

1993

# Lowell E. Potter v. Century 21 Mining, and OTC Stock Transfer : Brief of Appellant

Utah Court of Appeals

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J. Ray Barrios, P.C..

Robert M. McDonald; McDonald, West and Benson; F. Keith Biesinger.

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IN THE UTAH COURT OF APPEALS

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LOWELL E. POTTER,	:	
	:	
Plaintiff/Appellee,	:	BRIEF OF APPELLANT
	:	
v.	:	
	:	
CENTURY 21 MINING, and	:	Case No. 930179-CA
OTC STOCK TRANSFER,	:	
	:	
Defendants/Appellant.	:	

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APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT

THE HONORABLE RICHARD H. MOFFAT, PRESIDING

---

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**LIST OF PARTIES**

Lowell E. Potter, Plaintiff and Appellee

Century 21 Mining, Defendant and Appellant

OSC Stock Tranfer, a party Defendant who has not filed a  
notice of appeal

## TABLE OF CONTENTS

LIST OF PARTIES . . . . .	i
TABLE OF AUTHORITIES . . . . .	iv
JURISDICTION OF THE COURT . . . . .	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW . . . . .	1
DETERMINATIVE AUTHORITIES . . . . .	4
STATEMENT OF THE CASE . . . . .	4
NATURE OF CASE AND DISPOSITION IN LOWER COURT . . . .	4
STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW . . . . .	6
SUMMARY OF ARGUMENT . . . . .	12
ARGUMENT . . . . .	14
POINT I . . . . .	14
THE LOWER COURT ERRED IN DENYING CENTURY'S MOTION TO SET ASIDE A DEFAULT JUDGMENT ENTERED WHICH WAS WITHOUT NOTICE TO CENTURY IN VIOLATION OF RULE 5(A), U.R.C.P.	
POINT II . . . . .	18
THE LOWER COURT ERRED IN CONCLUDING CENTURY'S MOTION TO SET ASIDE DEFAULT JUDGMENT WAS UNTIMELY FILED	
POINT III . . . . .	23
THE LOWER COURT ERRED IN CONCLUDING CENTURY HAD NOT DEMONSTRATED THE EXISTENCE OF MERITORIOUS DEFENSES	

POINT IV . . . . .	26
THE LOWER COURT ABUSED ITS DISCRETION IN DENYING CENTURY'S MOTION TO SET ASIDE DEFAULT JUDGMENT	
CONCLUSION . . . . .	29
ADDENDUM TABLE OF CONTENTS . . . . .	31

## TABLE OF AUTHORITIES

<u>Aliva v. Winn</u> , 794 P.2d 20 (Utah 1990) . . . . .	1
<u>Berry v. Slagle</u> , 431 P.2d 575 (Utah 1967) . . . . .	3,24
<u>Birch v. Birch</u> , 771 P.2d 1114 (Utah App. 1989) . . . . .	3
<u>Bish's Sheet Metal Co. v. Luras</u> , 359 P.2d 21 (Utah 1961) . . . . .	2,3,19,26
<u>Blackhurst v. Transamerica Ins. Co.</u> , 699 P.2d 688 (Utah 1985) . . . . .	2,22
<u>Boston Acme Mines Dev. Co. v. Clawson</u> , 240 Pac. 165 (Utah 1925) . . . . .	3,24
<u>Davis v. Heath Dev. Co.</u> , 558 P.2d 594 (Utah 1976) . . . . .	3,25
<u>Deutz-Allis Credit Corp. v. Smith</u> , 785 P.2d 682 (Idaho App. 1990) . . . . .	26
<u>Dudley v. Keller</u> , 521 P.2d 175 (Colo.App. 1974) . . . . .	2,3,22
<u>Glen Allen Mining Co. v. Park Galena Mining Co.</u> , 236 Pac. 231 (Utah 1931) . . . . .	3,26
<u>Grayson Ropper Ltd. v. Finlinson</u> , 782 P.2d 467 (Utah 1989) . . . . .	2
<u>Gribble v. Gribble</u> , 583 P.2d 64 (Utah 1978) . . . . .	1,18
<u>Heathman v. Fabian &amp; Clendenin</u> , 377 P.2d 189 (Utah 1962) . . . . .	2,22
<u>Helgesen v. Inyangumia</u> , 636 P.2d 1079 (Utah 1981) . . . . .	3,28,29
<u>Hoggan &amp; Hall &amp; Higgins, Inc. v. Hall</u> , 414 P.2d 89 (Utah 1966) . . . . .	3,24,25
<u>Interstate Excavating, Inc. v. Agla Dev. Corp.</u> , 611 P.2d 369 (Utah 1980) . . . . .	2,22
<u>Jones Mining Company v. Cardiff Mining &amp; Milling Company</u> , 191 Pac. 426 (Utah 1920) . . . . .	3,24

<u>Lincoln Benefit Life Ins. Co. v. D. T. Southern Properties</u> , 838 P.2d 672 (Utah App. 1992)	2
<u>Mendez v. State</u> , 813 P.2d 1234 (Utah App. 1991)	2,22
<u>McKean v. Mountain View Memorial Estates, Inc.</u> , 411 P.2d 129 (Utah 1966)	2,22
<u>Nelson v. Jacobsen</u> , 669 P.2d 1207 (Utah 1983)	1,17
<u>Nicholson v. Evans</u> , 642 P.2d 727 (Utah 1982)	3,24,25
<u>P &amp; B Land, Inc. v. Klungervick</u> , 751 P.2d 274 (Utah App. 1988)	1,17
<u>Richardson v. Arizona Fuels Corp.</u> , 614 P.2d 636 (Utah 1980)	3,24
<u>Russell v. Martell</u> , 681 P.2d 1193 (Utah 1984)	1,17
<u>Scaharf v. BMG Corporation</u> , 700 P.2d 1068 (Utah 1985)	2
<u>Wells v. Children's Aid Society</u> , 681 P.2d 199 (Utah 1984)	1,18
<u>Workman v. Nagle Construction Co., Inc.</u> , 802 P.2d 749 (Utah App. 1990)	2,3,21,26

## RULES

Rule 5(a), (b) Utah Rules of Civil Procedure	1,4,14,15,16
Rule 55(a), (b) Utah Rules of Civil Procedure	1,4,15,16,17
Rule 56(a), Utah Rules of Civil Procedure	7
Rule 58(A)(d), Utah Rules of Civil Procedure	2,4,20,21
Rule 60(b), Utah Rules of Civil Procedure	2,4,13,18, 19,20,21
Rule 60(b)(1), Utah Rules of Civil Procedure	19
Rule 60(b)(7), Utah Rules of Civil Procedure	13,19,21

## STATUTES

Utah Code Annotated § 78-2a-3(2)(k)	1
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### JURISDICTION OF THE COURT

This is an appeal from a final Order dated January 15, 1993, wherein the lower court denied Defendant/Appellant's Motion to Set Aside Default Judgment. This Court has jurisdiction to hear this appeal pursuant to Utah Code Annotated § 78-2a-3(2)(k).

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the lower court err in denying Defendant/Appellant's Motion to Set Aside Default Judgment that had been entered without notice to Century? In addressing the issue, the Appellate Court will review the lower court's decision for correctness and accord no particular deference to the decision of the lower court. Aliva v. Winn, 794 P.2d 20 (Utah 1990). The authorities cited by Defendant/Appellant on this issue are as follows: Rule 5(a), Utah Rules of Civil Procedure; Rule 55(a), (b), Utah Rules of Civil Procedure; Russell v. Martell, 681 P.2d 1193 (Utah 1984); P & B Land, Inc. v. Klungervick, 751 P.2d 274 (Utah App. 1988); Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983); Gribble v. Gribble, 583 P.2d 64 (Utah 1978); Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984).

2. Did the lower court err in concluding that Defendant/Appellant failed to timely file its Motion to Set



Aside Default Judgment? In addressing the issue, the Appellate Court will review the lower court's decision for correctness and accord no particular deference to the decision of the lower court. Lincoln Benefit Life Ins. Co. v. D. T. Southern Properties, 838 P.2d 672 (Utah App. 1992). The authorities cited by Defendant/Appellant on this issue are as follows: Rule 60(b), Utah Rules of Civil Procedure; Rule 58A(d), Utah Rules of Civil Procedure; Bish's Sheet Metal Co. v. Luras, 359 P.2d 21 (Utah 1961); Blackhurst v. Transamerica Ins. Co., 699 P.2d 688 (Utah 1985); Mendez v. State, 813 P.2d 1234 (Utah App. 1991); Workman v. Nagle Construction, Inc., 802 P.2d 749 (Utah App. 1990) McKean v. Mountain View Memorial Estates, Inc., 411 P.2d 129 (Utah 1966); Dudley v. Keller, 521 P.2d 175 (Colo.App. 1974); Heathman v. Fabian & Clendenin, 377 P.2d 189 (Utah 1962); Interstate Excavating, Inc. v. Agla Dev. Corp., 611 P.2d 369 (Utah 1980).

