Hawley v. Union Pacific Railroad Company*, No. 20040461 (Utah Court of Appeals, 2004).
https://digitalcommons.law.byu.edu/byu_ca2/5018

This Brief of Appellee 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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH STATE COURT OF APPEALS

L. EARL HAWLEY,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,
a Delaware Corporation,

Defendant and Appellee.

BRIEF OF APPELLEE

Appeal No. 20040461-CA

(Trial Court Civ. No. 000500737 Pl)

**ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT,
THE HONORABLE J. PHILIP EVES PRESIDING**

**UTAH COURT OF APPEALS
BRIEF**

**UTAH
DOCUMENT
KFU
50**

.A10

DOCKET NO. 20040461-CA

Richard Ranney
Ranney & Peatross
1722 East 280 North, Suite C2
St. George, UT 84790
Tel. (435) 656-2004
Fax. (435) 656-2104
Attorneys for Appellant

Kent W. Hansen (Utah Bar No. 6560)
Union Pacific Railroad Company
Law Department
280 South 400 West
Salt Lake City, UT 84101
Tel. (801) 212-3985
Fax. (801) 212-3978
Attorneys for Appellee

NOV 04 2004

THE COURTS

IN THE UTAH STATE COURT OF APPEALS

L. EARL HAWLEY,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,
a Delaware Corporation,

Defendant and Appellee.

BRIEF OF APPELLEE

Appeal No. 20040461-CA

(Trial Court Civ. No. 000500737 PI)

**ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT,
THE HONORABLE J. PHILIP EVES PRESIDING**

Richard Ranney
Ranney & Peatross
1722 East 280 North, Suite C2
St. George, UT 84790
Tel. (435) 656-2004
Fax. (435) 656-2104
Attorneys for Appellant

Kent W. Hansen (Utah Bar No. 6560)
Union Pacific Railroad Company
Law Department
280 South 400 West
Salt Lake City, UT 84101
Tel. (801) 212-3985
Fax. (801) 212-3978
Attorneys for Appellee

TABLE OF CONTENTS

| | |
|--|----|
| Table of Authorities | 3 |
| Statement of Jurisdiction..... | 5 |
| Statement of Issues Presented For Review | 5 |
| Statement of the Case..... | 6 |
| 1. Nature of the Case..... | 6 |
| 2. Statement of Facts..... | 6 |
| Summary of the Argument..... | 10 |
| Argument..... | 11 |
| 1. Plaintiff was served with all notices to which he is entitled..... | 11 |
| 2. Plaintiff is not entitled to relief under Rule 60(b)(6) because he did not exercise reasonable diligence and his failure to discover the judgment was not excusable neglect..... | 12 |
| 3. Rule 58A(d) does not apply because Plaintiff failed to provide Union Pacific with an updated address..... | 18 |
| Conclusion..... | 19 |

TABLE OF AUTHORITIES

CASES

| | |
|--|------------|
| <u>Black's Title, Inc. v. Utah State Ins. Dept.</u> , 991 P.2d 607 (Utah App. 1999)..... | 14, 15 |
| <u>Franklin Covey Client Sales, Inc. v. Melvin</u> , 2 P.3d 451 (Utah App. 2000) | 6 |
| <u>Laub v. South Cent. Utah Tel. Ass'n</u> , 657 P.2d 1304 (Utah 1982) | 13 |
| <u>Oseguera v. Farmers Insurance Exchange</u> , 68 P.3d 1008 (Utah App. 2003) | 14, 16, 17 |
| <u>Ostler v. Buhler</u> , 957 P.2d 205 (Utah 1998) | 6 |
| <u>Reeves v. Steinfeldt</u> , 915 P.2d 1073 (Utah App. 1996)..... | 18, 19 |
| <u>Richins v. Delbert Chipman & Sons Co.</u> , 817 P.2d 382 (Utah App. 1991)..... | 13 |
| <u>Tubbs v Campbell</u> , 731 F.2d 1214 (7th Cir. 1984)..... | 18 |
| <u>Workman v. Nagle Construction, Inc.</u> , 802 P.2d 749 (Utah App. 1990)..... | 18 |

STATUTES

| | |
|----------------------------------|---|
| Utah Code Ann. § 78-2-2(4) | 5 |
| Utah Code Ann. § 78-2a-3 | 5 |

OTHER AUTHORITIES

| | |
|---|----|
| <i>Moore's Federal Practice</i> § 60.48[6][c] (3d ed. 2002) | 14 |
|---|----|

RULES

| | |
|---|----------------|
| Utah Rule of Civil Procedure Rule 58A | 18, 19 |
| Utah Rule of Civil Procedure, 60(b) | 12, 14, 15, 17 |

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly determine that Plaintiff was not entitled to notice pursuant to Rule 4-506, Utah Rules of Judicial Administration,¹ where Plaintiff's attorney filed a notice of withdrawal but did not obtain court approval therefor after the trial court indicated its intention to grant summary judgment but before the trial court entered an order granting summary judgment?

