

2004

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

L. EARL HAWLEY,

Plaintiff and Appellant

vs.

UNION PACIFIC RAILROAD
COMPANY,
A Delaware Corporation,

Defendant and Appellee.

BRIEF OF APPELLANT

Appellate Case No. 20040461-CA

Appeal from the Fifth District Court
Case No. 000500737

**UTAH COURT OF APPEALS
BRIEF**

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A10

DOCKET NO. 20040461-CA

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**FILED
UTAH APPELLATE COURT**

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Statement of Jurisdiction

This Court has jurisdiction under U.C.A. § 78-2-2(4) and U.C.A. § 78-2a-3(2)(j).

Statement of Issues Presented for Review

1. Whether, under Rule 4-506, Utah Rules of Judicial Administration¹, an attorney needs court approval to withdraw after a motion for summary judgment is made, fully briefed, orally argued, and after said motion is granted orally from the bench, but before a written final judgment is entered. In particular, the issue is whether Appellant L. Earl Hawley's (Hawley's) former counsel needed court approval to withdraw when he filed a Notice of Withdrawal under these circumstances.
2. Whether Appellant Hawley was entitled to be served with a "Notice to Appear or Appoint Counsel" under Rule 4-506(3), Rules of Judicial Administration prior to entry of judgment in this case.
3. Whether the prohibition in Rule 4-506(4) against any "further proceedings" prior to service of a "Notice to Appear or Appoint Counsel", applies when service of said Notice is defective in being mailed to a

¹ Rule 4-506, Utah Rules of Judicial Administration was in effect at all relevant times in this case. This Rule was repealed and replaced by the similar, though not identical, Rule 74, Utah Rules of Civil Procedure, effective November 1, 2003.

wrong address, where the correct address is contained in the former attorney's Notice of Withdrawal.

4. Whether the District Court erred in denying Appellant Hawley's Motion for Relief under Rule 60(b)(6), U.R.C.P. on the additional grounds that Hawley wasn't served with notice of entry of judgment.

The standard of review for issues 1, 2, and 3 is whether the trial court was correct. "A trial courts' interpretation of a rule in the Utah Code of Judicial Administration presents a question of law reviewed for correctness." Hartford Leasing Corp. v. State, 888 P.2d 694, 697 (Utah Ct. App. 1994). The standard of review for issue 4 is abuse of discretion; though we believe this is one of those "situations where 'the result [under Rule 60(b)(1)] is foreordained and it would be an abuse of discretion ... to deny relief.'" Oseguera v. Farmers Insurance Exchange, 68 P.3d 1008, 1010 (Utah Ct. App. 2003).

Statement of the Case

This is a personal injury case filed by Appellant J. Earl Hawley (Hawley) against Appellee Union Pacific Railroad Company (Union Pacific) for serious injuries sustained by Hawley on Union Pacific's property. The District Court orally granted Union Pacific's motion for summary judgment.

Hawley's attorney then filed a Notice of Withdrawal. Union Pacific's attorney filed two Notices to Appear or Appoint Counsel, but mailed them to wrong addresses. Final written judgment was entered in favor of Union Pacific. Notice of entry of final judgment was not mailed to Hawley's correct address. Shortly after learning of the entry of final judgment, Hawley moved under Rule 60(b)(6) to have it set aside. The District Court denied this motion by a Memorandum Opinion dated March 2, 2004. This appeal is from denial of the Rule 60(b)(6) motion.

Statement of Facts

Hawley was injured while driving his vehicle on Union Pacific property, and he filed suit against them for damages. Union Pacific filed a motion for summary judgment, which was fully briefed, then orally argued to the District Court at a hearing on June 10th, 2003. The Court ruled on the motion from the bench, granting Union Pacific's motion, and directing Union Pacific's counsel to prepare and submit a written judgment. (Memorandum Opinion, p. 2; minute entry, Record on Appeal, p. 152)

At the time of oral argument, Hawley was represented by attorney Karl H. Mueller. On June 19th, 2003 attorney Mueller filed a "Notice of Withdrawal of Attorney." (Record on Appeal, pp. 155-156) This Notice correctly noted

that “This matter is currently not set for trial or hearing.” The “Certificate of Delivery” attached to Mueller’s Notice of Withdrawal indicated it was served on Mr. Hawley **and on Union Pacific’s counsel**, thereby giving Union Pacific notice of Hawley’s correct address at:

L. Earl Hawley, Esq.
916 Casino Center Boulevard
Las Vegas, NV 89101
(702) 382-6675

In June and July of 2003, Hawley made several calls to the Court Clerk to ask if a final judgment had been entered. He was informed it had not been. (Record on Appeal, pp 169-172) On June 27th, 2003, Union Pacific’s counsel filed and mailed a “Notice to Appear or Appoint Counsel” pursuant to Rule 4-506(3) Utah Rules of Judicial Administration; but service of this Notice was defective since it was addressed and mailed to an old address. Hawley never received this Notice and it was returned. On July 15, 2003, Union Pacific filed and mailed a second “Notice to Appear or Appoint Counsel” to Hawley, but service of this second Notice was also defective, since it too was addressed and mailed to a wrong address (“**918** Casino Center Blvd.” rather than the correct “**916** Casino Center Blvd.”)

Unbeknownst to Hawley, a final written judgment was then entered on August 20, 2003. Service of this final judgment was mailed to Hawley at the

incorrect (and non-existent) address at **918** Casino Center Boulevard, Las Vegas, rather than Hawley's correct address at **916** Casino Center Boulevard. Hawley did not receive notice of the entry of this judgment. (Record on Appeal, pp 169-172)

Hawley continued his attempt to find counsel to represent him. Finally in mid-December of 2003, Hawley, still pro se and still residing out of state, again inquired of the Clerk of Court about entry of final judgment. He was then informed, for the first time, of the entry of final judgment. A copy was mailed to him by the Clerk, which he received December 22, 2003.