3. Did the lower court err in denying Defendant/Appellant's Motion to Set Aside Default Judgment on grounds that Defendant/Appellant had failed to present meritorious defenses? In addressing the issue, the Appellate Court will review the lower court's decision for correctness and accord no particular deference to the decision of the lower court. Scaharf v. BMG Corporation, 700 P.2d 1068 (Utah 1985); Grayson

Ropper Ltd. v. Finlinson, 782 P.2d 467 (Utah 1989). The authorities cited by Defendant/Appellant on this issue are as follows: Boston Acme Mines Dev. Co. v. Clawson, 240 Pac. 165 (Utah 1925); Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980); Nicholson v. Evans, 642 P.2d 727 (Utah 1982); Hoggan & Hall & Higgins, Inc. v. Hall, 414 P.2d 89 (Utah 1966); Berry v. Slagle, 431 P.2d 575 (Utah 1967); Jones Mining Company v. Cardiff Mining & Milling Company, 191 Pac. 426 (Utah 1920); Davis v. Heath Dev. Co., 558 P.2d 594 (Utah 1976); Glen Allen Mining Co. v. Park Galena Mining Co., 236 Pac. 231 (Utah 1931).

4. Did the lower court abuse its discretion in denying Defendant/Appellant's Motion to Set Aside Default Judgment? If the lower court made no erroneous legal conclusions with respect to construction of the Rules of Procedure or the legal sufficiency of anticipated defenses (see cases cited above), the lower court is afforded broad discretion and the Appellate Court will reverse only for abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989). The authorities cited by Defendant/Appellant on this issue are as follows: Workman v. Nagle Construction, Inc., 802 P.2d 749 (Utah App. 1990) Bish's Sheet Metal Co. v. Luras, 359 P.2d 21 (Utah 1961); Dudley v. Keller, 521 P.2d 175 (Colo.App. 1974) Helgesen v.

Inyangumia, 636 P.2d 1079 (Utah 1981).

#### **DETERMINATIVE AUTHORITIES**

Defendant/Appellant does not contend any authorities are determinative of any issue involved in the appeal. However, the following Rules of Procedure are central to the issues to be considered by this appeal: Rule 5(a), (b) U.R.C.P. (attached as Addendum Exhibit "E"); Rule 55(a), (b) U.R.C.P. (attached as Addendum Exhibit "F"); Rule 58A(d) U.R.C.P. (attached as Addendum Exhibit "G"); and, Rule 60(b), U.R.C.P. (attached as Addendum Exhibit "H").

#### **STATEMENT OF THE CASE**

##### **NATURE OF CASE AND DISPOSITION IN LOWER COURT**

In addressing the issues raised by this appeal, Plaintiff/Appellee Lowell E. Potter will be referred to as "Potter" and Defendant/Appellant Century 21 Mining Company will be referred to as "Century."

On or about September 13, 1988, Potter commenced this action by the filing of a Verified Complaint. (R. 2-6). In Count III of the Complaint, Potter sought to enforce a promissory note which he alleged was dated February 28, 1986, in the principal sum of \$90,000. (R. 2-5). In Count IV of

the Complaint, Potter alleged that the Note "was to secure a purchase price of five million (5,000,000) shares of Century 21 stock" and Potter sought rescission of the Promissory Note (R. 4). The other allegations of the Complaint have little relevance to the issues involved on appeal.<sup>1</sup>

Century's prior attorney, Nathan Drage, was justifiably confused as to the purpose for the commencement of the instant action by reason of unorthodox procedures and the pendency of previously filed litigation which asserted the same claim. In an attempt to resolve the confusion, the matter was discussed between counsel for Potter and Century, and Century's attorney was informed that no further action would be taken in the matter without further notice. In reliance on this representation, counsel for Century did not file an answer to the Complaint.

On December 2, 1988, contrary to the prior representation of Potter's attorney and without notice to Century or its attorney, Potter obtained a Default Judgment against Century (R. 21-22, Addendum Exhibit "B"). Thereafter, the existence

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<sup>1</sup> Count I of the Verified Complaint alleged that Defendant had wrongfully refused to honor stock certificate 11391 issued by Century (R. 2-3). Count II asserted claims relating to such refusal. In this regard, discovery in a subsequent case entitled "Lowell E. Potter, Plaintiff v. TV Communications Network, Inc., et al., Defendants" Civil No. 920905554, pending in the Third Judicial District Court, has established that certificate 11391 was later submitted and honored by the transfer agent. Thus, the issues relating to Counts I and II are now moot.

of the Judgment was not disclosed by Potter to Century or its attorney.

When Century's prior attorney learned of the Judgment from a third party in December, 1989, he filed a Motion to Set Aside Judgment. On January 15, 1993, the lower court entered an Order denying Century's Motion to Set Aside Default Judgment (R. 94-95, Addendum Exhibit "D"). The Order of January 15, 1993, denying Century's Motion to Set Aside Default Judgment, is the subject of this appeal.

#### **STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW**

On March 18, 1987, Potter commenced an action against Century alleging Century was "indebted" to Potter in the sum of \$110,000 (hereinafter "1987 action") (R. 43). On June 2, 1987, Century filed an Answer to the Complaint in the 1987 action denying liability for the "indebtedness" (R. 44). Apparently unwilling to subject his claims to the scrutiny of litigation, Potter abandoned prosecution of the 1987 action.<sup>2</sup>

On September 13, 1988, while the 1987 action was still pending, Potter commenced the instant action asserting the

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<sup>2</sup>

On May 31, 1989, the 1987 action was dismissed for lack of prosecution (R. 46).

same claims that had been asserted in the 1987 action.<sup>3</sup> On the same date that the instant action was filed, Potter obtained an Order to Show Cause requiring Defendants to appear and show cause why the relief demanded in Count I of the Complaint should not be granted. The Order to Show Cause was originally prepared to reflect a hearing date in September, but was apparently changed after execution by the Court to show a hearing date of November 2, 1988 (R. 6).

The Order to Show Cause was the equivalent of a motion for summary judgment with respect to Count I of the Verified Complaint and was apparently characterized as an Order to Show Cause in order to circumvent the 20-day restriction relating to summary judgments filed by Plaintiffs imposed by Rule 56(a), Utah Rules of Civil Procedure.<sup>4</sup>

Despite the fact the Complaint was filed on September 13, 1988, and the Order to Show Cause entered on the same date, the Complaint and Order to Show Cause were not delivered to

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<sup>3</sup> The Promissory Note which is the subject of the instant action was in existence on the date of the filing of the 1987 action and the principal and accrued interest (18% per annum) on the date of the filing of the Complaint in the 1987 action (\$107,000) was approximately the same as the demand for relief stated in the 1987 action (\$110,000). Although the allegations of the 1987 action are brief and incomplete, it is apparent that the demand for \$3,000 in excess of principal and accrued interest was attributable to costs and/or attorney's fees.

<sup>4</sup> The original Order to Show Cause noted a hearing date in September, 1988 (R. 6). The Order to Show Cause was later changed by interlineation to November 2, 1988 (Ibid).

the sheriff for service on Century until October 20, 1988 (R. 8-9, 10-12) apparently to reduce Century's preparation time. Service of the Complaint and Order to Show Cause was not accomplished until October 24, 1988 (R. 8-9, 10-12). Service was made on Leonard Nielson, registered agent for Century 21 (Ibid). The registered agent mailed the Summons, Complaint and Order to Show Cause to Century's attorney Ronald L. Vance on October 28, 1988 (R. 48).

The documents were received by Ronald L. Vance and his associate, Nathan Drage, on October 30, 1988 (Drage Affidavit, para. 2, R. 50) only three days before the scheduled hearing stated in the amended Order to Show Cause (Drage Affidavit, para. 2, R. 50). Upon observing the unorthodox procedure, the suspicious interlineation changes on the Order to Show Cause and the inadequate Notice of Hearing on the dispositive "motion," Drage immediately contacted the court clerk to determine the legitimacy of the hearing date (Drage Affidavit, para. 6, R. 51). Drage was informed by the clerk that no such hearing had been scheduled on the court's calendar (Ibid).

Immediately after the telephone conversation with the court clerk, Drage telephoned Potter's attorney, Richard Leedy, to express his confusion arising from the unorthodox procedure, the interlineation change on the hearing date, the

absence of a hearing date on the court's calendar and the purpose in filing the litigation in light of the pendency of the 1987 action asserting the same claim. At that time, attorney Leedy informed Drage that Drage need not take any further action in the matter without further notice (Drage Affidavit, para. 7, R. 51).<sup>5</sup>

It was apparent that on and after November 1, 1988, Potter's attorney, Richard Leedy, was fully aware that Ronald Vance and/or his associate, Nathan Drage, had been engaged by Century to defend the instant action as well as the 1987 action asserting the same indebtedness claim.<sup>6</sup>

On November 4, 1988, only three days after attorney Leedy had represented that no further action would be taken without notice to Drage, Leedy filed a Notice of Hearing stating that hearing on the Order to Show Cause would be held on December 2, 1988 (R. 19). Contrary to the express representation made to Drage only three days earlier, a copy of the Notice was not sent or delivered to Century or its attorneys. The Mailing Certificate on the Notice of Hearing made no mention of

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<sup>5</sup> In his Affidavit dated May 21, 1990, attorney Leedy did not deny his representation to attorney Drage that no further action would be taken without further notice (Affidavit of Richard Leedy, para. 3, R. 70-70A). Leedy merely stated he had "no independent recollection of the conversation and/or stipulation" (Ibid).

