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Michael L. Hendry, Douglas Bassett, and Five "T"
Corporation v. Unidyn Financial Management
Corporation Douglas Longfellow, G. Lawrence
Critchfield, Paul Christensen, Wespac Holdings,
L.L.C., Ken Morgan, Western Real Estate
Investment Trust, Inc., and Does 1-10 : Brief of
Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL L. HENDRY, DOUGLAS
BASSETT, AND FIVE "T"
CORPORATION,

Plaintiffs and Appellees,

v.

G. LAWRENCE CRITCHFIELD,

Defendant and Appellant.

BRIEF OF APPELLEES

Court of Appeals No. 20040772-CA

**APPEAL FROM AN ORDER DENYING DEFENDANT'S MOTION TO SET
ASIDE THE JUDGMENT UNDER RULE 60(b)
OF THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY,
HONORABLE ROGER S. DUTSON, DISTRICT JUDGE**

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STATEMENT OF JURISDICTION

The Utah Courts of Appeals has appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2004).

ISSUES PRESENTED FOR REVIEW

Issue 1: Did the trial court err in denying G. Lawrence Critchfield's (hereafter "Critchfield") Rule 60(b) post-judgment motion, insofar as it was premised on the grounds of mistake.

Determinative Law: Utah R. Civ. P. 60(b); Fisher v. Bybee, 2004 UT 92, 104 P.3d 1198; Ostler v. Buhler, 957 P.2d 205, 206 (Utah 1998); Katz v. Pierce, 732 P.2d 92, 93 (Utah 1996); Franklin Covey Client Sales Inc. v. Melvin, 2000 UT App. 110, ¶ 8, 2 P.3d 451.

Standard of Review: "A trial court has discretion in determining whether a movant has shown [Rule 60(b) grounds], and this Court will reverse the trial court's ruling only when there has been an abuse of discretion." Ostler v. Buhler, 957 P.2d 205, 206 (Utah 1998).

"The outcome of Rule 60(b) motions are rarely vulnerable to attack. We grant broad discretion to trial court's rule 60(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review." Fisher v. Bybee, 2004 UT 92, ¶ 7, 104 P.3d 1198.

“That some basis may exist to set aside the default does not require the conclusion that the court abused its discretion in refusing to do so when facts and circumstances support the refusal.” Katz v. Pierce, 732 P.2d 92, 93 (Utah 1996).

“An appeal or motion for new trial, rather than a [Rule] 60(b) motion, is the proper avenue to redress mistakes of law committed by the trial judge, as distinguished from clerical mistakes, caused by inadvertence, especially where the [Rule] 60(b) motion has been filed after the time for appeal has expired.” Franklin Covey Client Sales Inc. v. Melvin, 2000 UT App. 110, ¶ 21.

“Even where an order on a Rule 60(b) motion is appealable, the appeal is narrow in scope. An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. The appeal does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought. Appellate review of Rule 60(b) orders must be narrowed in this manner lest Rule 60(b) become a substitute for timely appeals.” Franklin Covey Client Sales Inc. v. Melvin, 2000 UT App. 110, ¶ 19 (quoting 12 James Wm. Moore et al. Moore’s Federal Practice § 60.68[3] (3d ed. 1999)).

Issue 2: Did the trial court err in denying Critchfield’s Rule 60(b) post-judgment motion, insofar as it was premised on the grounds of inadvertence or excusable neglect.

Determinative Law: Utah R. Civ. P. 60(b); Fisher v. Bybee, 2004 UT 92, 104 P.3d 1198; Ostler v. Buhler, 957 P.2d 205, 206 (Utah 1998); Katz v. Pierce, 732 P.2d 92, 93 (Utah 1996).

Standard of Review: “A trial court has discretion in determining whether a movant has shown [Rule 60(b) grounds], and this Court will reverse the trial court’s

ruling only when there has been an abuse of discretion.” Ostler v. Buhler, 957 P.2d 205. 206 (Utah 1998).

“The outcome of Rule 60(b) motions are rarely vulnerable to attack. We grant broad discretion to trial court’s rule 60(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review.” Fisher v. Bybee, 2004 UT 92, ¶ 7, 104 P.3d 1198.