Standard of Review: This issue presents only a question of law. This court reviews the trial court's determinations of law for correctness.

2. Did the trial court correctly determine that the judgment in this matter should not be set aside pursuant to Rule 60(b), Utah Rules of Civil Procedure, where Plaintiff was aware that the judgment could be entered at any time and knew that the entry of the judgment would trigger the period of time in which Plaintiff could file an appeal but nevertheless failed to check with the court for more than four months to determine if the judgment had been entered and failed to notify the trial court or Union Pacific that Plaintiff had changed his address.

¹ Rule 4-506 has since been repealed effective November 1, 2003. Withdrawal of counsel is now governed under Rule 74, Utah Rules of Civil Procedure.

Standard of Review: This Court has recently reiterated “[a] trial court has discretion in determining whether a movant has shown [Rule 60(b) grounds], and this court will reverse the trial court’s ruling only when there has been an abuse of discretion.” Franklin Covey Client Sales, Inc. v. Melvin, 2 P.3d 451, ¶ 9 (Utah App. 2000), quoting Ostler v. Buhler, 957 P.2d 205, 206 (Utah 1998).

STATEMENT OF THE CASE

1. Nature of the Case.

Plaintiff and Appellant, L. Earl Hawley (“**Plaintiff**”) is an attorney, licensed to practice law in the State of Nevada. (R. 211.) Plaintiff seeks recovery from Union Pacific Railroad Company (“**Union Pacific**”) for injuries he alleges he sustained while he was driving without permission on Union Pacific’s right-of-way when he drove into section of a dirt road that Plaintiff alleges was washed out by a recent storm. (R. 003-006 ¶¶ 4-5; R. 169-170.) In this appeal, Plaintiff asks this Court to set aside the judgment entered by the trial court.

2. Statement of Facts.

The underlying facts pertaining to Plaintiff’s appeal are not genuinely in dispute. Union Pacific believes that Plaintiff’s factual statement is incomplete in certain respects, and therefore provides the following factual background.

Plaintiff filed his Complaint in this action on December 1, 2000. (R. 003-0006.) In his Complaint, Plaintiff listed his address as 815 South Fourth Street, Las Vegas,

Nevada, 89101. (R. 003.)

In March of 2003, Union Pacific filed a motion for summary judgment in this case. (R. 069.) The trial court heard oral argument regarding Union Pacific's Motion for Summary Judgment on June 10, 2003. At the conclusion of that hearing, the court indicated that it would grant Union Pacific's motion and directed Union Pacific to prepare an Order of Summary Judgment within thirty days to submit for entry by the court. (R. 152.)

On or about, June 19, 2003, Plaintiff's former counsel, Karl Mueller, filed a Notice of Withdrawal of Attorney. (R. 155-156.) Mr. Mueller did not request, and the Court did not grant, approval of the withdrawal. (R. 212.) According to the mailing certificate attached to that notice, Mr. Mueller sent a copy of the notice to Plaintiff, listing Plaintiff's address on the mailing certificate at 916 Casino Center Boulevard, Las Vegas, Nevada, 89101. As noted by the trial court, no effort was made to alert Union Pacific to the fact that this was a new address for Plaintiff. (R. 212.)

At no time did Plaintiff or his attorney file a notice with the court or Union Pacific that the address Plaintiff listed in his Complaint was no longer the address at which the court or Union Pacific could contact Plaintiff. As of June 16, 2003, Union Pacific had not yet submitted the order on the trial court's ruling to Plaintiff's counsel for approval, as required at the time under Rule 4-504, Utah Rules of Judicial Administration, nor to the court, and the court had not yet entered an order on Union Pacific's motion.