<sup>6</sup> Ronald Vance filed an answer to the Complaint in the 1987 action on June 2, 1987 (R. 44).



Century or its attorney (R. 19) and Drage confirmed that he received no notice of the hearing (Drage Affidavit, para. 11, R. 52). On the date the Notice of Hearing was filed, Century was not in default. On the contrary, on the date of the Notice of Hearing, the time permitted to answer the Complaint had not yet expired. Thus, Century was entitled to receive notice of the hearing.

Inasmuch as Drage received no notice of the hearing scheduled for December 2, 1988, the hearing proceeded without participation of Century or its attorney, Nathan Drage (R. 21). During the course of the hearing, attorney Leedy, on behalf of Potter, apparently noted Century's failure to answer the Complaint and moved for entry of default judgment (R. 21). There is disturbing evidence that Potter's counsel may have represented to the court at the hearing that Century had stipulated to the entry of a default judgment. The Minute Entry prepared by the court stated: "Based on Pltf's Motion to Default Deft's and stipulation of respective counsel, the court hereby grants the motions." (Emphasis added) (R. 20, Addendum Exhibit "A"). The lower court granted Potter's motion and entered Century's default and ordered a default judgment against Century in the sum of \$90,000 together with interest at the rate of 18% per annum and attorney's fees in

the sum of \$1,500 (Ibid).

After the entry of the Judgment, the existence of the Judgment was concealed. At no time did Potter provide Century notice of the entry of the judgment.<sup>7</sup> Nathan Drage, attorney for Century, first learned of the existence of the Judgment from a third party in December, 1989 (Drage Affidavit, para. 11, R. 52).

After learning of the existence of the Judgment, attorney Drage, on behalf of Century, filed a Motion to Set Aside Default Judgment (R. 23-24) with an accompanying Memorandum (R. 26-41), supporting Affidavits (R. 50-52; 55; 58-60) and other supporting documents. (See R. 57).

The Memorandum and affidavits submitted by Century in support of its Motion to Set Aside Default Judgment established the existence of meritorious defenses. Century provided documentation showing clear evidence of self-dealing and related failure of consideration for the Promissory Note. In this regard, Potter and his son, Thomas Potter, constituted two of the three members of Century's Board of Directors at the time Century purportedly "approved" the \$90,000 debt to Potter. The resolution purporting to approve Century's

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<sup>7</sup>

The file contains no notice of entry of judgment as required by Rule 58A(d). U.R.C.P.

obligation was signed only by Potter and his son (R. 57). The third Board member's signature is conspicuously absent from the resolution (Ibid). Furthermore, the Promissory Note was executed in consideration for the purchase of 5,000,000 shares of Century stock held by Potter (Verified Complaint, para. 19, R. 4; R. 57). After receiving the Promissory Note, Potter failed and refused to deliver the 5,000,000 shares of Century stock (R. 55, 30). The transactions described in the resolution, Potter's involvement in voting on a resolution for his own benefit and Potter's conduct after the resolution, establish the existence of the defenses of breach of fiduciary duties and failure of consideration.

On the basis of these facts, Century has justiciable defenses including breach of fiduciary duty; lack of consideration; and, absence of valid corporate authorization for the indebtedness.

#### **SUMMARY OF ARGUMENT**

Point I. On November 4, 1988, Potter filed a notice of a hearing to be held before the lower court on December 2, 1988. On the date the notice was filed, the time permitted for Century to file its answer to the Complaint had not yet expired. Thus, Century was not in default and entitled to

notice of all hearings. Despite the fact that Potter's attorney was fully aware of the identity of Century's registered agent and attorneys, Potter did not serve notice of the hearing on Century or its attorneys and the hearing proceeded in Century's absence. During the course of the hearing in the absence of Century and its attorney, Potter obtained a default judgment against Century. The default judgment was obtained in violation of the due process procedures specified in the Utah Rules of Civil Procedure which require notice of hearing in this circumstance. The lower court erred in refusing to set aside the default judgment obtained in violation of due process procedures.

Point II. Century's Motion To Set Aside Default was based, in part, on Potter's failure to comply with the due process procedures of adequate notice. Such grounds fall within the provisions of Rule 60(b)(7), U.R.C.P., which are not subject to a three-month filing restriction. The lower court erred in denying Century's Motion To Set Aside Default on the ground it was not filed within the three-month period. On the basis of the facts and circumstances, including Potter's abandonment of a prior action on the same claim and concealment of the judgment in the instant case, Century's Motion To Set Aside Default was timely filed.

Point III. By reason of Potter's status as a director of Century and his involvement in the corporate resolution purporting to authorize Century's indebtedness to Potter, the Promissory Note is void. Furthermore, Potter failed to deliver the consideration for the Promissory Note. In such circumstances, the lower court erred in concluding that Century had not demonstrated the existence of meritorious defenses.

Point IV. The default judgment was obtained on the basis of representations on the part of Potter's attorney and other actions expressly designed to induce Century's attorney to delay filing an answer or otherwise defending against the allegations of the Complaint. In such circumstances, the lower court abused its discretion by denying Century's Motion To Set Aside Default Judgment thereby allowing Potter to benefit by his deception and the violation of Century's procedural rights.

### **ARGUMENT**

#### **POINT I**

**THE LOWER COURT ERRED IN DENYING CENTURY'S MOTION TO SET ASIDE A DEFAULT JUDGMENT ENTERED WHICH WAS WITHOUT NOTICE TO CENTURY IN VIOLATION OF RULE 5(a), U.R.C.P.**

As noted in the Statement of Facts, on November 4, 1988, Potter prepared and filed a Notice of Hearing to be held on

December 2, 1988. It is undisputed that Potter did not serve a copy of the notice on Century or its attorney.<sup>8</sup> During the course of the hearing on December 2, 1988, the default judgment was entered against Century.

On the date the Notice of Hearing was filed, Century had not filed an answer to the Complaint. However, on the date the Notice of Hearing was filed, the time permitted for answering the Complaint had not expired.<sup>9</sup> Thus, Century was entitled to notice of the hearing on December 2, 1988. Rule 5(a), Utah Rules of Civil Procedure.

At no time prior to the hearing on December 2, 1988, including the period after Century's answer became due, was Century's default entered in accordance with Rule 55(a), Utah Rules of Civil Procedure. Thus, at all times prior to the hearing on December 2, 1988, Century was entitled to notice of all proceedings in the litigation. Rule 55(a)(2), Utah Rules of Civil Procedure.<sup>10</sup>

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<sup>8</sup> The Notice of Hearing did not include Century or its attorney on the mailing certificate (R. 19) and attorney Drage confirmed the absence of notice (Drage Affidavit, para. 11, R. 52).

<sup>9</sup> The Summons and Complaint were served on October 24, 1988 (R. 10-12). Thus, an answer was not due until November 13, 1988, nine days after the Notice of Hearing was filed.

<sup>10</sup> A litigant is released from an obligation to give opposing parties notice only "after the entry of the default of any party, as provided in subdivision (a)(1) of this Rule . . ." Rule 55(a)(2), Utah Rules of Civil Procedure. Century's default was not entered until December 2, 1988, immediately before entry of the default judgment (R. 21).

During the course of the scheduled hearing on December 2, 1988, the default of Defendant was first entered simultaneously with entry of the default judgment. At all times prior thereto, Century was entitled to notice of any proceedings. Rule 5(a), Utah Rules of Civil Procedure; Rule 55(a), Utah Rules of Civil Procedure. It is readily apparent that if the required notice had been given, the default judgment would not have been entered. The notice would have advised Century that Potter's counsel misrepresented his intentions and had reneged on the stipulation thereby prompting Century to file an answer and otherwise protect its interests. Furthermore, if Potter's counsel falsely represented Century had stipulated to the default<sup>11</sup>, the notice would have allowed Century to be present to deny the existence of the stipulation.

At the time of the entry of the default judgment, the court file clearly reflected that the Notice of Hearing had been filed before Century's answer was due and that Century had not received notice of the hearing. Century's absence from the hearing should have prompted some inquiry by the

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<sup>11</sup> As previously noted, the wording of the court's Minute Entry arising out of the December 2, 1988, hearing indicates Potter's attorney may have represented to the court that Century had stipulated to the default (R. 20, Appendix Exhibit "A").

lower court as to the reason therefore.<sup>12</sup>

Parties in default retain some procedural rights as stated in the Rules of Civil Procedure. Russell v. Martell, 681 P.2d 1193 (Utah 1984). It follows with greater force that parties not in default under Rule 55(a) are entitled to the procedural rights stated in the Rules of Procedure.