“That some basis may exist to set aside the default does not require the conclusion that the court abused its discretion in refusing to do so when facts and circumstances support the refusal.” Katz v. Pierce, 732 P.2d 92, 93 (Utah 1996).

Issue 3: Did the trial court err in awarding damages against Critchfield without making adequate findings to support the award of damages.

Determinative Law: Utah R. Civ. P. 59(1)(6).

Standard of Review: This issue would be an issue of law reviewed for correctness. However, this issue was not raised in Critchfield’s Rule 60(b) Motion, and thus, was not preserved for appeal. Moreover, mistakes of law are properly the subject of a Rule 59 Motion, and would have been required to be filed within 10 days of the entry of Judgment. Thus, even if this issue had been briefed in conjunction with Critchfield’s Rule 60(b) Motion, it was not timely filed, and thus, was not preserved for appeal.

DETERMINATIVE PROVISIONS

This case is governed by Utah R. Civ. P. 60(b), which reads in pertinent part:

(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; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken[.]

Utah R. Civ. P. 60(b) (2005).

Utah R. Civ. P. 59 is also determinative with respect to addressing the propriety of certain issues within the context of this appeal. This Rule reads in pertinent part:

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes . . . [:]

(a)(1) Irregularity in the proceedings of the court[.]

. . .

(a)(5) Excessive or inadequate damages[.]

(a)(6) Insufficiency of the evidence[.]

(a)(7) Error in law.

(b) *Time for motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment[.]

Utah R. Civ. P. 59 (2005).

The rule regarding withdrawal of counsel applicable during the time-period relevant to this lawsuit was as follows:

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 record¹ 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 withdrawal shall include a statement by the attorney that no motion has been 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, 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 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[.]

Utah R. Judicial Admin. 4-506 (2003). This rule was repealed effective November 1,

2003, after the trial in this matter. A copy of this Rule is attached as Exhibit “A” hereto.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

As reflected in the record, the final judgment in this case was the resolution of a lengthy and drawn out process, with defendant G. Lawrence Critchfield (hereafter “Critchfield”) repeatedly failing to appear for scheduled depositions or to timely respond to discovery requests. [R. 827-871.] For a long period of time, Plaintiffs and Plaintiffs’ counsel went out of their way to accommodate Critchfield, who was allegedly not in good health, by way of multiple continuances and reschedulings. [Id.]. However, at some point, Plaintiffs decided not to schedule the continuance of Critchfield’s deposition and proceed to trial. [Id.].

A trial was scheduled during a May 15, 2003, telephonic conference with the Court, in which Critchfield’s attorney participated. [R. 872-890]. Critchfield terminated his attorney approximately one month after the trial was scheduled. [Id.]. Shortly thereafter, Critchfield’s attorney filed a “Withdrawal of Counsel,” a “Motion to Allow Withdrawal of Counsel,” and an “Order Allowing Withdrawal of Counsel.” [See Docket entries dated 6-19-03 and 6-20-03, attached as Addendum “A” to Appellant’s Brief]. A certificate of service indicates all three pleadings were mailed to Critchfield. [See Exhibit C to Appellees’ Brief]. On about June 16, 2003, counsel for defendant WESPAC Holdings served a Notice to Appear or Appoint. [R. 872-890]. Critchfield admits he received such Notice. [R. 777-809]. Critchfield also admits that he received a “trial brief” and “subpoena” prior to trial, while he was out of town. [Id.].

On October 1, 2003, plaintiffs' attorney and plaintiffs, and attorney for defendant WESPAC Holdings, together with a subpoenaed witness, appeared at Court for trial. Neither Critchfield nor his attorney appeared. A trial was held and judgment issued on or about November 12, 2003. [See Docket entry dated 10-1-03, attached as Addendum "A" to Appellant's Brief].

The primary issue presented on appeal is whether the trial court abused its discretion in denying Critchfield's Rule 60(b) post-judgment motion for relief from judgment premised upon mistake or inadvertence. As argued below, the "third" issue, whether there were adequate findings to support the judgment in this matter, was not preserved for appeal, and would not have been the proper subject of a Rule 60(b) motion in any event.

II. STATEMENT OF FACTS

1. The first deposition of Critchfield was scheduled for January 20, 2000. [R. 827-871].

2. On May 4, 2001, after numerous continuances and reschedulings to accommodate Critchfield, the first deposition was held. [Id.].