Hawley then retained his current attorneys Ranney and Peatross, who filed a "Motion for Relief From Judgment Under Rule 60(b)(6)" on January 12th, 2004. (Record on Appeal, pp 167-168) The sole purpose of the Motion was to have the Court withdraw the Final Judgment of August 20, 2003 and re-issue it, thereby giving Hawley time within which to appeal it. The Court, by Memorandum Opinion dated March 2, 2004, denied Hawley's motion. This appeal is from denial of Hawley's Rule 60(b)(6) motion.

Summary of Arguments

Rule 4-506, Utah Rules of Judicial Administration governs procedure on withdrawal of attorneys in pending cases. This Rule requires court approval

for withdrawal by an attorney “when a motion has been filed and the court has not issued an order on the motion”; otherwise counsel may withdraw simply by filing a Notice of Withdrawal.² In this case Hawley’s attorney filed a Notice of Withdrawal after the court had issued an oral order granting a motion for summary judgment, but prior to written final judgment being entered. We argue that this withdrawal by Notice was proper, and the district court erred in interpreting Rule 4-506 to require court approval in circumstances where the only pending motion had been ruled on by an orally issued order, memorialized by the Clerk’s minute entry.

After an attorney withdraws, Rule 4-506 requires opposing counsel to serve on the unrepresented party a “Notice to Appear or Appoint Counsel,” and if he fails to do so, “No further proceedings shall be had in the case.” Rule 4-506(4). Union Pacific then filed two “Notices to Appear or Appoint Counsel”, but service of both were defective, since they were not mailed to Hawley’s address as given in his attorney’s Notice of Withdrawal. We argue that defective service of the required “Notice to Appear or Appoint Counsel,” where Hawley’s proper address was given in the Notice of Withdrawal,

² The language from Rule 74, U.R.C.P., which has now replaced Rule 4-506, Utah Rules of Judicial Administration, is similar: “If a motion is not pending ..., an attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal.”

which was served on Union Pacific's counsel and filed with the court, requires application of the mandatory rule of 4-506(4) that "No further proceedings be had in the case." If this rule is enforced, as it must be in our case, the subsequent judgment must be vacated. Application of this rule is mandatory, even if the unrepresented party is not diligent in seeking to discover if any further proceedings, such as entry of judgment, have been had in the case. Hartford Leasing Corp. v. State, 888 P.2d 694 (Utah Ct. App. 1994). (No action for 4 ½ years) Therefore the district court erred in failing to grant Hawley's motion for relief from the judgment under Rule 60(b)(6), U.R.C.P.

An additional ground for granting relief from the judgment under Rule 60(b)(6) is that after the final written judgment was entered, service of this judgment was not made on Hawley on his proper address, as required by Rule 58A(d), U.R.C.P. The most common reason for granting relief under Rule 60(b)(6) is when the losing party fails to receive notice of the entry of judgment in time to file an appeal. Relief should be given when the moving party shows diligence in trying to determine whether judgment had been entered, and files his Rule 60(b)(6) motion within a reasonable time after learning of the entry of judgment. Oseguera v. Farmers Insurance Exchange,

68 P.3rd 1008 (Utah App. 2003). We argue that the district court abused its discretion in denying relief from the judgment under these additional grounds.

Arguments

I. Attorney Mueller's Notice of Withdrawal was Effective to Cause His Withdrawal as Hawley's Attorney, Without Leave of Court.

The lower Court's opinion is based on its conclusion that attorney Mueller was required to seek leave of court prior to withdrawing as Hawley's attorney, so his Notice of Withdrawal was ineffective. From this the Court concluded that Hawley was still represented by counsel on August 20, 2003 when final judgment was entered. Accordingly, the Court held that Hawley was not entitled to any Notice to Appear or Appoint, making the defect in service of this document irrelevant. The lower Court reasoned as follows:

“...this court finds that plaintiff was not entitled to receive notice to appear personally or appoint new counsel as he was still represented by Mr. Karl Mueller when the judgment was filed with the court.

Rule 4-506 URCP provided the law for withdrawing from a civil case at the time applicable to this matter. Subsection (1) of the Rule read:

“(1) *Withdrawal requiring court approval.* Consistent with the Rules of Professional Conduct, 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... Under these circumstances, an attorney may not withdraw except upon motion and order of the court.”
(Emphasis added.)

When Mr. Mueller filed his Notice of Withdrawal, he neither sought nor obtained leave of the court to withdraw. The rule clearly provides that an attorney cannot simply withdraw when a motion has been filed and the court has yet to issue its order on the motion. Court approval must be obtained for the withdrawal under these circumstances.

The provisions of Rule 4-506(3) URCP, which entitle the plaintiff to notice to appear or appoint, do not become operative until his attorney has withdrawn, dies, or is suspended from the practice of law. None of these things had happened at the time the judgment was filed. Mr. Mueller was still counsel for the plaintiff.” (Memorandum Opinion, pp 3-4)

We respectfully disagree with the lower court’s conclusion that attorney Mueller was required to obtain court approval for withdrawal in the circumstances of this case. As the Court notes, Rule 4-506(1) 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...” In our case, when attorney Mueller filed his Notice of Withdrawal, the motion for summary judgment had been filed, fully briefed

by the parties, fully argued orally before the court, and ruled on by the Court. As the Court noted in its Memorandum opinion, “Having heard the argument, and having read the memoranda of law submitted by the parties, **the court granted Summary Judgment to the defendant from the bench...**” (Memorandum Opinion, p. 2, emphasis supplied). In fact, the Clerk even made and filed a written minute entry noting “The Court grants the Motion for Summary Judgment as a whole.” (Record, p. 152)

It is true that the written final judgment had not yet been entered (all final judgments must be in writing, usually signed by the Judge, Rule 58A, U.R.C.P.) But we submit that when the Court orally granted Union Pacific’s motion for summary judgment from the bench, after hearing oral argument on June 10, 2003, that he then orally “issued an order on the motion” within the meaning of Rule 4-506(1). The Rule does not specify that the order on the pending motion needs to be in writing, just that it needs to be “issued”. Obviously a Court order ruling on a motion can be issued orally as easily as in writing. That is what happened in our case, and so attorney Mueller was not required by the Rules to obtain court permission to withdraw as Hawley’s attorney.