The failure of the lower court to demand compliance with the procedural provisions of the Rules of Procedure compels reversal of the judgment which was entered in violation of the Rules. P & B Land, Inc. v. Klungervick, 751 P.2d 274 (Utah App. 1988); Russell v. Martell, 681 P.2d 1193 (Utah 1984).

The failure of Potter to provide Century with Notice of Hearing on December 2, 1988, goes beyond violation of the Rules of Procedure. The matter involves violation of basic concepts of fairness and due process of law. In Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983), the Utah Supreme Court held:

Timely and adequate notice and  
opportunity to be heard in a meaningful  
way are the very heart of procedural  
fairness . . . .

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<sup>12</sup> The lower court apparently failed to observe that the Notice of Hearing was filed prior to the time Century's answer was due. In its Minute Entry, the court stated: "In this circumstance there is no obligation under the rules or the statutes for a party taking the default to give notice thereof to the opposition" (R. 91, Addendum, Exhibit "C").



An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Many cases have held that where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process. Accord, Gribble v. Gribble, 583 P.2d 64 (Utah 1978); Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984).

By reason of the apparent intentional failure of Potter to provide Century with notice of hearing wherein the default judgment was entered, in clear violation of the Rules of Civil Procedure and basic concepts of due process, the order of the trial court should be reversed and the default judgment should be set aside.

#### POINT II

#### THE LOWER COURT ERRED IN CONCLUDING CENTURY'S MOTION TO SET ASIDE DEFAULT JUDGMENT WAS UNTIMELY FILED

In its Minute Entry dated January 13, 1993, the lower court considered Century's Rule 60(b) motion as based solely on "excusable neglect" and denied the motion as untimely

(R. 91, Addendum Exhibit "C"). In this regard, a motion under Rule 60(b)(1) ("Mistake, Inadvertence, Surprise and Excusable Neglect") must be filed "not more than three months after the judgment . . . was entered."

The ruling by the lower court was clearly erroneous. Century's Motion To Set Aside Default Judgment was not limited to excusable neglect. On the contrary, paragraph 4 of the Motion also asserted: "Counsel for Plaintiff took a default judgment against Century 21 Mining without notice to Century 21 Mining or its counsel resulting in a lack of due process of law." (R. 24). The facts supporting this ground for vacating the default judgment are considered in Point I, supra.

It is established that a motion under Rule 60(b), asserting failure of due process, falls within subdivision 7 of Rule 60, i.e., "any other reason justifying relief from the operation of the judgment." Bish's Sheet Metal Co. v. Luras, 359 P.2d 21 (Utah 1961). Rule 60(b)(7) is not subject to the three month time limitation imposed by the lower court. Thus, the imposition of time constraints relating to "excusable neglect" was erroneous and imposed time limitations upon Century not stated in Rule 60(b).

Admittedly, Century's prior attorney did not file the motion until February 26, 1990, more than 14 months after the

judgment was entered. However, under the circumstances of the case, it is respectfully submitted that such delay was not unreasonable. It is undisputed that counsel for Potter expressly represented to Century's prior counsel that no further action would be taken in the matter without further notice. In this regard, the continued absence of any further notice for an extended period, including a period of 14 months, was not an unusual circumstance in this case. On the contrary, in the 1987 action Potter took no action on the same claim for a period of 26 months.<sup>13</sup>

Potter's involvement in Century's delay in filing its Rule 60(b) motion is not limited to the false representation of Potter's counsel and Potter's established practice of abandoning the claim after it was filed. In addition to these factors, Potter failed to comply with the provisions of Rule 58A(d), Utah Rules of Civil Procedure, which provide:

The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

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<sup>13</sup> The 1987 action was commenced on March 18, 1987 (R. 43) and was dismissed for failure to prosecute on May 31, 1989 (R. 46), a period of 26 months.

Century's failure to file its Motion under Rule 60(b)(7) for a period of 14 months is not unreasonable in the circumstances of this case. In Workman v. Nagle Construction, Inc., 802 P.2d 749 (Utah App. 1990), this Court held that a delay of more than one year in filing a motion under Rule 60(b)(5)-(7) was not unreasonable where the plaintiff had failed to give notice of the entry of the judgment pursuant to Rule 58A, Utah Rules of Civil Procedure. It follows with greater force that failure of both pre-judgment and post-judgment notice excuses delay in filing a motion under Rule 60(b)(7).

If anything is established by the record, it is that Potter was the primary force in inducing Century's delay in filing its motion under Rule 60(b). The combined effect of the false representation that no further action would be taken without notice; the failure to serve notice of the hearing on December 2, 1989; the prior abandonment of the same claim in the 1987 action; and, the failure to give notice of the judgment pursuant to Rule 58A(d) should be weighed against Century's only contribution to the delay, i.e., continuing good faith reliance on the representation and stipulation of Potter's attorney.

In such circumstance, the doctrine of equitable estoppel should be imposed by the Court to prevent Potter from benefitting from the misrepresentations of his attorney and delay which he induced. Blackhurst v. Transamerica Ins. Co., 699 P.2d 688 (Utah 1985); Mendez v. State, 813 P.2d 1234 (Utah App. 1991).

To the extent that Century's prior attorney's delay is deemed unreasonable, Century should not be subjected to an unjust judgment to which it has meritorious defenses merely by reason of the neglect of its attorney to whom it entrusted to represent its interests in the matter. McKean v. Mountain View Memorial Estates, Inc., 411 P.2d 129 (Utah 1966).; Dudley v. Keller, 521 P.2d 175 (Colo.App. 1974). Moreover, default judgments are not favored by the courts and are not in the interest of justice and fair play. Heathman v. Fabian & Clendenin, 377 P.2d 189 (Utah 1962). Any doubt as to the reasonableness of the filing should be resolved in favor of setting aside the default judgment. Interstate Excavating, Inc. v. Agla Dev. Corp., 611 P.2d 369 (Utah 1980).

On the basis of the foregoing, the order of the lower court denying Century's Motion to Set Aside Default Judgment should be reversed.

### POINT III

#### THE LOWER COURT ERRED IN CONCLUDING CENTURY HAD NOT DEMONSTRATED THE EXISTENCE OF MERITORIOUS DEFENSES

In its Minute Entry of January 13, 1993, one of the stated grounds for denying Century's Motion to Set Aside Default Judgment was that Century had not shown that it had meritorious defenses (R. 91, Addendum Exhibit "C").

This ruling by the lower court was clearly erroneous. In this regard, attached to Century's memorandum filed in support of its Motion, was a copy of the Minutes of the Board of Directors purporting to approve the \$90,000 indebtedness of Century in favor of Potter (R. 57) (hereinafter "Minutes").

The Minutes establish that at the time of the corporate "authorization" for the \$90,000 indebtedness, Potter and his son, Thomas Potter, comprised two of the three members of Century's Board of Directors. Thus, there was obvious self-dealing and serious questions of breach of fiduciary duties.

The Minutes involved a "special Board of Directors meeting" conducted in the absence of the third director, John L. Anderson. Mr. Anderson was the only director that did not have a personal interest in the matter. Although the Minutes recite that notice of the meeting was waived, John L. Anderson did not sign the Minutes and no signed waiver of notice has ever been produced. Anderson has confirmed to Century that he

received no notice of the meeting (R. 59). Furthermore, the Minutes expressly acknowledge the obvious conflict of interest which was openly ignored by Potter's participation in the self-serving "authorization" for indebtedness in his favor at the expense of the corporation.

The Promissory Note was executed by Century as consideration for the purchase of 5,000,000 shares of Century stock.<sup>14</sup> (Verified Complaint, para. 19, R. 4; R. 57). After receiving the Promissory Note, Potter refused to deliver the 5,000,000 shares (R. 55, 30).

These circumstances demonstrate the existence of meritorious defenses. In this regard, the absence of notice to all directors of a special meeting of the Board renders the Board action void. Boston Acme Mines Dev. Co. v. Clawson, 240 Pac. 165 (Utah 1925). Furthermore, a director has a fiduciary duty to the corporation. Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980); Nicholson v. Evans, 642 P.2d 727 (Utah 1982); Hoggan & Hall & Higgins, Inc. v. Hall, 414 P.2d 89 (Utah 1966); Berry v. Slagle, 431 P.2d 575 (Utah 1967); Jones Mining Company v. Cardiff Mining & Milling Company, 191 Pac. 426 (Utah 1920). This duty requires the director to

---

<sup>14</sup> It was contemplated that the stock would be received by Century as treasury stock and thereafter delivered to Raymond Naylor as consideration for the purchase of a mining property (R. 55).

subordinate his personal interests to the interests of the corporation. Nicholson v. Evans, 642 P.2d 727 (Utah 1982); Hoggan & Hall & Higgins, Inc. v. Hall, 414 P.2d 89 (Utah 1966).