3. To accommodate Critchfield, the deposition was cut short and the continuation of the deposition was scheduled for May 22, 2001, at 9:30 a.m. [Id.].

4. On May 22, 2001, at 9:00 a.m., Critchfield's attorney called to cancel this deposition. The appearance of plaintiffs' counsel was documented by the court reporter. [Id.].

5. Thereafter, plaintiffs' counsel attempted numerous times to schedule the continuation of the deposition, but were unsuccessful due to Critchfield's failure to appear or repeated requests for continuance. [Id.].

6. On May 15, 2003, attorney for plaintiffs, attorney for defendants WESPAC Holdings, L.L.C., and Paul Christensen, and attorney for Critchfield, Wesley Sine, participated in a telephone conference with the Court. [R. 842-890].

7. During the May 15, 2003, telephonic status and scheduling conference, Judge Dutson set a bench trial for October 1, 2, and 3, 2003. [Id.].

8. On or about June 12, 2003, plaintiffs' counsel received a letter from Wesley Sine (through counsel for defendant WESPAC Holdings, indicating that Critchfield had terminated Sine but would have an attorney present at Critchfield's deposition, scheduled for June 16, 2003. [Id.]. A copy of the letter from Wesley Sine is attached as Exhibit "B" hereto.

9. On or about June 12, 2003, Timothy W. Blackburn received a Withdrawal of Counsel, Motion to Withdraw and Order of Withdrawal from attorney Sine. [R. 827-871]. A copy of such pleadings are attached as Exhibit "C" hereto.

10. The Withdrawal of Counsel, Motion to Withdraw and Order of Withdrawal were filed with the court. [See Docket entries dated 6-19-03 and 6-20-03, attached as Addendum "A" to Appellant's Brief].

11. On or about June 16, 2003, Derek Langton served Critchfield with a Notice to Appear or Appoint Counsel. [R. 872-890]. A copy of the Notice to Appear or Appoint is attached as Exhibit "D" hereto.

12. Critchfield did in fact receive this Notice. [R. 777-809] . A copy of Critchfield's Affidavit in support of Motion to Set Aside Judgment is attached as Exhibit "E" hereto.

13. Although Critchfield contacted attorney Alan Mecham, Mr. Mecham informed Critchfield that he was not able to enter an appearance on Critchfield's behalf. [R. 777-809] . [See also Exhibit "E" hereto].

14. On or about September 24, 2003, defendant WESPAC Holdings served its "Trial Brief" on Critchfield. [See Docket entry dated 9-24-03, attached as Addendum "A" to Appellant's Brief].

15. On or about September 25, 2003, Plaintiffs served Mr. Critchfield with a copy of a "Subpoena to Doug Longfellow," indicating that Longfellow's testimony was requested on October 1, 2003. [R. 827-871].

16. Critchfield did receive the trial brief and subpoena but was out of town. [R. 777-809] . [See also Exhibit "E" hereto].

SUMMARY OF ARGUMENT

There is no basis to reverse the decision of the trial court in this case. The trial court acted within its discretion in refusing to set aside the judgment on a Rule 60(b) Motion. Critchfield failed to demonstrate to the trial court that there was a "mistake" or "inadvertence" justifying setting aside the judgment, or that Critchfield exercised diligence in failing to appear at trial. Finally, the issue of whether the findings of fact support the judgment in this matter was not preserved for appeal and should not be addressed by the Court of Appeals.

ARGUMENT

A. (ISSUE 1). A MISTAKE OF LAW IS NOT THE PROPER SUBJECT OF A RULE 60(b) MOTION

Critchfield argues that the trial court erred in refusing to set aside the judgment after it was alerted to the fact by way of Critchfield's Rule 60(b) Motion, that it "mistakenly assumed it had ruled on the Motion to Withdraw as Counsel; therefore, the required time to appoint new counsel never began." Appellant's Brief at 10.¹

This argument fails for the reason that the proper procedure to alert the court to such a judicial "mistake" or "irregularity in the proceedings" is by way of a Rule 59 Motion rather than a Rule 60(b) Motion. The Utah Supreme Court recently discussed the narrow scope of a Rule 60(b) Motion in the case of Fisher v. Bybee, 2004 UT 92, 104 P.3d 1198, wherein the appellant sought to set aside a judgment based on the trial court's mistaken interpretation of the law. In Fisher, "[the appellant] insisted that the trial court must have been mistaken within the meaning of rule 60(b)(1) when it failed to provide him with the notice that the orders extending the judgment had been entered, and when it granted the Fishers' motion in contravention of section 78-12-22 of the Utah Code[.]" Id.