It is significant that counsel for both parties believed, at the time, that Mueller's action in filing his Notice of Withdrawal after the Court had orally granted the motion for summary judgment, was both proper and effective. Both attorneys certainly acted as if it was effective. Attorney Mueller obviously believed he was entitled to withdraw without leave of court, as he filed a Notice of Withdrawal, rather than a motion for leave to withdraw.. Union Pacific's attorney obviously then believed the Notice of Withdrawal was effective to leave Hawley unrepresented, since he then filed and attempted to serve two separate "Notices to Appear or Appoint Counsel" on Hawley, as was required by Rule 4-506(4): "If an attorney withdraws . . . opposing counsel shall serve a Notice to Appear or Appoint Counsel on the unrepresented client." Hawley believed he was unrepresented, since he then sought other counsel to represent him. (Hawley affidavit, p. 1) And the Court itself then did nothing to warn any of the attorneys or parties that Mueller's Notice of Withdrawal was ineffective. Only in ruling on the Rule 60(b)(6) motion did the Court come up with his surprising interpretation of the Rules; an interpretation and a ground that neither attorney had thought to argue to the court in their Rule 60(b)(6) motion briefings. Accordingly, we

submit that the District Court erred in its interpretation of Rule 4-506, and in his finding that attorney Mueller's Notice of Withdrawal was not effective.

II. Hawley was Entitled to be Properly Served with a Notice to Appear or Appoint Counsel; But Service of This Required Notice was Defective.

If, as argued above, attorney Mueller was entitled to withdraw as Hawley's attorney simply by filing his Notice of Withdrawal, as he did, then Hawley was then left unrepresented. In this situation, Union Pacific was required to serve a "Notice to Appear and Appoint Counsel" on Hawley before any further proceedings could be had in the case.

"If an attorney withdraws, dies, is suspended . . . opposing counsel shall serve a Notice to Appear or Appoint Counsel on the unrepresented client. . . . No further proceedings shall be held in the case until 20 days have elapsed from the filing of the Notice to Appear or Appoint Counsel..."
(Rule 4-506, Rules of Judicial Administration)

Union Pacific's counsel attempted to comply with this provision, by mailing two separate Notices to Appear or Appoint Counsel to Hawley, and filing both with the Court. (Record pp 157-160) However, service of both of these required Notices were defective in being mailed to wrong addresses, resulting in Hawley not receiving either notice. The first was mailed to an old address for Hawley, and was returned to Union Pacific. The second was mailed to Hawley at **918** Casino Center Boulevard, Las Vegas, NV 89101.

The Notice of Withdrawal filed by Hawley's former attorney, which had been served on Union Pacific's counsel and filed with the Court, contained Hawley's correct address, at **916** Casino Center Boulevard:

L. Earl Hawley, Esq.
916 Casino Center Boulevard
Las Vegas, NV 89101
(702) 382-6675

So, having been notified of Hawley's correct mailing address, in the very document that triggered the duty on Union Pacific to serve a "Notice to Appear or Appoint Counsel" on Hawley, there was no good excuse for Union Pacific not to have used the correct address.

III. Failure to Properly Serve a Required Notice to Appear or Appoint Counsel Requires that the Subsequent Judgment be Set Aside.

If a Notice to Appear or Appoint Counsel is required to be served under Rule 4-506, and it is not, then "No further proceedings shall be held in the case..." Rule 4-506(4) Rules of Judicial Administration. The prohibition of this Rule is strictly enforced. In Hartford Leasing Corp. v. State, 888 P.2d 694 (Utah Ct. App. 1994), plaintiff Hartford's counsel filed a withdrawal, leaving Hartford unrepresented. The State did not then, or ever, serve and file a Notice to Appear or Appoint Counsel as required by Rule 4-506. Four and one-half years passed

with no action by either side, when the State filed a motion to dismiss for failure to prosecute. Despite the fact that Hartford then hired new counsel, and responded to the motion to dismiss, the trial Court's dismissal of the case was reversed by this court, on grounds that the notice requirements of Rule 4-506 were mandatory. In granting the motion to dismiss, the trial court had held that it was enough that Hartford was granted sufficient time after the motion to dismiss was filed to obtain counsel and adequately respond (which they in fact did.) This Court disagreed, stating: "The rule's provisions, however, offer no room for such discretion to excuse compliance: 'opposing counsel must notify . . . before opposing counsel can initiate further proceedings'." Hartford v. State, 888 P.2d @ 700.

Hartford is very significant for our case because it also stands for the proposition that the diligence, or lack of diligence, by an unrepresented party who is entitled to be properly served with a "Notice to Appear or Appoint Counsel", but who is not so served, is irrelevant to the issue of whether the further proceedings in the case are valid. Despite Hartford's lack of any diligence for 4 ½ years to prosecute the case as plaintiff, they were still entitled to rely on the fact that they had not been served with any "Notice to Appear or

Appoint Counsel.” Solely for this failure, the subsequent proceedings, including entry of judgment, were held to be invalid.

In Loporto v. Hoegemann, 982 P.2d 586 (Ut. App. 1999), after Hoegemann’s attorney withdrew, and no Notice to Appear or Appoint was served or filed, the Court took further proceedings in the case, including entry of judgment. On appeal, this court reversed, holding “that Rule 4-506 unambiguously restricts both opposing counsel and the trial court. The first sentence of subsection three requires opposing counsel to notify the client of his or her responsibility to retain another attorney or appear in person ‘before opposing counsel can initiate further proceedings against the client.’ Id. The rule also directs the trial court that ‘no further proceedings shall be held in the matter until 20 days have elapsed from the date of filing [of the notice].” Loporto v. Hoegemann, 982 P.2d @ 988.