Of greatest significance is the fact that Potter's participation in the corporate resolution purporting to authorize Century's execution of the Promissory Note renders the Promissory Note void. In Davis v. Heath Dev. Co., 558 P.2d 594 (Utah 1976), the Supreme Court held:

. . . Any director who has an interest in a proposed transaction with the corporation cannot participate in such business to bind the corporation, either to make up a quorum, or to vote on the proposal. . . . The well established rule is that in such circumstances, where its officers deal with the corporation in their own interest, that as to them the contract is void, or at best voidable at the option of the corporation.

The transactions described in the Minutes further suggest a failure of consideration, i.e., Potter obtained a receivable of \$90,000 for 5,000,000 shares of his stock and then received 4,800,000 shares in addition to the \$90,000 (R. 57). Thereafter, Potter refused to deliver the 5,000,000 shares that gave rise to the execution of the Promissory Note (R. 55, 30).



A corporate director has the burden to establish good faith in his dealings with the corporation. Glen Allen Mining Co. v. Park Galena Mining Co., 236 Pac. 231 (Utah 1931). Under the circumstances noted herein, Potter should be compelled to demonstrate his good faith at a trial on the merits.

On the basis of the facts above described, it is respectfully submitted that the lower court erred in concluding that Century had failed to demonstrate the existence of meritorious defenses. For this reason, the order of the lower court denying Century's Motion to Set Aside Default Judgment should be reversed.

#### POINT IV.

##### THE LOWER COURT ABUSED ITS DISCRETION IN DENYING CENTURY'S MOTION TO SET ASIDE DEFAULT JUDGMENT

Century respectfully submits that by reason of the errors in law noted in Points I - III, the issue of abuse of discretion is moot. See Workman v. Nagle Construction, Inc., 802 P.2d 749 (Utah App. 1990); Bish's Sheet Metal Company v. Luras, 359 P.2d 21 (Utah 1961); Deutz-Allis Credit Corp. v. Smith, 785 P.2d 682 (Idaho App. 1990). However, if the Court determines that the discretion of the lower court should be reviewed in this matter, Century submits that the facts and circumstances of this case compel the conclusion that the

lower court abused its discretion in denying Century's Motion to Set Aside Default Judgment.

As noted in this brief, the misrepresentations of Potter's attorney was a controlling factor in inducing Century's counsel to refrain from timely filing an appropriate response to the Complaint. Century's attorney's continued reliance upon the representations of Potter's attorney was not unreasonable in light of Potter's prior abandonment of the same claim in the 1987 action which extended for a period of 26 months.

The default judgment was the direct consequence of an apparent deliberate attempt to deprive Century of notice of the hearing wherein the default judgment was entered. The failure of such notice constituted a clear violation of the due process procedure specified in the Utah Rules of Civil Procedure.

The suspicious circumstances under which the indebtedness to Potter arose and Potter's failure to deliver the consideration for the Promissory Note (noted in Point III), provided Potter with a compelling incentive to avoid scrutiny as to the legitimacy and enforceability of the indebtedness which he claimed was owing to him by Century. The record before the lower court demonstrated that Potter intended to

use every means ranging from fraudulent misrepresentations to blatant violations of procedural rights to avoid such scrutiny. In this regard, when Century filed its answer in the 1987 litigation, thereby subjecting Potter's claims to the possibility of scrutiny in the litigation process, Potter abandoned further prosecution taking no action for a period of 26 months. When the instant litigation was commenced, all efforts were focused on preventing the filing of an answer and avoiding any procedure which would result in any investigation or scrutiny of Potter's claims.

Potter should not be permitted to benefit by the deception and violation of procedural rules that pervade every aspect of this case.

It has been held that where a plaintiff is fully aware that defendant intends to appear and defend the action<sup>15</sup>; the identity of defendant's representatives are known to plaintiff through communications regarding the issues in the action, an extension to answer has been implied by said communications; and, plaintiff thereafter takes a default judgment without notice to plaintiff or his representatives, it is an abuse of discretion to deny defendant's motion to set aside the default

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<sup>15</sup> This fact is established not only by attorney Drage's telephone communication with opposing counsel shortly after service of summons in the instant action (Drage Affidavit, para. 7, R. 51), but also by the filing of an answer denying the same claim in the 1987 action by Drage's associate, Ronald Vance (R. 44).

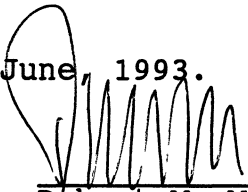
judgment. Helgesen v. Inyangumia, 636 P.2d 1079 (Utah 1981). It is respectfully submitted that the circumstances involved in the instant case, where an express agreement for an extension to answer was knowingly breached, the holding of the Helgesen case applies with greater force.

The order denying Century's Motion to Set Aside Default Judgment clearly extends these unjust benefits to Potter and thereby constitutes an abuse of discretion.

#### CONCLUSION

On the basis of the foregoing, the order of the lower court denying Century's Motion to Set Aside Default Judgment should be reversed and the case remanded to the lower court for a trial on the merits.

DATED this 1<sup>st</sup> day of June, 1993.



Robert M. McDonald



Keith Bresinger

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, two true and accurate copies of the foregoing Appellate's Brief this \_\_\_\_ day of June, 1993, to the following:

J. Ray Barrios, P.C.  
First American Title Building  
330 East 400 South, Suite 250  
Salt Lake City, Utah 84111

**ADDENDUM TABLE OF CONTENTS**

Exhibit A:	Minute Entry dated December 2, 1988
Exhibit B:	Judgment dated December 15, 1988
Exhibit C:	Minute Entry dated January 13, 1993
Exhibit D:	Order on Defendant's Motion to Set Aside Default Judgment dated January 15, 1993
Exhibit E:	Rule 5(a), (b), Utah Rules of Civil Procedure
Exhibit F:	Rule 55(a), (b), Utah Rules of Civil Procedure
Exhibit G:	Rule 58A(d), Utah Rules of Civil Procedure
Exhibit H:	Rule 60(b), Utah Rules of Civil Procedure

Tab A

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

POTTER, LOWELL	:	CASE NUMBER 880905981 CV
PLAINTIFF	:	
	:	DATE 12/02/88
VS	:	HONORABLE RICHARD H MOFFAT
	:	COURT REPORTER
CENTURY 21	:	COURT CLERK WWD
OTC STOCK TRANSFER	:	
DEFENDANT	:	

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TYPE OF HEARING: MOTION HEARING  
PRESENT:

P. ATTY. RICHARD J LEEDY  
D. ATTY. O ROBERT MEREDITH

---

BASED ON PLTF'S MOTION TO DEFAULT DEFT'S AND STIPULATION OF  
RESPECTIVE COUNSEL, THE COURT HEREBY GRANTS THE MOTION

000020



Tab B

Richard J. Leedy  
Attorney for Plaintiff  
245 Vine Street, No. 302  
Salt Lake City, Utah 84121  
Telephone: (801) 359-1767

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

DEC 15 1988  
H Dixon Hindley Clerk 3rd Dist Court  
By [Signature]  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LOWELL C. POTTER,  
Plaintiff,

vs.

CENTURY 21,  
Defendant.

: 2144587  
: 12-16-88-824am  
: JUDGMENT

: Civil No. 088-5981  
: Judge Richard Moffat

This matter came on for hearing on the 2nd day of December, 1988; it appearing that process was duly served on Defendant Century 21 and that more than 20 days have elapsed since the service of the Summons and the Verified Complaint; the Plaintiff moved for the entry of Default against the Defendant Century 21 and requested Judgment in accordance with the prayer of the Complaint; the Court entered the Default of the Defendant Century 21 and ordered Judgment as follows:

IT IS HEREBY ORDERED that the Defendant Century 21 and its agent OTC Stock Transfer, acknowledge the two million shares of its common stock represented by Certificate No. 11391 and they are to transfer the same without restriction in accordance with Plaintiff's request.

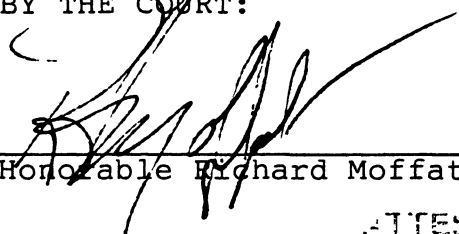
It is further ordered that the Plaintiff have Judgment against Century 21 for the sum of \$90,000 together with interest

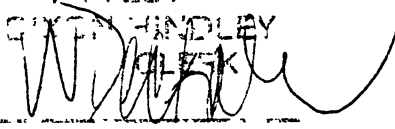
000021

at the rate of 18% per annum from February 28, 1986, and attorney fees in the amount of \$1,500.

DATED this 15 day of December, 1988.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Richard Moffat

ATTEST  
H. GUYTON HINDLEY  
CLERK  
  
\_\_\_\_\_  
Deputy Clerk

000022

Tab C

**IN THE THIRD JUDICIAL DISTRICT COURT**

**SALT LAKE COUNTY, STATE OF UTAH**

-----  
Lowell Potter,  
Plaintiff,

vs.