¶ 5. Further,

[t]he trial court agreed with Mr. Bybee that section 78-12-22 required that a separate suit be initiated to renew a judgment and that the Fishers had proceeded improperly when they renewed their judgment by motion. The trial court declined, however, to set aside the order renewing the judgment, holding that Judge Harding's

¹ Critchfield characterizes the first issue as a "question of law," "reviewed for correctness, one involving the Court's interpretation of a statute, rule or ordinance. Appellant's Brief at 2.

decision to grant the motion and to enter the order was not a “mistake” within the meaning of Rule 60(b)(1).

Id. ¶ 6. The Utah Supreme Court affirmed the decision of the trial court that the “mistake” at issue was not the proper subject of a Rule 60(b)(1) Motion. The Court reasoned:

Relying on the guidance from the Seventh Circuit Court of Appeals, our court of appeals pared back its definition of judicial “mistake” to include only the correctness of “a minor oversight, such as the omission of damages, which in most cases would be obvious.” . . . We find the court of appeals’s explication of rule 60(b)(1) “mistake” sound, and we therefore endorse it.

Id. ¶ 11 (citing Franklin Covey Client Sales, Inc. v. Melvin, 2000 UT App 110, ¶ 19, 2 P.3d 451.). The Supreme Court further reasoned:

In addition, by clarifying that the term “mistake,” as used in rule 60(b)(1), has general application to the activities of counsel and parties, but seldom extends to judicial decisions, we bring logical harmony to this component of the rule. The other forms of unintentional conduct that rule 60(b)(1) deems eligible to be considered as grounds to set aside a judgment—inadvertence, surprise, and excusable neglect—are aptly suited to describe circumstances which might befall counsel or parties. . . . Those afflicted by these circumstances are also best suited to explain them to a court in a motion for relief under rule 60(b)(1). The same is not true of the inadvertence, surprise, or neglect, which might influence the decision of judges.

Id. ¶ 12. In sum, a legal “mistake” wherein the court mistakenly thought appellant’s counsel had withdrawn, or that the court was mistaken in allowing counsel to withdraw without ruling on the motion, is the proper province of Rule 59(a)(1) or (a)(7), which must be filed within ten (10) days of judgment, and not one which falls under a Rule 60(b) Motion. See also Franklin Covey Client Sales, Inc. v. Melvin, 200 UT App 110 (an

appeal or motion for new trial, rather than a 60(b) motion, is the proper way to redress mistakes of law committed by the trial court. Parties should not be allowed to escape the consequences of their failure to timely appeal by addressing questions of law to the trial court for reconsideration.). Accordingly, this issue was not timely filed and should not be disturbed on appeal.

Even were the court's "mistake" properly before the Court on a Rule 60(b) motion, the trial court did not abuse its discretion in failing to set aside the judgment on this basis.

Critchfield cites Sperry v. Smith, 694 P.2d 581 (Utah 1984), in support of his argument that the trial court's decision should be reversed. In Sperry, the trial court proceeded with trial despite the fact that after defendant's counsel withdrew, plaintiff's counsel failed to file a Notice to Appear or Appoint. The Utah Supreme Court reversed the trial court's decision denying a motion to vacate the judgment because it found that the trial court failed to follow a rule of court in not requiring plaintiff's counsel to prepare a Notice to Appear or Appoint. Id. at 583. However, the instant case is clearly distinguishable from Sperry, because in this case, counsel for co-defendant did send out a Notice to Appear or Appoint, and Critchfield did in fact receive that notice. [R. 777-809] [See also Exhibit "E" hereto].

Critchfield argues that the Notice to Appear or Appoint was defective because his counsel never effectively withdrew. The facts of Sperry are relevant to this point. In Sperry, plaintiff's counsel made the same argument in defense of the fact that it had failed to file a Notice to Appear or Appoint. Id. at 582. The Utah Supreme Court found

that defendant's counsel had "substantially complied" with the rule: he filed the appropriate pleadings, and did in fact notify his client of his withdrawal. Id.