So, failure to properly serve the required Notice to Appear or Appoint Counsel on Hawley, though his correct address was given in the last document filed in the case by his withdrawing attorney, means that “no further proceedings” should have been had in the case. The subsequent entry of judgment against an unrepresented party who not been properly served with a Notice to Appear or Appoint is in violation of Rule 4-506. Hawley’s motion for

relief from the judgment under Rule 60(b)(6), made within days he first learned that this judgment had been entered, should therefore have been granted.

**IV. Failure to Serve the Notice of Judgment on Hawley at His
Correct Address Are Additional Grounds For Relief From the Judgment**

In addition to not properly serving Hawley with the required Notice to Appear or Appoint Counsel under Rule 4-506, Union Pacific compounded the problem by failing to properly serve Hawley with Notice of Entry of Judgment, as required by Rule 58A(d), U.R.C.P. Like the “Notice to Appear or Appoint Counsel”, the Notice of Entry of Judgment shows it was mailed to Hawley at **918** Casino Center Boulevard, rather than the correct **916** Casino Center Boulevard, and Hawley never received it. (Hawley affidavit)

Hawley intended to file an appeal of the grant of summary judgment in this case, based on what he perceived to be an error of law by the court. When Hawley did finally learn of the entry of the judgment, on December 22, 2003, it was beyond the requisite ten days to file a motion for a new trial under Rule 59(b), beyond the 30 day limit to file an appeal under Rule 4(a), beyond the 60 day limit to seek an extension of the time to appeal under Rule 4(e), and even beyond the 3 month limit to seek relief from a judgment under Rule 60(b)(1), (2) or (3), U.R.C.P. Accordingly he immediately retained present counsel to move

to set the judgment aside under Rule 60(b)(6), so the matter could be appealed.

Rule 60(b) provides in pertinent part:

“On motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order or proceeding for 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 three months after the judgment, order, or proceeding was entered or taken.”

Hawley’s motion was brought under the “catch all” provision of the above rule, Rule 60(b)(6), “any other reason justifying relief from the operation of the judgment.” The most common reason the Courts grant relief under subsection (6) of Rule 60(b), is that the losing party does not receive notice of entry of judgment in time to file an appeal. Utah law applicable to this motion is most clearly stated in Oseguera v. Farmers Insurance Exchange, 68 P.3rd 1008 (Utah App. 2003): “The most common ‘other reason’ for which courts have granted relief [under rule 60(b)(6)] is when the losing party fails to receive

notice of the entry of judgment in time to file an appeal.’ (citing authority³) However, in order to merit relief from judgment under rule 60(b)(6) for lack of notice, the moving party must also have ‘shown diligence in trying to determine whether judgment had been entered’ or have been ‘actually misled . . . as to whether there had been entry of judgment.’ (citing authority) Furthermore, the movant must file her rule 60(b)(6) motion within a reasonable time after learning of entry of the judgment.” Oseguera, 68 P.3d @ 1010.

In Oseguera the losing party did not learn about entry of the final judgment for more than 3 months after it was entered. She appealed, but the appeal was denied as untimely. She then moved in the district court to set aside the judgment under Rule 60(b)(6). Upon denial of this motion by the district court, she appealed. This court reversed, holding that it was an abuse of discretion not to have granted relief under Rule 60(b)(6), so that the losing party could appeal the judgment.

Under the standards and rule set forth in Oseguera, it was an abuse of discretion for the District Court to have denied Hawley’s motion to set aside the

³ 11 Charles Alan Wright, et al., Federal Practice and Procedure § 2864 (2d ed. 1995). See Tubbs v. Campbell, 731 F.2d 1214, 1215-16 (5th Cir. 1984)(per curium); Buckeye Cellulose Corp v. Braggs Elec. Constr., 569 F.2d 1036, 1038-39 (8th Cir. 1978)(per curium); Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst., 500 F.2d 808, 809-10 (D.C. Cir. 1974) (per curium); Radack v. Norwegian Am. Line Agency, Inc., 318 F. 2d 538, 542-43 (2d Cir. 1963).

judgment under Rule 60(b)(6). One of the requirements stated in Oseguera for the setting aside of a judgment under Rule 60(b)(6) for lack of notice of entry of the judgment, is that “the moving party must also have ‘shown diligence in trying to determine whether judgment had been entered’.” Oseguera, 68 P.3d @ 1010. In our case, the Hawley was left pro se and residing out of state, looking for another attorney to represent him. He himself called the court on several occasions to see if any judgment had been entered, and a Utah attorney who was looking at the matter for him likewise inquired for him. Hawley only did finally discover that judgment had been entered when another call to the court clerk so informed him. He did show due diligence in trying to determine whether judgment had been entered.

Our case is similar to, though even stronger than, Tubb v. Campbell, 731 F.2d 1214 (5th Cir. 1984), relied on and cited approvingly by Oseguera. In Tubbs, the plaintiff’s attorney made several inquiries to the clerk’s office as to whether judgment had been entered. They were told it had not. The court found this to be a diligent effort and allowed the plaintiff’s 60(b)(6) motion. Though Hawley did show diligence in attempting to discover if judgment had been entered, it actually would have been excusable if he had not inquired at all about whether judgment had been entered. Hawley was entitled to rely on the Rules of

Civil Procedure being followed by Union Pacific and its attorney. Utah Rules of Civil Procedure 58A(d) provides that “a copy of the signed ⁴ judgment shall be promptly served by the party preparing it in the manner provided in Rule 5.” Rule 58A(d), U.R.C.P. Because of defendant’s mistake, this rule was not complied with, thereby causing Plaintiff not to be timely notified of entry of the judgment, and thereby causing the time to appeal to run against Plaintiff without his knowledge. We submit that when the reason the losing party does not receive timely notice of entry of judgment is solely a mistake by the opposing party and his counsel amounting to a violation of the Rules of Civil Procedure, the requirement of “due diligence” by the losing party in discovering if a judgment had been entered should be relaxed.