Century 21 Mining and OTC Stock Transfer,  
Defendants.

:  
:  
:  
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:  
:  
:  
:  
:  
:

MINUTE ENTRY

CASE NO: 880905981 CV

JUDGE RICHARD H. MOFFAT

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The Court having considered the Motion of the defendant Century 21 Mining, to set aside the Default Judgment and the memorandum and other pleadings in support and in opposition thereto and now being fully advised in the premises makes this its:

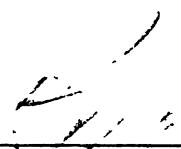
**MINUTE ENTRY**

The Motion is denied. The basis, inter alia, is as set forth in the plaintiff's Memorandum in Opposition to the Defendant's Motion. In particular even assuming as is argued, but in the Court's opinion not demonstrated, that the judgment was entered through excusable neglect on the part of Counsel for the defendant in order to prevail herein the defendant must also file it's Motion to Set Aside in a timely fashion and show that it has a meritorious defense. In the Court's opinion neither of the two latter requirements have been met. It stretches the Court's imagination to think that a fifteen (15) month period from the date of entry of the judgment until a Motion to Set Aside is filed can be deemed to be timely. In this circumstance there is no obligation under the rules or the statutes for the party taking the default to give notice thereof to the opposition. If in fact the parties had been negotiating as the

defendant claims when a fifteen (15) month hiatus occurs it would seem that the prudent thing to do would be to check the file in the clerk's office. Even a simple inquiry of opposing Counsel would have elicited a response that the default had been taken. More importantly, no meritorious defense was filed with the Motion to Set Aside the Default and any later filing such as was done herein on April 4, 1991 only occurred because the previously filed memorandum by the plaintiff in opposition to the defendant's Motion pointed out the defect. Under the circumstances the Court concludes that there is not sufficient basis to grant the defendant's Motion to Set Aside the Default and the same is therefore denied.

Counsel for the plaintiff will prepare an appropriate order.

Dated this 13 day of January, 1993.

  
\_\_\_\_\_  
Richard H. Moffat  
District Court Judge



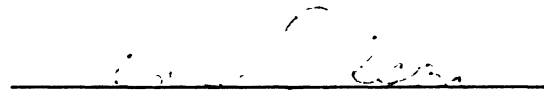
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry,  
postage prepaid, to the following on this 15 day of January, 1993.

J. Ray Barrios  
Attorney for Plaintiff  
First American Title Building  
330 East 400 South, Suite 250  
Salt Lake City, Utah 84111

Nathan W. Drage  
Attorney for Defendant  
357 South 200 East, Suite 300  
Salt Lake City, Utah 84116

Nathan W. Drage  
Attorney for Defendant  
2445 West North Temple  
Salt Lake City, Utah 84116



Tab D



DISTRICT COURT  
Third Judicial District

JAN 15 1993

J. RAY BARRIOS, P.C. (A3915)  
FIRST AMERICAN TITLE BUILDING  
330 East 400 South, Suite 250  
Salt Lake City, Utah 84111  
Telephone: (801) 322-3762

SALT LAKE COUNTY

Deputy Clerk

Attorney for Plaintiff

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

LOWELL POTTER,	)	
	)	
Plaintiff,	)	
	)	ORDER ON DEFENDANT'S MOTION
vs.	)	TO SET ASIDE DEFAULT JUDGMENT
	)	
CENTURY 21 MINING, and	)	Civil No. 880905981 CV
OTC STOCK TRANSFER,	)	
	)	Judge Richard H. Moffat
Defendant.	)	

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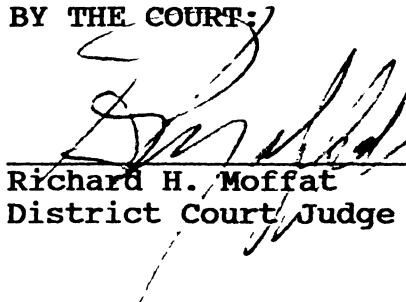
The Court, having reviewed Defendant's Motion To Set Aside Default Judgment and memorandum in support thereof in the above captioned case, and having reviewed the Plaintiff's Opposition to said Motion and supporting memorandum, and the matter having properly come before the Court pursuant to the Code of Judicial Administration, Rule 4-501(1)(d); and the Court having found that the Defendant has neither filed it's motion timely nor presented a meritorious defense, and being fully advised in the premises, it is hereby

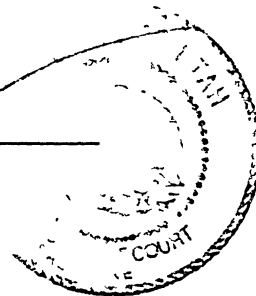
ORDERED, ADJUDGED AND DECREED that there is not sufficient basis to grant Defendant's Motion To Set Aside Default Judgment

and the Defendant's Motion To Set Aside Default Judgment is denied.

Dated this 15<sup>th</sup> day of January, 1993.

BY THE COURT:

  
\_\_\_\_\_  
Richard H. Moffat  
District Court Judge



Tab E

by amendment, to be served any time before trial; otherwise, the plaintiff in an action would be virtually foreclosed from adding additional defendants after three months. *Valley Asphalt, Inc. v. Eldon J. Stubbs Constr., Inc.*, 714 P.2d 1142 (Utah 1986).

—**Untimeliness.**

Where a summons was dated 38 days later than a complaint was filed, but was not placed in the hands of a qualified person for service until seven months after the complaint was filed, the summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

—**Amended complaint.**

In wrongful death action filed November 15, 1973 with no summons issued, filing of amended complaint on November 8, 1974 did

not recommence action, but amended complaint related back to time of original one by virtue of Rule 15(c); therefore, since summons did not issue within three months of filing of complaint, action was dismissed. *Cook v. Starkey*, 548 P.2d 1268 (Utah 1976).

—**Waiver.**

If a party appears in court, counterclaims, and is partially successful, the party may not claim untimely service under Subdivision (b). *Sorensen v. Sorensen*, 18 Utah 2d 102, 417 P.2d 118 (1966).

Cited in *State ex rel. Utah State Dep't of Social Servs. v. Santiago*, 590 P.2d 335 (Utah 1979); *Wood v. Weenig*, 736 P.2d 1053 (Utah 1987); *Van Tassell v. Shaffer*, 742 P.2d 111 (Utah Ct. App. 1987); *Schultz v. Conger*, 755 P.2d 165 (Utah 1988).

### COLLATERAL REFERENCES

**Utah Law Review.** — *Graham v. Sawaya*: Utah's Notice Requirements for In Personam Actions, 1982 Utah L. Rev. 657.

**Recent Developments in Utah Law — Judicial Decisions — Constitutional Law**, 1988 Utah L. Rev. 153.

**Recent Developments in Utah Law — Judicial Decisions — Civil Procedure**, 1989 Utah L. Rev. 166.

**Brigham Young Law Review.** — Reasonable Assurance of Actual Notice Required for In Personam Default Judgement in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

**Am. Jur. 2d.** — 19 Am. Jur. 2d Corporations § 2192 et seq.; 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions, § 854; 62B Am. Jur. 2d Process § 1 et seq.; 68 Am. Jur. 2d Schools § 21; 72 Am. Jur. 2d States, Territories, and Dependencies § 126.

**C.J.S.** — 19 C.J.S. Corporations § 1305 et seq.; 20 C.J.S. Counties § 263; 64 C.J.S. Municipal Corporations § 2205; 72 C.J.S. Process § 26 et seq.; 79 C.J.S. Schools and School Districts § 436; 81 C.J.S. States § 226.

**A.L.R.** — Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons, or the like, 6 A.L.R.3d 1179.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A.L.R.3d 738.

Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicile, as used in statutes relating to service of process, 32 A.L.R.3d 112.

Airplane or other aircraft as "motor vehicle" or the like within statute providing for constructive or substituted service of process on nonresident motorist, 36 A.L.R.3d 1387.

Sunday or holiday, validity of service of summons or complaint on, 63 A.L.R.3d 423.

In personam jurisdiction under long-arm statute of nonresident banking institution, 9 A.L.R.4th 661.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state, 16 A.L.R.4th 1318.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state, 37 A.L.R.4th 852.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred — state cases, 82 A.L.R.4th 1115.

**Key Numbers.** — Corporations ⇐ 507; Counties ⇐ 219; Municipal Corporations ⇐ 1029; Process ⇐ 21, 23, 24, 50 to 58, 63, 64, 82, 84 to 111, 127 to 153; 161 to 165; Schools and School Districts ⇐ 119; States ⇐ 204.

## Rule 5. Service and filing of pleadings and other papers.

(a) **Service: When required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, notice of signing or entry of judgment under Rule 58A(d), and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings) or pleadings asserting new or additional claims

for relief against them which shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

**(b) Service: How made.**

(1) 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 himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(2) A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any foreign attorney practicing in any of the courts of this state.