On June 27, 2003, in response to Mr. Mueller's notice of withdrawal, Union Pacific filed a Notice to Appear or Appoint Counsel (the "**First Notice to Appear**"). (R. 157-158.) Defendant sent a copy of the First Notice to Appear to Plaintiff at the address provided by Plaintiff in his Complaint and to Plaintiff's counsel, Mr. Mueller. (R. 157-158.) The First Notice to Appear was returned to Union Pacific with an indication by the postal service that it was undeliverable. (E.g., R. 194.)

After the First Notice to Appear was returned, Union Pacific contacted Mr. Mueller, to inquire as to Plaintiff's address. (R. 193-194.) To the best of Union Pacific's knowledge,² the address provided by Mr. Mueller or his office at which Union Pacific could contact Plaintiff was 918 Casino Center Blvd., Las Vegas, NV 89101. On July 15, 2003, Union Pacific mailed a second *Notice to Appear or Appoint Counsel* (the "**Second Notice to Appear**") to Plaintiff at 918 Casino Center Blvd, Las Vegas, Nevada, 89101 and to Plaintiff's counsel, Karl Mueller. (R. 159 – 160.)

As indicated in the *Affidavit of Jeffery Peatross*, filed in support of Plaintiff's motion, on August 8, 2003, Mr. Peatross contacted Union Pacific's counsel to inquire as to the status of the judgment, and specifically discussed whether the time in which to file a notice of appeal had begun. (R. 173-174.) During that conversation, Union Pacific's

² Based on subsequent events, it appears that the address was incorrect due to an error either on the part of Mr. Mueller or Union Pacific. Union Pacific would prefer to maintain that Mr. Mueller provided the incorrect address, but under the circumstances acknowledges the alternative possibility that a Union Pacific representative may have erroneously transcribed the address provided by Mr. Mueller or his office.

counsel explained that it had not yet filed the proposed judgment with the Court because it had been waiting for 20 days from when it submitted the *Second Notice to Appear*. (R. 174.) According to Plaintiff, prior to the entry of judgment he personally contacted the Court's clerk to inquire as to the status of the case. (R. 169-172.) At that time, Plaintiff attests that he was advised that he did not need to be concerned about the time in which to appeal until the formal judgment was entered. (R. 169-172.) By corollary, Plaintiff was advised that the entry of judgment would trigger dates within which Plaintiff must file his appeal.

Plaintiff claims that he did not make any further inquiries until August, 2003, when Mr. Peatross contacted the court to inquire on Plaintiff's behalf. (R. 169-172.) Mr. Peatross states that he was told that the judgment had not been entered at that time. (R. 173-174.) As evidenced by his affidavit, his call to the court, and Mr. Peatross' call to the Court, Plaintiff was aware that judgment could be entered at any time, and that entry of judgment would trigger dates within which Plaintiff could appeal the court's decision.

On August 11, 2003, Union Pacific submitted the proposed Judgment in this case. At that time, a copy of that proposed Judgment was mailed to Plaintiff at 918 Casino Center Blvd., Nevada, 89101. (R. 161-165.) On August 19, 2003, this Court entered the Judgment in Union Pacific's favor. (R. 161-165.)

Plaintiff alleges that he did not receive a copy of the judgment because his correct address is 916 Casino Center Blvd., Las Vegas, Nevada. (R. 182.) Plaintiff alleges that

notwithstanding his knowledge that a judgment could be entered at any time which would trigger dates by which Plaintiff could appeal, he did not make any further effort to contact the court to inquire whether judgment had been entered until December, 2003, nearly four months after Mr. Peatross made the last inquiry regarding the status of the judgment. (R. 170-172.) When he inquired in December, 2002, Plaintiff was advised of the entry of judgment. (R. 170-172.) On January 12, 2004, Plaintiff filed a motion to set aside judgment, the denial of which he now appeals. (R. 167-168.)

SUMMARY OF THE ARGUMENT

Because the Court's order had not yet been entered on Union Pacific's motion, Plaintiff's counsel was not entitled to withdraw without leave of court. As such Plaintiff was not entitled to notice under Rule 4-506, Utah Rules of Judicial Administration. Nevertheless, a notice to appear or appoint successor counsel was properly served on the only address provided by Plaintiff at which to reach him and served on his counsel.

Plaintiff is not entitled to have the judgment set aside pursuant to Rule 60(b)(6), Utah Rules of Civil Procedure. Relief under Rule 60(b)(6) is reserved for unusual and exceptional circumstances. In addition, relief under that rule should not be granted unless the moving party has shown reasonable diligence to discover when the judgment is entered.