Rule 58A(d), above quoted, does go on to provide that “The time for filing notice of appeal is not affected by the requirement of this provision.” However, that provision is applicable only to standard cases, and prevents a party from taking advantage of a technical failure to serve a judgment that he might otherwise know to have been entered. Our case is controlled by Oseguera, supra, in which the failure by counsel to properly give notice of entry

⁴ It is interesting to note that defendant could not have even attempted to serve a signed copy of the judgment on Plaintiff, since his certificate of service shows he mailed it on August 11, and it was not signed until August 19th. (Record on Appeal, 165)

of judgment is highly relevant to a motion to set aside the judgment under Rule 60(b)(6).

The other requirement of the rule stated in Oseguera is that “the movant must file her rule 60(b)(6) motion within a reasonable time after learning of entry of the judgment.” Oseguera, supra. The court in Oseguera held a 60(b)(6) motion to be timely when it was filed within seven weeks of notice of entry of final judgment. Oseguera 68 P.3d @ 1011. Thirty days was found to be a reasonable amount of time in Expeditions Unlimited Aquatic Enterprises v. Smithsonian Inst. 163 U.S. App. D.C. 140, 500 F.2d at 809 (D.C. Cir. 1974), (relied on and cited by Oseguera). In our case, Hawley clearly filed his motion within a reasonable amount of time, since he got actual notice of final judgment on December 22, 2003, and filed his Rule 60(b)(6) motion only 20 days later, on January 12, 2004.

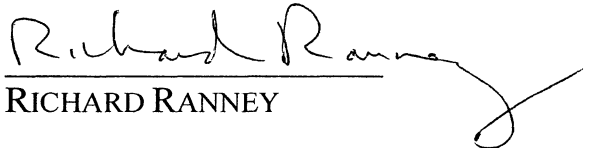
Conclusion

When the District Court issued its oral order granting the motion for summary judgment, Hawley’s former attorney was then entitled to withdraw by filing his Notice of Withdrawal. The Court erred in construing Rule 4-506 to require court approval in these circumstances. Since the required “Notices to Appear or Appoint Counsel” were not properly served, Hawley never received

them; and so Rule 4-506 required that “no further proceedings shall be held in the case.” The subsequent judgment was therefore entered in violation of this Rule. Accordingly, the District Court erred in failing to grant relief by vacating this judgment. In addition, the District Court abused it’s discretion to deny relief on grounds that the notice of entry of judgment was not properly served on Hawley. We respectfully submit that this Court should reverse and remand, with instructions to vacate the Final Judgment of August 20, 2003.

DATED this 2nd day of October, 2004.

RANNEY & PEATROSS

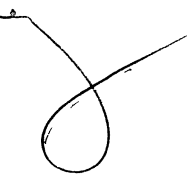

RICHARD RANNEY

Certificate of Service

I hereby certify that on the 2nd day of October, 2004, two true and correct copies of this “**Brief of Appellant**”, were served by first-class mail, with postage prepaid thereon, to:

Kent W. Hansen, Esq.
Union Pacific Railroad
280 South 400 West
Salt Lake City, UT 84101

Richard Ranney
Richard Ranney



Addendum

A. Memorandum Opinion of March 2, 2004	A
B. Rule 4-506, Utah Rules of Judicial Administration	B
C. Second Notice to Appear or Appoint Counsel (Record pp. 159-160) . . .	C
D. First Notice to Appear or Appoint Counsel (Record pp. 157-158).	D
E. Notice of Withdrawal of Attorney (Record pp. 155-156)	E
F. Minutes of Hearing on Motion for Summary Judgment (Record, 152). .	F

Memorandum Opinion of March 2, 2004

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR IRON COUNTY, STATE OF UTAH**

L. EARL HAWLEY,

Plaintiff,

vs.

**UNION PACIFIC RAILROAD
COMPANY, A Delaware Corporation,**

Defendant.

MEMORANDUM OPINION

CASE NO. 000500737 PI

This matter came before the court for oral argument on plaintiff's *Motion For Relief From Judgment Under Rule 60 (b) (6)*. The parties were represented by their respective counsel, Richard Ranney representing the plaintiff and Kent Hansen representing the defendant. The court heard argument and took the matter under submission to prepare this written opinion.

PROCEDURAL BACKGROUND

On December 6, 2000, the plaintiff filed his complaint against the defendant seeking redress for injuries which he claimed to have suffered while driving on the defendant's property. The plaintiff was then represented by Floyd W. Holm. The defendant was served and then filed an answer on January 16, 2001. The defendant was represented by Kent Hansen.

On March 19, 2001, the court held a scheduling conference with the attorneys. The resulting Order provided deadlines for the completion of various aspects of the case, including

discovery and filing of motions. Discovery was to be completed by August 31, 2001, and all motions were to be filed by September 17, 2001. The case was scheduled for a pretrial/settlement conference on October 22, 2001.

Apparently between March, 2001, and July, 2001, the plaintiff changed attorneys and notices from defendant's counsel began going to Karl Mueller, attorney at law. No withdrawal or notice of substitution was filed with the court.

When the time came for the pretrial/settlement conference, the attorneys began filing stipulated motions to continue and began filing notices of depositions, although the time for such had expired according to the court's scheduling order. The case finally came on the court's calendar on June 10, 2002, but neither attorney was present. Rather another attorney in Mr. Mueller's office informed the court that the parties were working on discovery and moved to continue the pretrial/settlement conference to July, 2002. That date was likewise continued by stipulation of the attorneys, and then continued again to December 16, 2002.

On December 16, 2002, the matter came before the court for pretrial/settlement conference and was set for trial in May, 2003, at the request of counsel. That setting was later continued when a notice of demand for jury trial was filed. The matter was set for a five day jury trial in June, 2003.