In the instant case, Critchfield's counsel filed pleadings with the court to effectuate his withdrawal pursuant to Rule 4-506. [R. 827-871, and Exhibit "C" hereto]. Perhaps unclear whether a motion was required, he filed a Motion to Allow Withdraw of Counsel and an Order Allowing Withdrawal of Counsel in addition to a Withdrawal of Counsel. [R. 827-871, and Exhibit "C" hereto]. Pursuant to the rule in effect at the time of trial, a motion is required when there is a pending motion or a certificate of readiness has been filed. Utah R. Jud. Admin. 4-506 (1). Critchfield's counsel noted on his Withdrawal that there was no pending motion and a certificate of readiness had not been filed, although a trial was scheduled. He also stated in his motion that "[d]efendants have terminated Wesley F. Sine as their attorney. From the tenor of the termination letter, it would be impossible for Wesley F. Sine to continue as counsel." In addition, he stated that a trial was scheduled in October 2003. Critchfield avers that he did not receive these pleadings.² However, as a practical matter, there is no question that Critchfield was aware his counsel had withdrawn, because Critchfield terminated his counsel under conditions where it would have been impossible for counsel to continue his representation. The Court was also aware that counsel had withdrawn after a trial had been scheduled, because Critchfield's counsel was present at the scheduling of the trial

² The Certificate of Service signed by Wesley F. Sine, indicates that all of these pleadings were mailed on June 12, 2003, to G. Lawrence Critchfield, Western Real Estate Investment.

with the Court. Finally, the court acknowledged at trial that Critchfield was not represented by counsel and that a Notice to Appear or Appoint had been sent.

The trial court clearly has discretion to allow withdrawal of counsel. Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081, 1087 (7th Cir. 1982) (“The grant or denial of an attorney's motion to withdraw in a civil case is a matter addressed to the discretion of the trial court and will be reversed on appeal only when the trial court has abused its discretion.”) Thus, in this case, there was “substantial compliance” with Rule 4-506, and Critchfield’s counsel did effectively withdraw. A “mistake,” if any, was harmless and should have been overcome in any event by some diligence on Critchfield’s part to ensure he was adequately represented by counsel or otherwise make an appearance before the court.

In sum, the issue of whether the requirements of Rule 4-506 were met is a question of law or a “procedural irregularity” that should have been addressed by a Rule 59 motion filed within ten days of judgment. However, even if the issue was properly brought under Rule 60(b), where the Withdrawal of Critchfield’s counsel and the Notice to Appear or Appoint were served 3 ½ months prior to trial, and where Critchfield terminated his own counsel under circumstances making it impossible for the counsel to continue his representation, any failure of the Court in not signing the Order of Withdrawal was a technicality not arising to the level of a “mistake” justifying setting aside the judgment. Thus, the Court’s refusal to set aside the judgment on this basis was well within the discretion of the trial court and should be affirmed.

B. (ISSUE 2). CRITCHFIELD’S ACTIONS IN THIS CASE, OR LACK THEREOF, DO NOT FALL WITHIN THE “INADVERTANCE” PRONG OF RULE 60(b)

Critchfield’s failure to appoint new counsel, and failure to appear at the trial in this matter, do not rise to the level of “inadvertence, or excusable neglect” contemplated by Rule 60(b). Inadvertence and excusable neglect have been used by Utah courts interchangeably, but both require some form of diligence or reasonable action on the part of the party asserting such excuse, to justify the court’s taking action on the basis thereof.

For example, in the context of setting aside a stipulation, the Utah Supreme Court stated that “a court may set aside a stipulation for inadvertence or justifiable cause ‘if the mistake is not due to the failure to exercise due diligence and it could not have been avoided by the exercise or ordinary care.’” Rivera v. State Farm Mut. Automobile Ins. Co., 2000 UT 36, ¶ 11, 1 P.3d 539.

Utah courts have also defined “excusable neglect” as it is used in Rule 60(b) to require some form of due diligence.