This case is not an exceptional circumstance. To the extent Plaintiff did not receive express notice, it is because he failed to provide the Court or Union Pacific with

his current address. Knowing that a judgment could be entered at any time, Plaintiff's inexplicable lapse of approximately four months before inquiry as to the status of the judgment evidences a lack of reasonable diligence. The trial court's denial of Plaintiff's Motion for Relief from Judgment should be upheld.

ARGUMENT

1. Plaintiff was served with all notices to which he is entitled.

As of the time of events at issue in Plaintiff's appeal, Rule 4-506, Utah Rules of Judicial Administration, governed withdrawal of counsel in civil cases. That rule provides that an attorney may withdraw as counsel of record only upon approval of the court when a motion has been filed and the court has not issued an order on the motion. The rule specifically states "under these circumstances, an attorney may not withdraw except upon motion and order of the court." As noted by the trial court in its Memorandum Opinion dated March 2, 2004, Plaintiff's original attorney, Floyd Holm, never filed any notice of withdrawal nor substitution with the court. Plaintiff's other counsel, Mr. Mueller, did not obtain an order allowing him to withdraw as counsel. The court found that Mr. Mueller was not entitled to withdraw simply by filing notice because, although the court had indicated its intention to do so, the court had not yet entered an order on Union Pacific's Motion. As such, Plaintiff's reliance upon Rule 4-506 and the case law under that rule is misplaced.

Moreover, although technically unnecessary under the rule, Plaintiff received all

notice to which he would have been entitled under Rule 4-506 upon service of the First

Notice to Appear. Rule 5(b)(1), Utah Rules of Civil Procedure, states:

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

Union Pacific served the First Notice to Appear upon Plaintiff's attorney and upon Plaintiff at his last known address, which Plaintiff himself listed in his Complaint. If in fact Plaintiff wished to receive service at some other address, Plaintiff owed a duty to the court and Union Pacific to provide his new address at which he hopes to receive case related documents. Plaintiff cannot simply sit back and hope that Union Pacific will discover that Plaintiff's counsel included his new address on a mailing certificate. As such, Plaintiff received all notice to which he was entitled. To the extent Plaintiff did not receive actual notice of the notice to appear or appoint, it is to the Plaintiff's own neglect. As such, Plaintiff is in no position to complain that he did not receive the notices to appear where such failure is do to Plaintiff's own failure.

2. **Plaintiff is not entitled to relief under Rule 60(b)(6) because he did not exercise reasonable diligence and his failure to discover the judgment was not excusable neglect.**

Under Utah Rule of Civil Procedure, 60(b) a court may grant a party relief from judgement if it is "in the furtherance of justice" and satisfies one of the following

conditions:

(1) mistake, inadvertence 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, . . . 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.

Rule 60(b)(6) is a catch-all provision that allows a court to set aside judgment for “any other reason” which is just. This requires the moving party to meet three conditions. First, the reason for setting aside judgment must not fall under one of the first five categories. Richins v. Delbert Chipman & Sons Co., 817 P.2d 382, 387 (Utah App. 1991). Second, the reason must justify relief. Id. Third, the motion must be made within a reasonable time after learning about the judgment. Id. However, Rule 60(b)(6) “should be very cautiously and sparingly invoked by the Court only in unusual and exceptional instances.” Id. (quoting Laub v. South Cent. Utah Tel. Ass’n, 657 P.2d 1304, 1307-08 (Utah 1982)).³

Failure to receive notice does not automatically entitle a moving party to relief. Rather, the moving party must have “shown diligence in trying to determine whether

³This quote originally referred to subsection (7) of Rule 60(b). However, subsection (7) was renumbered as (6) as a result of the 1998 amendment eliminating one other ground for relief. Utah R. Civ. Pro. 60 (1998).

judgment had been entered” or actually have been “misled . . . as to whether there had been entry of judgment.” Oseguera v. Farmers Insurance Exchange, 68 P.3d 1008, 1011 (Utah App. 2003) (quoting 12 James Wm. Moore et al., *Moore’s Federal Practice* § 60.48[6][c] (3d ed. 2002)). This is not one of the rare and exceptional cases in which Rule 60(b)(6) should be invoked because Plaintiff’s motion more properly falls within the ambit of Rule 60(b)(1), the circumstances of this case do not justify relief, and Plaintiff failed to exercise reasonable diligence to determine whether the judgment had been entered.