On March 24, 2003, the defendant filed its Motion For Summary Judgment, which was briefed by both sides. The Motion For Summary Judgment came before the court for oral argument on June 10, 2003. Having heard the argument, and having read the memoranda of law submitted by the parties, the court granted Summary Judgment to the defendant from the bench and directed defendant's counsel to prepare and submit the Summary Judgment within 30 days.

On June 19, 2003, Mr. Mueller filed with the court his Notice Of Withdrawal Of Attorney. The court did not approve the withdrawal of Mr. Mueller, and no such approval was ever requested. No final Summary Judgment had yet been filed by the defendant. Mr. Mueller sent a copy of his Notice to defendant's attorney and to the plaintiff, listing the plaintiff's address on the mailing certificate at 916 Casino Center Boulevard, Las Vegas, Nevada, 89101. No effort was made in that Notice to alert the defendant to the fact that this address was a new address for the plaintiff.

On June 30, 2003, defendant's counsel filed with the court a Notice To Appear or Appoint Counsel, which, in compliance with Rule 4-506 URCP, directed the plaintiff to appear or name new counsel within 20 days. The Notice was sent to Karl Mueller and to plaintiff himself at 815 South Fourth Street, Las Vegas, Nevada, 89101. Apparently defendant's counsel learned that this Notice was not delivered because on July 18, 2003, a second Notice To Appear or Appoint Counsel was filed with the court. That notice was also sent to Mr. Mueller and to the plaintiff, this time addressed to 918 Casino Center Blvd., Las Vegas, Nevada, 89101.

Finally, on August 20, 2003, defendant's counsel filed with the court a Judgment based on the court's ruling from the bench on June 10, 2003. Plaintiff now seeks relief from that judgment asserting that since he never received either of the Notices required by Rule 4-506 URCP, the judgment should not have been entered.

ANALYSIS

The plaintiff's Motion For Relief From Judgment must be denied. From the procedural history set out above, this court finds that plaintiff was not entitled to receive notice

to appear personally or appoint new counsel as he was still represented by Mr. Karl Mueller when the judgment was filed with the court.

Rule 4-506 URCP provided the law for withdrawing from a civil case at the time applicable to this matter. Subsection (1) of the Rule read:

“(1) *Withdrawal requiring court approval.* Consistent with the Rules of Professional Conduct, 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.... Under these circumstances, an attorney may not withdraw except upon motion and order of the court.” (Emphasis added)

When Mr. Mueller filed his Notice of Withdrawal, he neither sought nor obtained leave of the court to withdraw. The rule clearly provides that an attorney cannot simply withdraw when a motion has been filed and the court has yet to issue its order on the motion. Court approval must be obtained for the withdrawal under these circumstances.

The provisions of Rule 4-506 (3) URCP, which entitle the plaintiff to notice to appear or appoint, do not become operative until his attorney has withdrawn, dies, or is suspended from the practice of law. None of these things had happened at the time the judgment was filed. Mr. Mueller was still counsel for the plaintiff.

Rule 60 Utah Rules of Civil Procedure

The plaintiff, who is himself a lawyer in Nevada, argues that he should be granted relief under the provisions of Rule 60(b). Yet the record shows that he knew that his attorney had filed a Notice of Withdrawal, that there was pending a Motion, that the court had announced its intent to rule against his position, and that a judgment to that effect was soon to be filed. Plaintiff also knew that his right to file an appeal would expire 30 days after the Judgment was signed by the court and filed by the clerk. In fact, the parties agree that the

plaintiff himself contacted the court in August, 2003, and asked if the final judgment had been filed. Apparently his contact was days before the Judgment actually reached the court. Thereafter, the plaintiff did not again check with the court until December, 2003, when he learned that the Judgment had been filed in later August.

Plaintiff argues that his failure to check with the court constitutes excuseable neglect and, in any case, should justify relief from the Judgment under Rule 60 (b) (1) or (6).

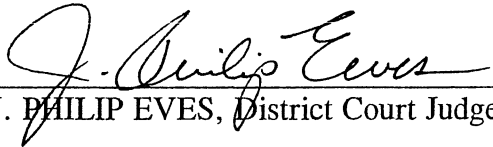
Defendant argues that the lengthy delay in checking with the court is not excusable under Rule 60 (b) (1) and in any case was not raised timely under that prong of the Rule. Additionally defendant argues that the failure of the defendant to check with the court is not a circumstance which would justify relief from the Judgment under Rule 60 (b) (6) URCP.

The court agrees with the defendant. If plaintiff wanted to file an appeal based on the announced intention of the court to grant the Summary Judgment, then he and his attorney were obligated to take reasonable steps to determine when the Judgment was filed so that the appeal could be timely filed. Checking with the court every 4 months or so would not be reasonable when the time for filing an appeal runs 30 days after the Judgment is filed and the right to seek relief from the Judgment based upon excuseable neglect expires 3 months after the Judgment is filed. Plaintiff and his counsel were well aware that the right to file an appeal would expire 30 days after the Judgment was filed and that the relief available under Rule 60 (b) would be severely limited 3 months after the Judgment was filed.

Accordingly, the Motion For Relief From Judgment is denied. The Motion is untimely under Rule 60 (b) (1) and does not present a circumstance where the plaintiff should be granted relief from the Judgment under Rule 60 (b) (6). In addition, there was no entitlement

to a Notice to Appoint Counsel or Appear in Person, since the plaintiff's lawyer was never permitted to withdraw under the applicable rules and plaintiff was at all times represented by Mr. Mueller.

DATED this 2nd day of March 2004.



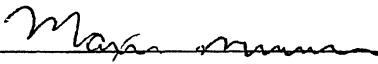
J. PHILIP EVES, District Court Judge

Certificate of Mailing

I hereby certify that on this 2nd day of March 2004, I mailed true and correct copies of the above and foregoing document, first-class postage prepaid, to the following:

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

Kent W. Hansen, Esq.
Attorney at Law
380 South 400 West
Salt Lake City, UT 84101



Maxine Munson, Deputy Clerk

Rule 4-506, Utah Rules of Judicial Administration

(Effective to November 1, 2003)

B.

fees included in the judgment, and the statements contained in the affidavit supporting the motion for augmentation.