Rule 60(b)(1) confers discretion upon a trial court judge to set aside a judgment for “excusable neglect.” We have heretofore defined “excusable neglect” as the exercise of “due diligence” by a reasonably prudent person under similar circumstances. Even if we were to consider any argued distinction between “good cause” and “excusable neglect,” which we expressly decline to do, the undisputed facts here do not support any claim that the employer diligently acted in a reasonably prudent manner in failing to file its response until three weeks after it was due.” With knowledge that the notice was forthcoming and a response was necessary, the employer’s neglect or mistake was not excusable.

Mini Spas, Inc. v. Industrial Commission, 733 P.2d 130, 132 (Utah 1987) (citation omitted).

In the context of setting aside a default judgment, the Utah Supreme Court has stated: “[A] party trying to set aside a default judgment ‘must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.’” Heath v. Mower, 597 P.2d 855, 859 (Utah 1979).

Critchfield has not established that the trial court abused its discretion in refusing to set aside the judgment on the basis of “inadvertence or excusable neglect.” Critchfield has not established that he exercised due diligence, or that his failure to appear at trial was for reasons beyond his control. A three-day trial in this matter was scheduled during a telephonic pre-trial counsel with the Court, with Critchfield’s attorney, Wesley Sine, present, prior to Sine’s withdrawing as counsel. [R. 842-890]. Mr. Sine did not withdraw as Critchfield’s counsel until approximately one-month after the trial was scheduled. [R. 842-890, and Exhibit “B” hereto]. There was plenty of time for Sine to inform Critchfield of the trial dates. Moreover, on or about June 16, 2003, attorney for WESPAC Holdings sent Critchfield a Notice to Appear or Appoint. [R. 842-890]. By his own admission, Critchfield did receive such Notice. [R. 777-809, and Exhibit “E” hereto.] There was more than enough time for Critchfield to obtain new counsel prior to the October 1, 2003, trial date. Although Appellant’s counsel argues that the Notice to Appear or Appoint was defective because there had not been a technical withdrawal, this should not have had a practical effect on Critchfield who had no notice of any alleged defect, and who had himself terminated his own counsel. Although Critchfield contacted friends, some of whom were attorneys, to look into matters for him, one specifically informed him he would not be able to enter an appearance in the case. [R. 777-809, and

Exhibit “E” hereto.] Critchfield never did hire other counsel to enter an appearance on his behalf, or appear *pro se* prior to trial.

Additionally, a week before trial, Plaintiffs sent Critchfield a copy of a Subpoena, indicating that Doug Longfellow’s testimony was required in court October 1, 2003. [R. 827-871]. Defendant WESPAC Holdings also sent Critchfield a “Trial Brief” approximately one week before trial. [See Docket entry dated 9-24-03, attached as Addendum “A” to Appellant’s Brief]. Critchfield admitted to having received such documents although he was out of town. [R. 777-809, and Exhibit “E” hereto.] Receiving such documents should have sparked at least curiosity by a *pro se* litigant. If Critchfield was out of town at the time these documents were sent to him, given that he never obtained a new attorney, this does not constitute excusable neglect. The facts of this case are similar to the case of Valley Leasing v. Houghton, 661 P.2d 959, 960 (Utah 1983). There, the Utah Supreme Court affirmed the trial court’s refusal to set aside the judgment based on excusable neglect where defendant failed to appear at trial but sent his wife. The Court reasoned:

In the instant case, defendant had notice for nearly a year prior to trial that his counsel had withdrawn. Counsel had advised him to hire new counsel or to appear on his own behalf at trial, yet he saw fit to send his wife instead. He made no showing that he was in any way prevented from appearing at trial by circumstances over which he had no control. Mere inconvenience or the press of personal business affairs is not deemed as an excuse for failure to appear at trial.

Id. (emphasis added).

Critchfield argues as an excuse that his failure to appear at trial was in part due to the failure of his prior counsel, Wesley Sine, who was present at a telephonic conference call with the Court when the trial was scheduled, and who remained counsel to Critchfield for nearly one month after the trial was scheduled. Critchfield's then-counsel's failure to notify his own client of the trial dates is certainly not an excusable event that warrants the setting aside of the Judgment in this matter. The case of Airkem Intermountain, Inc. v. Parker, 513 P.2d 429 (Utah 1973), is directly on point in this regard. In Parker, the Utah Supreme Court affirmed the trial court's refusal to set aside a judgment on the basis of excusable neglect. The Court noted that "the movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control." Id. at 431. In finding that the trial court did not abuse its discretion, the Supreme Court reasoned:

In the instant action, defendant was informed in February that the matter would probably be set for trial in early autumn; he also knew of the irregular hours during which he was present in his home. His failure to contact his counsel under such circumstances could reasonably be considered as not constituting due diligence by the trial court. Defense counsel was informed in early May of the trial setting in September, his belated efforts ten days prior to trial to contact his client, particularly when there is no allegation as to the means of communication utilized, might reasonably be considered as not indicating due diligence. Since defendant's conduct was not entirely inexcusable, the trial court did not abuse its discretion by refusing to relieve defendant of the judgment.