**(c) Service: Numerous defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

**(d) Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may upon motion of a party or on its own initiative order that depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

**(e) Filing with the court defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

**Advisory Committee Note.** — Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.

**Compiler's Notes.** — This rule is substantially similar to Rule 5, F.R.C.P.

**Cross-References.** — How civil action commenced, U.R.C.P. 3(a).

Service by mail, additional time after, U.R.C.P. 6(e).

Third-party practice, U.R.C.P. 14.

Tab F

600 P.2d 550 (Utah 1979); *Myers v. Morgan*, 626 P.2d 410 (Utah 1981); *Bernard v. Attebury*, 629 P.2d 892 (Utah 1981); *Bailey v. Sound Lab, Inc.*, 694 P.2d 1043 (Utah 1984); *GMAC v. Martinez*, 712 P.2d 243 (Utah 1986); *Williams v. State*, 716 P.2d 806 (Utah 1986); *Owen v. Owen*, 734 P.2d 414 (Utah 1986); *Tebbs, Smith & Assocs. v. Brooks*, 735 P.2d 1305 (Utah 1986); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986); *Freegard v. First W. Nat'l Bank*, 738 P.2d 614 (Utah 1987); *Crosland v. Peck*, 738 P.2d 631 (Utah 1987); *Elder v. Triax Co.*, 740 P.2d 1320 (Utah 1987); *Mascaro v. Davis*, 741 P.2d 938 (Utah 1987); *Payne ex rel. Payne v. Myers*, 743 P.2d 186 (Utah 1987); *McKee v. Williams*, 741 P.2d 978 (Utah Ct. App. 1987); *Galloway v. Mangum*, 744 P.2d 1365 (Utah 1987); *Davies v. Olson*, 746 P.2d 264 (Utah Ct.

App. 1987); *Kathy's Food Stores, Inc. v. Equitable Life & Cas. Ins. Co.*, 753 P.2d 501 (Utah 1988); *Williams v. Public Serv. Comm'n*, 754 P.2d 41 (Utah 1988); *OK Motors, Inc. v. Hill*, 762 P.2d 1102 (Utah Ct. App. 1988); *Redevelopment Agency v. Daskalas*, 785 P.2d 1112 (Utah Ct. App. 1989); *Wade v. Burke*, 800 P.2d 1106 (Utah Ct. App. 1990); *City Consumer Serv., Inc. v. Peters*, 815 P.2d 234 (Utah 1991); *Cornish Town v. Koller*, 817 P.2d 305 (Utah 1991); *Town of Manila v. Broadbent Land Co.*, 818 P.2d 2 (Utah 1991); *Peterson v. Peterson*, 818 P.2d 1305 (Utah Ct. App. 1991); *Quinn v. Quinn*, 830 P.2d 282 (Utah Ct. App. 1992); *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858 (Utah 1992); *Watson v. Watson*, 837 P.2d 1 (Utah Ct. App. 1992); *J.H. ex rel. D.H. v. West Valley City*, 840 P.2d 115 (Utah 1992).

#### COLLATERAL REFERENCES

**Brigham Young Law Review.** — Multiple Claims Under Rule 54(b): A Time for Reexamination?, 1985 B.Y.U. L. Rev. 327.

**Am. Jur. 2d.** — 5 Am. Jur. 2d Appeal and Error § 1009 et seq.; 20 Am. Jur. 2d Costs §§ 14, 26 to 36, 87 et seq.; 46 Am. Jur. 2d Judgments § 1.

**C.J.S.** — 4 C.J.S. Appeal and Error §§ 46 to 166; 20 C.J.S. Costs § 1 et seq.; 49 C.J.S. Judgments § 1.

**A.L.R.** — Attorney's personal liability for expenses incurred in relation to services for client, 15 A.L.R.3d 531; 66 A.L.R.4th 256.

Effect on compensation of architect or building contractor of express provision in private building contract limiting the cost of the building, 20 A.L.R.3d 778.

Recoverability under property insurance or insurance against liability for property damage of insured's expenses to prevent or mitigate damages, 33 A.L.R.3d 1262.

Dismissal of plaintiff's action as entitling defendant to recover attorney's fees or costs as "prevailing party" or "successful party," 66 A.L.R.3d 1087.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims, 66 A.L.R.3d 1115.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Running of interest on judgment where both parties appeal, 11 A.L.R.4th 1099.

Allocation of defense costs between primary and excess insurance carriers, 19 A.L.R.4th 107.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial, 29 A.L.R.4th 160.

Allowance of attorneys' fees in mandamus proceedings, 34 A.L.R.4th 457.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A.L.R.4th 694.

Obduracy as basis for state-court award of attorneys' fees, 49 A.L.R.4th 825.

Modern status of state court rules governing entry of judgment on multiple claims, 80 A.L.R.4th 707.

Recoverability of cost of computerized legal research under 28 USC § 1920 or Rule 54(d), Federal Rules of Civil Procedure, 80 A.L.R. Fed. 168.

Modern status of Federal Civil Procedure Rule 54(b) governing entry of judgment on multiple claims, 89 A.L.R. Fed. 514.

**Key Numbers.** — Appeal and Error ⇐ 24 to 135; Costs ⇐ 78 et seq., 195 et seq., 221 et seq.; Judgment ⇐ 1.

### Rule 55. Default.

#### (a) Default.

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

(b) **Judgment.** Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment against the state or officer or agency thereof.** No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(Amended effective Sept. 4, 1985.)

**Compiler's Notes.** — This rule is similar to Rule 55, F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

Damages.

Divorce action.

Failure to plead.

Judgment.

—Conduct of counsel.

—Default entry necessary.

—Failure to follow rule.

—Hearing on merits.

—Punitive damages.

Notice.

Setting aside default.

—Collateral attack.

—Direct attack.

—Discretion of court.

—Grounds.

—Excusable neglect.

—Judicial attitude.

—Movant's duty.

—Setting aside proper.

Time for appeal.

Cited.

**Damages.**

A default judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint. Nevertheless, it is still incumbent upon the nondefaulting party to establish by competent evidence the amount of recoverable damages and costs he claims. *Amica Mut. Ins. Co.*

*v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

There is no right to a jury trial on the issue of damages once default has been entered. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

**Divorce action.**

Defendant who failed to file answer in divorce action was not entitled to hearing or notice before entry of default divorce decree even though 90-day statutory period had not elapsed. *Heath v. Heath*, 541 P.2d 1040 (Utah 1975).

**Failure to plead.**

In an action for modification of the custody provision in a divorce decree, it was appropriate for the trial court to rule on appellee's petition, absent any responsive pleading, and to accept the allegations in the petition as true in resolving the threshold requirement of whether appellant's circumstances had materially changed; however, it does not follow that appellee's petition entitled her to relief. A trial court asked to render a judgment by default must first conclude that the uncontroverted allegations of an applicant's petition are, on their face, legally sufficient to establish a valid claim against the defaulting party. *Stevens v. Collard*, 180 Utah Adv. Rep. 19 (Ct. App. 1992).



Tab G

State Retirement Office v. Salt Lake County, 780 P.2d 813 (Utah 1989); Donahue v. Durfee, 780 P.2d 1275 (Utah Ct. App. 1989); Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452 (Utah Ct. App. 1989); G. Adams Ltd. Partnership v. Durbano, 782 P.2d 962 (Utah Ct. App. 1989); Chapman ex rel. Chapman v. Primary Children's Hosp., 784 P.2d 1181 (Utah 1989); Yoho Automotive, Inc. v. Shillington, 784 P.2d 1253 (Utah Ct. App. 1989); Hunt v. Hurst, 785 P.2d 414 (Utah 1990); Butterfield ex rel. Butterfield v. Okubo, 790 P.2d 94 (Utah Ct. App. 1990); Whatcott v. Whatcott, 790 P.2d 578 (Utah Ct. App. 1990); Village Inn Apts. v. State Farm Fire & Cas. Co., 790 P.2d 581 (Utah Ct. App. 1990); Madsen v. United Television, Inc., 797

P.2d 1083 (Utah 1990); Alford v. Utah League of Cities & Towns, 791 P.2d 201 (Utah Ct. App. 1990); Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah Ct. App. 1990); Gate City Fed. Sav. & Loan Ass'n v. Dalton, 808 P.2d 1061 (Utah 1991); City Consumer Serv., Inc. v. Peters, 815 P.2d 234 (Utah 1991); Rollins v. Petersen, 813 P.2d 1156 (Utah 1991); Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623 (Utah Ct. App. 1991); Kirk v. Division of Occupational & Professional Licensing, 815 P.2d 242 (Utah Ct. App. 1991); Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991); Hill v. Seattle First Nat'l Bank, 827 P.2d 241 (Utah 1992); Campbell v. State Farm Mut. Auto. Ins. Co., 840 P.2d 130 (Utah Ct. App. 1992).

#### COLLATERAL REFERENCES

Utah Law Review. — Attorneys' Fees in Utah, 1984 Utah L. Rev. 553.