Rule 60(b)(6) does not apply because Plaintiff’s grounds for relief are covered by (b)(1). Rule 60(b)(1) allows a court to grant relief if the moving party can show mistake, inadvertence, surprise, or *excusable* neglect. Utah R. Civ. Pro. 60(b)(6) (emphasis added). As such, (b)(1) governs, and Plaintiff cannot recover because he cannot show that his failure to receive notice of the judgment was the result of excusable neglect. Black’s Title, Inc. v. Utah State Ins. Dept., 991 P.2d 607, 612 (Utah App. 1999).

In Black’s Title, *supra*, the petitioner, who was ill, was not staying at his normal residence and was only keeping minimal contacts with the business he owned. *Id.* at 609. During one of his few visits, the manager informed him that the respondent was investigating the business. *Id.* Shortly thereafter, the respondent initiated a suit against the petitioner and mailed the complaint to his home and his business address. *Id.* However, petitioner never received the complaint because he never requested his mail

from his business and he “made no effort to inform the [respondent] of his change in address.” Id. at 612. Because petitioner never received the complaint, he failed to respond and a default judgment was entered against him. Id. at 609. Upon learning about the judgment, petitioner sought to have it set aside under either 60(b)(1) or 60(b)(6) because he never knew about it. Id. at 611. The court found that the petitioner should have known a suit was likely and checked his mail. Id. at 612. The court held that petitioner was not entitled to 60(b)(6) relief because his “lack of knowledge” was the result of his own inexcusable neglect and thus fell within the bounds of 60(b)(1). Id. As such, relief was not available under 60(b)(1) nor 60(b)(6). Id.

Plaintiff cannot recover under (b)(1) or (b)(6) because his failure to receive notice is the result of his own inexcusable neglect. Having initially provided Union Pacific and the court with an address at which to contact him, Plaintiff never informed Union Pacific nor the court of his new address. As such, Union Pacific was forced to do its best to find Plaintiff. Despite Union Pacific’s reasonable efforts, Plaintiff claims he never received this notice and thus claims he did not know that the judgment had been entered. Plaintiff argues that Union Pacific should have realized that his counsel included him on the certificate of mailing on Mr. Mueller’s notice of withdrawal, and that that address was a changed address from the one on his Complaint.

Obviously, had Union Pacific realized that Mr. Mueller had served the notice of withdrawal on Plaintiff, Union Pacific would have used that address. However,

Plaintiff's argument misses the point. Union Pacific served the First Notice to Appear on Plaintiff at the address Plaintiff provided Union Pacific and the Court to contact him. Plaintiff was well aware of his own change of address. Plaintiff's failure to give Union Pacific his new address while his suit against Union Pacific was still open in no way can be characterized as excusable neglect.

Even more to the point, Plaintiff admits that he was advised that a judgment might be entered at any time and that the period in which to appeal would then begin. Nevertheless, Plaintiff chose not to contact the court again to inquire as to the status of the judgment for over four months.

Even if subsection (b)(6) were applicable, Plaintiff still would not be entitled to have his judgment set aside because this is not a case where failure to receive notice would justify relief. Plaintiff's claimed failure to receive notice is entirely because he did not keep Union Pacific and the Court informed of how to contact him.

Plaintiff relies heavily upon Oseguera v. Farmers Insurance Exchange, supra, in support of his argument that failure to receive notice justifies 60(b)(6) relief. 68 P.3d 1008. However, that case is factually distinguishable from plaintiff's case and thus does not support his argument.

In Oseguera, one party filed a motion for summary judgment and the other party opposed the motion, but did not make a motion seeking summary judgment in its favor. Id. at 1008-09. Without hearing oral arguments, the court denied the moving party's

motion and then granted summary judgment for the non-moving party. Id. at 1011-12. The court did not tell the parties it intended to nor had entered judgment. Id. Moreover, neither party had any reason to suspect judgment had been entered because the court still scheduled an oral argument. Id. As a result, the petitioner was not aware that judgment had been entered until it was too late. Id. at 1010. The court granted petitioner's 60(b)(6) motion based upon her failure to receive notice because she "had no reason to believe such a judgment could be forthcoming . . . and no reason to check periodically to see" if the judgment had been entered. Id. at 1012.

Unlike Oseguerra, Plaintiff knew of the court's ruling and was expressly advised that judgment could be entered at any time. Nevertheless, Plaintiff did not call the court periodically between August and December. Moreover, any failure to receive notice was due to Plaintiff's own failure to advise Union Pacific and the court of his new address.