(6) Prior to entry of a judgment which grants attorney fees pursuant to this rule, any party may move the court to depart from the fees allowed by paragraph (1) of this rule. Such application shall be made pursuant to Rule 4-505.

(7) If a contract or other document provides for an award of attorney fees, an original or copy of the document shall be made a part of the file before attorney fees may be awarded pursuant to this rule.

(8) No affidavit for attorney fees need be filed in order to receive an award of attorney fees pursuant to this rule.

(9) No attorney fees awarded pursuant to this rule, nor portion thereof, may be shared in violation of Rule of Professional Conduct 5.4.

(Added effective March 31, 1992; amended effective November 15, 1995; November 1, 2002.)

Amendment Notes. — The 2002 amendment substituted “principal damages amount of \$5,000 or less” for “principal amount of \$5,000 or less” twice and, in the table, substituted

“Damages” for “Judgment” and added “and Interest” in the first column head and made stylistic changes.

NOTES TO DECISIONS

Construction.

Construction with other rules.

Construction.

Attorney-fee-augmentation motions under Subdivision (6) are not conclusively governed by the fee schedule, since the language in the subdivision is very broad and does not mention any restrictions imposed by the schedule. *N.A.R., Inc. v. Farr*, 2000 UT App 62, 997 P.2d 343.

Subdivision (6) of this rule, which deals with attorney fees incurred before judgment, does not affect the implementation of Subdivision (5), which deals with attorney fees incurred post-judgment. *N.A.R., Inc. v. Farr*, 2000 UT App 62, 997 P.2d 343.

Construction with other rules.

The trial court’s decision denying plaintiff’s request for attorney fees was reversed and remanded for a determination of an award of reasonable attorney fees pursuant to Rule 4-505 where the record was unclear if the trial court used the fee schedule in Rule 4-505.01 merely as one of the factors in arriving at its decision that the attorney fees requested by plaintiff were not to be awarded, or whether the trial court believed that Rule 4-505.01 was the sole mechanism to award fees. *N.A.R., Inc. v. Marcek*, 2000 UT App 300, 13 P.3d 612.

Rule 4-506. Withdrawal of counsel in civil cases.

Intent:

To establish a uniform procedure and criteria for withdrawal of counsel in civil cases.

Applicability:

This rule shall apply to all counsel in civil proceedings in trial courts of record except guardians ad litem and court-appointed counsel.

Statement of the Rule:

(1) *Withdrawal requiring court approval.* Consistent with the Rules of Professional Conduct, 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 or after a certificate of readiness for trial has been filed. Under these circumstances, an attorney may not withdraw except upon motion and order of the court.

(2) *Withdrawal not requiring court approval.* If an attorney withdraws under circumstances where court approval is not required, the notice of

filed on which the court has not issued an order and that no certificate of readiness for trial has been filed.

(3) If an attorney withdraws as counsel of record, the withdrawing attorney must serve written notice of the withdrawal upon the client of the withdrawing attorney and upon all other parties not in default. A certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal shall include a notification of the trial date.

(4) If an attorney withdraws, dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, opposing counsel shall serve a Notice to Appear or Appoint Counsel on the unrepresented client. The Notice to Appear or Appoint Counsel must inform the unrepresented client of the responsibility to appear in a court or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days have elapsed from filing of the Notice to Appear or Appoint Counsel unless the client of the withdrawing attorney waives the time requirement or unless otherwise ordered by the court.

(5) *Substitution of counsel.* An attorney may replace the current counsel of record by filing and serving a notice of substitution of counsel. Filing a substitution of counsel enters the appearance of new counsel of record and effectuates the withdrawal of the attorney being replaced. Where a request for a delay of proceedings is not made, substitution of counsel does not require the approval of the court. Where new counsel requests a delay of proceedings, substitution of counsel requires the approval of the court as provided in this rule.

(Amended effective January 15, 1990; April 15, 1991; May 15, 1994; November 1, 1997.)

NOTES TO DECISIONS

Notice to appoint counsel.
Cited.

Notice to appoint counsel.

Defendant's failure to give notice to plaintiff of its responsibility to appoint counsel under Subdivision (3) before filing its motion to dismiss rendered it improper for the trial court to dismiss plaintiff's action, notwithstanding the inordinate period of inactivity that preceded defendant's motion to dismiss. *Hartford Leasing Corp. v. State*, 888 P.2d 694 (Utah Ct. App. 1994).

Because this rule compels opposing counsel to file a required notice and also directs the trial court to wait 20 days after that filing before holding further proceedings, the court erred by striking a wife's pleadings and placing her in default after granting her counsel's motion to withdraw. *Loporto v. Hoegemann*, 1999 UT App 175, 982 P.2d 586.

Cited in *Jeschke v. Willis*, 811 P.2d 202 (Utah Ct. App. 1991); *Roderick v. Ricks*, 2002 UT 84, 54 P.3d 1119.

Rule 4-507. Disposition of funds on trustee's sale.

Intent:

To establish a uniform procedure for filing trustee affidavits of deposit and claimant petitions for adjudication of priority in trustee's sales.

To establish a uniform procedure in determining the disposition of funds on trustee's sales.

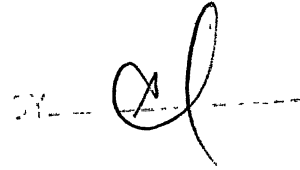
Applicability:

This rule shall apply to all courts of record.

Statement of the Rule:

Second Notice to Appear or Appoint Counsel (Record pp. 159-160)

Kent W. Hansen, #6560
Union Pacific Railroad Company
Law Department
280 South 400 West
Salt Lake City, UT 84101
Telephone: (801) 595-3226
Fax: (801) 595-3265



IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

L. EARL HAWLEY,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,
a Delaware corporation,

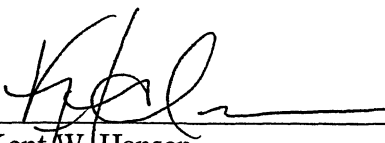
Defendant.