Note, The Movant's Burden in a Motion for Summary Judgment, 1987 Utah L. Rev. 731.

Am. Jur. 2d. — 73 Am. Jur. 2d Summary Judgment §§ 16 to 19, 26 to 36, 41 to 44.

C.J.S. — 49 C.J.S. Judgments §§ 219 to 227.

A.L.R. — Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Reviewability of order denying motion for summary judgment, 15 A.L.R.3d 899.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Dead man's statute, use of evidence excludable under, to defeat or support summary judgment, 67 A.L.R.3d 970.

Liability in tort for interference with physician's contract or relationship with hospital, 7 A.L.R.4th 572.

Admissibility of oral testimony at state summary judgment hearing, 53 A.L.R.4th 527.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings, 53 A.L.R.4th 561.

Necessity of oral argument on motion for summary judgment or judgment on pleadings in federal court, 105 A.L.R. Fed 755.

Key Numbers. — Judgment ⇌ 178 to 190.

### Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to Chapter 33 of Title 78, U.C.A. 1953, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Compiler's Notes. — This rule is similar to Rule 57, F.R.C.P.

#### NOTES TO DECISIONS

Cited in Oil Shale Corp. v. Larson, 20 Utah 2d 369, 438 P.2d 540 (1968).

#### COLLATERAL REFERENCES

Am. Jur. 2d. — 22A Am. Jur. 2d Declaratory Judgments §§ 183, 186, 203 et seq.

C.J.S. — 26 C.J.S. Declaratory Judgments §§ 17, 18, 104, 155.

A.L.R. — Right to jury trial in action for

declaratory relief in state court, 33 A.L.R.4th 146.

Key Numbers. — Declaratory Judgment ⇌ 41, 42, 251, 367.

### Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

**Advisory Committee Note.** — Paragraph (d) is intended to remedy the difficulties suggested by *Thompson v. Ford Motor Co.*, 14 Utah 2d 334, 384 P.2d 109 (1963).

**Compiler's Notes.** — The subject matter of this rule is dealt with in Rules 58 and 79(a), F.R.C.P.

**Cross-References.** — Judgment against person dying after verdict or decision, not a lien on realty, § 78-22-1.1.

Judgment by confession authorized, § 78-22-3.

## NOTES TO DECISIONS

### ANALYSIS

Death of party.  
—During appeal.  
Other cases.  
—Unsigned minute entry.  
When entered.  
—Completion.  
—Formal judgment.  
—Notice to parties.  
—Filing.  
—Unsigned minute entry.  
Cited.

### Death of party.

#### —During appeal.

Where jury returned verdict for plaintiff but judge entered judgment notwithstanding the verdict for defendant, death of plaintiff during appeal did not abate appeal since court, under Subdivision (e) of this rule, could still enter judgment on verdict if judgment notwithstanding verdict were reversed. *Bates v. Burns*, 2 Utah 2d 362, 274 P.2d 569 (1954).

### Other cases.

#### —Unsigned minute entry.

An appeal from a summary judgment was dismissed where the record showed only an unsigned minute entry and no judgment or order signed by the judge. *Wisden v. City of Salina*, 696 P.2d 1205 (Utah 1985).

#### When entered.

#### —Completion.

#### —Formal judgment.

Whether plaintiff had right to have action dismissed upon payment of costs presented judicial question to be determined by court, so that where court ordered case dismissed and clerk entered "case dismissed" in register of actions but formal judgment had not been entered, action was still pending between parties. *Yusky v. Chief Consol. Mining Co.*, 65 Utah 269, 236 P. 452 (1925).

#### —Notice to parties.

Under this rule, a judgment is complete and

Tab H

Cited in *National Farmers Union Property & Cas. Co. v. Thompson*, 4 Utah 2d 7, 286 P.2d 249 (1955); *Holmes v. Nelson*, 7 Utah 2d 435, 326 P.2d 722 (1958); *Howard v. Howard*, 11 Utah 2d 149, 356 P.2d 275 (1960); *Nunley v. Stan Katz Real Estate, Inc.*, 15 Utah 2d 126, 388 P.2d 798 (1964); *Hanson v. General Bldrs. Supply Co.*, 15 Utah 2d 143, 389 P.2d 61 (1964); *James Mfg. Co. v. Wilson*, 15 Utah 2d 210, 390 P.2d 127 (1964); *Porcupine Reservoir Co. v. Lloyd W. Keller Corp.*, 15 Utah 2d 318, 392 P.2d 620 (1964); *Watson v. Anderson*, 29 Utah 2d 36, 504 P.2d 1003 (1973); *Nichols v. State*, 554 P.2d 231 (Utah 1976); *Edgar v. Wagner*, 572 P.2d 405 (Utah 1977); *Time Com. Fin. Corp. v. Brimhall*, 575 P.2d 701 (Utah 1978); *Anderton v. Montgomery*, 607 P.2d 828 (Utah 1980); *Miller Pontiac, Inc. v. Osborne*,

622 P.2d 800 (Utah 1981); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981); *Kohler v. Garden City*, 639 P.2d 162 (Utah 1981); *Pozzolan Portland Cement Co. v. Gardner*, 668 P.2d 569 (Utah 1983); *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983); *Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730 (Utah 1985); *Estate of Kay*, 705 P.2d 1165 (Utah 1985); *York v. Unqualified Washington County Elected Officials*, 714 P.2d 679 (Utah 1986); *King v. Fereday*, 739 P.2d 618 (Utah 1987); *Fackrell v. Fackrell*, 740 P.2d 1318 (Utah 1987); *Walker v. Carlson*, 740 P.2d 1372 (Utah Ct. App. 1987); *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989); *Paryzek v. Paryzek*, 776 P.2d 78 (Utah Ct. App. 1989); *Allred v. Allred*, 835 P.2d 974 (Utah Ct. App. 1992).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d New Trial §§ 11 to 14, 29 et seq., 187 to 191.

**C.J.S.** — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

**A.L.R.** — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in

case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

**Key Numbers.** — New Trial ⇐ 13 et seq., 110, 116.

### Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) 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 (7) 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), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

**Compiler's Notes.** — This rule is similar to Rule 60, F.R.C.P.

**Cross-References.** — Fee for filing motion to set aside judgment, § 21-1-5.

#### NOTES TO DECISIONS

##### ANALYSIS

"Any other reason justifying relief."  
 —Default judgment.  
 —Impossibility of compliance with order.  
 —Incompetent counsel.  
 —Lack of due process.  
 —Merits of case.  
 —Mistake or inadvertence.  
 —Real party in interest.  
 Appeals.  
 Clerical mistakes.  
 —Computation of damages.  
 —Correction after appeal.  
 —Date of judgment.  
 —Void judgment.  
 —Estate record.  
 —Inherent power of courts.  
 —Intent of court and parties.  
 —Judicial error distinguished.  
 —Order prepared by counsel.  
 —Predating of new trial motion.  
 Court's discretion.  
 Default judgment.  
 Effect of set-aside judgment.  
 —Admissions.  
 Fraud.  
 —Divorce action.  
 Form of motion.  
 Independent action.  
 —Constitutionality of taxes.  
 —Divorce decree.  
 —Fraud or duress.  
 —Motion distinguished.  
 Invalid summons.  
 —Amendment without notice.  
 Inequity of prospective application.  
 Jurisdiction.  
 Mistake, inadvertence, surprise or excusable neglect.  
 —Default judgment.  
 —Illness.  
 —Inconvenience.  
 —Merits of claim.  
 —Negligence of attorney.  
 —No claim for relief.  
 —Delayed motion for new trial.  
 —Failure to file cost bill.

—Failure to file notice of appeal.  
 —Nonreceipt of notice and findings.  
 —Trial court's discretion.  
 —Unemployment compensation appeal.  
 —Workmen's compensation appeal.  
 Newly discovered evidence.  
 —Burden of proof.  
 —Discretion not abused.  
 Procedure.  
 —Notice to parties.  
 Res judicata.  
 Reversal of judgment.  
 —Invalidation of sale.  
 Satisfaction, release or discharge.  
 —Accord and satisfaction.  
 —Discharging representative of estate from further demand.  
 —Erroneously included damages.  
 —Prospective application of judgment.  
 Timeliness of motion.  
 —Confused mental condition of party.  
 —Dismissal for lack of prosecution.  
 —Fraud.  
 —Invalid service.  
 —Judicial error.  
 —Jurisdiction.  
 —Mistake, inadvertence and neglect.  
 —Newly discovered evidence.  
 —Order entered upon erroneous assumption.  
 —"Reasonable time."  
 —Reconsideration of previously denied motion.  
 —Satisfaction.  
 Unauthorized appearance.  
 Void judgment.  
 —Basis.  
 —Lack of jurisdiction.  
 Cited.

##### "Any other reason justifying relief."

Subdivision (7) embodies three requirements: First, that the reason be one other than those listed in Subdivisions (1) through (6); second, that the reason justify relief; and third, that the motion be made within a reasonable time. *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982); *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Utah Ct. App. 1991).