Finally, Plaintiff is not entitled to Rule 60(b)(6) relief because he did not show reasonable diligence in trying to determine whether the judgment had been entered. Plaintiff only made three calls to the court. Plaintiff placed the first call in June, Mr. Peatross placed the second call on Plaintiff's behalf in August. Having been advised that judgment could be entered at any time, Plaintiff did not place a third call until December. Plaintiff easily could have and should have called the court every two to three weeks to determine whether or not the signed judgment had been issued. Had he done so, he would have learned of the judgment in time to file a timely notice.

Plaintiff attempts to compare himself to the petitioner in Tubbs v Campbell, 731 F.2d 1214, 1215-16 (7th Cir. 1984). However, Tubbs is again factually distinguishable from this case. In Tubbs, the petitioner made inquiries to the court and the clerk told him that a judgment had not been entered when in fact it had. Id. Nothing in the Tubbs case suggests that waiting four months to inquire after having been advised that judgment could be entered constitutes reasonable diligence. In this case, Plaintiff was not misled by the court's clerk, did not make reasonably diligent efforts to learn of the entry of judgment, and is therefore not entitled to relief.

3. Rule 58A(d) does not apply because Plaintiff failed to provide Union Pacific with an updated address.

Rule 58A(d), Utah Rules of Civil Procedure, requires that “a copy of the signed judgment shall be promptly served” by the prevailing party. This rule expressly provides that the time for filing a notice of appeal is not affected by the requirement of this provision. Id. Further, a failure to comply with this provision does not invalidate the judgment; it is only one factor the court uses to analyze the timeliness of post-judgment proceedings. Workman v. Nagle Construction, Inc., 802 P.2d 749, 751 (Utah App. 1990). If “a party has had notice of the judgment but has nevertheless remained idle in attacking it . . . that lack of diligence is a strong reason not to disturb the judgment.” Workman, 802 P.2d at 751. Constructive notice is enough to satisfy this requirement. See, Reeves v. Steinfeldt, 915 P.2d 1073, 1077, n.6 (Utah App. 1996). A party to a lawsuit is deemed to have constructive notice of the contents of the court record. Id.

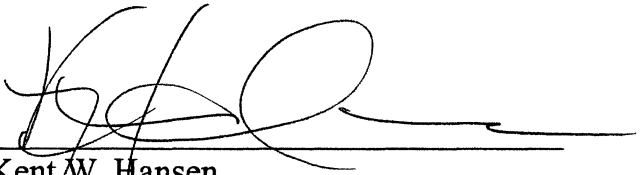
Additionally, a litigant has a duty to stay informed about what the trial court is doing. Id. Thus, a party to a lawsuit may be deemed to have knowledge of a judgment even if the party has not received actual notice. See id. As Plaintiff notes, Section 58A(d) does not allow a party who knows judgment has been entered to take “advantage of a technical failure to serve judgment.” Plaintiff’s Brief, 8.

In the present case, 58A(d) does not help Plaintiff. Union Pacific mailed Plaintiff a copy of the proposed judgment to the address it had been able to obtain for Plaintiff after learning that the only address Plaintiff provided was no longer valid. Plaintiff alleges that he did not receive the judgment, but he certainly had constructive knowledge that it had been entered because it was part of the court record after August 19, 2003. In addition, Plaintiff had a duty to keep himself informed of the case status, and had a clear means to do so. Despite this duty, he failed to maintain periodic contact with the court or Union Pacific. As a result, Plaintiff had constructive notice the judgment had been entered, and is not entitled to relief due to his claimed failure to receive actual notice.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court uphold the trial court’s denial of Plaintiff’s Motion to Set Aside Judgment.

Dated this 24th day of November, 2004.



Kent W. Hansen
Attorney for Union Pacific Railroad Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2004, two true, correct and complete copies of the foregoing were served upon the following, in the manner so indicated:

Richard Ranney
Ranney & Peatross
1722 East 280 North, Suite C2
St. George, UT 84790
Attorneys for Plaintiff

| | |
|---------------|----------------|
| <u>X</u> | U.S. Mail |
| <u> </u> | Hand Delivered |
| <u> </u> | Overnight |
| <u> </u> | Facsimile |
| <u> </u> | No Service |



A handwritten signature, appearing to be "KR", is written over a horizontal line.