NOTICE TO APPEAR OR APPOINT COUNSEL

Case No. 000500737
Judge J. Philip Eves

Pursuant to Rule 4-506, Utah Rules of Judicial Administration, upon the withdrawal of Plaintiff's counsel of record in the above-entitled action, Defendant Union Pacific Railroad Company hereby provides notice to Plaintiff of his responsibility to appear in person or to appoint successor counsel to prosecute this matter. Pursuant to that same rule, Plaintiff is further notified that no further proceedings shall occur in this case until 20 days from the date of filing of this Notice, after which the case may proceed in its normal course.

DATED this 18th day of July, 2003.



Kent W. Hansen
Attorney for Union Pacific Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2003, a true, correct and complete copy of the foregoing was delivered upon the following attorneys in the following manner indicated below:

Karl Mueller
315 West Hilton Dr., Suite 4
St. George, UT 84770

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight
☐ Facsimile
☐ No Service

L. Earl Hawley
918 Casino Center Blvd.
Las Vegas, NV 89101

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight
☐ Facsimile
☐ No Service


Secretary

First Notice to Appear or Appoint Counsel (Record pp. 157-158)

D.

Kent W. Hansen, #6560
Union Pacific Railroad Company
Law Department
280 South 400 West
Salt Lake City, UT 84101
Telephone: (801) 595-3226
Fax: (801) 595-3265



IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

L. EARL HAWLEY,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,
a Delaware corporation,

Defendant.

NOTICE TO APPEAR OR APPOINT COUNSEL

Case No. 000500737
Judge J. Philip Eves

Pursuant to Rule 4-506, Utah Rules of Judicial Administration, upon the withdrawal of Plaintiff's counsel of record in the above-entitled action, Defendant Union Pacific Railroad Company hereby provides notice to Plaintiff of his responsibility to appear in person or to appoint successor counsel to prosecute this matter. Pursuant to that same rule, Plaintiff is further notified that no further proceedings shall occur in this case until 20 days from the date of filing of this Notice, after which the case may proceed in its normal course.

DATED this 27th day of June, 2003.



Kent W. Hansen
Attorney for Union Pacific Railroad Company

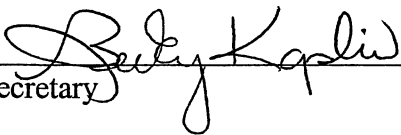
CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June, 2003, a true, correct and complete copy of the foregoing was delivered upon the following attorneys in the following manner indicated below:

Karl Mueller
315 West Hilton Dr., Suite 4
St. George, UT 84770

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight
☐ Facsimile
☐ No Service

L. Earl Hawley
815 South Fourth Street
Las Vegas, NV 89101


Secretary

Notice of Withdrawal of Attorney (Record pp.155-156)

Michael W. Park (2516)
Karl H. Mueller (8559)
THE PARK FIRM, P.C.
P.O. Box 2438
St. George, UT 84771
Telephone: (435) 673-8689
Facsimile (435) 673-8767


SY 

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH

L. EARL HAWLEY,)	
)	
Plaintiff,)	NOTICE OF WITHDRAWAL
)	OF ATTORNEY
v.)	
)	
UNION PACIFIC RAILROAD)	
COMPANY, a Delaware Corporation,)	Case No.000500737
)	Judge J. Philip Eves
Defendant.)	

Karl H. Mueller, hereby gives his notice of withdraw as attorney for plaintiff, L. Earl
Hawley. This matter is currently not set for trial or hearing.

DATED this 16th day of June, 2003.



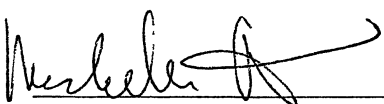
Karl H. Mueller

CERTIFICATE OF DELIVERY

I hereby certify that on the 16th day of June, 2003, I caused a true and correct copy of the above and foregoing **Notice of Withdrawal of Attorney** to be sent via U.S. Mail to the following:

Kent W. Hansen, Esq.
Union Pacific Railroad
280 South 400 West
Salt Lake City, UT 84101

L. Earl Hawley, Esq.
916 Casino Center Boulevard
Las Vegas, NV 89101
(702) 382-6675



Legal Secretary

Minutes of Hearing on Motion for Summary Judgment (Record pp 152)

F.

FIFTH DISTRICT COURT- CEDAR COURT
IRON COUNTY, STATE OF UTAH

L. EARL HAWLEY,	:	MINUTES
Plaintiff,	:	HEARING ON MOTION
	:	
	:	
vs.	:	Case No: 000500737 PI
	:	
UNION PACIFIC RAILROAD,	:	Judge: J. PHILIP EVES
Defendant.	:	Date: June 10, 2003

Clerk: tammyc

PRESENT

Plaintiff's Attorney(s): KARL H. MUELLER

Defendant's Attorney(s): KENT W HANSEN

Video

Tape Number: 2003-46 Tape Count: 1:30 p.m.

HEARING

TAPE: 2003-46 COUNT: 1:30 p.m.

On record. Mr. Hansen submits to the court the Original of Exhibit #5, which is to be given to the clerk and replace the copy.

Mr. Hansen argues his Motion for Summary Judgment. The court states it will grant the part of the Motion for Summary Judgment regarding lost wages, as there is no dispute from Mr. Mueller.

COUNT: 2:01pm

Mr. Mueller makes arguments.

COUNT: 2:08pm

Mr. Hansen makes a statements in response.

COUNT: 2:14pm

The court grants the portion of the Motion for Summary Judgment relating to lost wages. Also, the portion relating to Plaintiff's being a licensee. The court grants the Motion for Summary Judgment as a whole.

Mr. Hansen is to prepare the Order of Summary Judgment within 30 days. Any further proceedings which are scheduled in this court are vacated.