Id. (emphasis added). Accordingly, the trial court in the instant case was justified in not considering the failings of Critchfield's counsel an "excusable event" warranting setting aside the judgment. See also Parke-Chapley Constr. Co. v. Cherrington, 865 F.2d 907,

913 (7th Cir. 1989) (stating, “attorney errors such as preoccupation with other matters, irresponsibility of counsel, tactical decisions and misreading of procedural rules” do not rise to the level of “excusable neglect”).

In sum, Plaintiffs should not be prejudiced by the inexcusable conduct of Critchfield’s prior counsel, the failure of Critchfield’s alleged safety net of friends to exercise diligence in checking on the status of trial, or of Critchfield’s own failure to timely checking his mail while he was out of town. The facts and circumstances support the trial court’s refusal to set aside the judgment on the basis of “excusable neglect,” and accordingly, the trial court’s decision should be affirmed.

C. (ISSUE 3). THE ISSUE OF THE ADEQUACY OF THE COURT’S FINDINGS WAS NOT PRESERVED FOR APPEAL

In order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. . . . This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. For a trial court to be afforded an opportunity to correct the error "(1) the issue must be raised in a timely fashion[,] (2) the issue must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority." Issues that are not raised at trial are usually deemed waived.

438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (citations omitted)

(emphasis added).

Critchfield argues on appeal that the findings of fact are not sufficient to support the judgment against Critchfield. However, this issue was not raised as part of Critchfield’s Rule 60(b) Motion to Set Aside the Judgment. Appellant sets forth certain “facts” in his “Statement of Facts” which appear to be “relevant” to the issue of the

adequacy of the findings, and refers to some of these facts in his argument on Issue 3. See Appellant's Brief pp 7-8, 14. The record citation given by Appellant for these "facts" is "R. 777-809," listed in the docket Index prepared by the Second District Court in conjunction with this appeal, as: "Affidavit of G. Lawrence Critchfield in support of motion for relief from judgment." However, the "facts" attributed to this Affidavit are not, in fact, set forth in this Affidavit, rather, they were set forth in the Affidavit submitted in support of Appellant's Reply Brief, listed in the Court Index at 925-944. These facts were used in response to Plaintiffs' argument that Defendant never even attempted to argue that he had a "meritorious defense" as required in a Motion to Set Aside the Judgment. This prong is only reached if the threshold questions of mistake, and inadvertence are met, which the trial court determined he did not meet. See State ex rel. Utah State Department of Social Servs. v. Musselman, 667 P.2d 1053, 1055-1056 (Utah 1983).

Even where an order on a Rule 60(b) motion is appealable, the appeal is narrow in scope. An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. The appeal does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought. Appellate review of Rule 60(b) orders must be narrowed in this manner lest Rule 60(b) become a substitute for timely appeals.

Franklin Covey Client Sales Inc. v. Melvin, 2000 UT App. 110, ¶ 19, 2 P.3d 451

(quoting 12 James Wm. Moore et al. Moore's Federal Practice § 60.68[3] (3d ed. 1999)).

At best, Critchfield set forth certain facts in his Reply Memorandum before the trial court, presumably to support the contention that he would have had a "meritorious defense" to Plaintiffs' allegations were he allowed to put on evidence as such, as required

under Rule 60. See State ex rel. Utah State Department of Social Servs. v. Musselman, 667 P.2d 1053, 1055-1056 (Utah 1983). However, Critchfield's argument on appeal that: "The trial court erred when it awarded damages against Critchfield personally and awarded punitive damages without making adequate findings to support the conclusion of fraud and inadequate findings to support the amount of punitive damages awarded," was not preserved below. This argument, attacking the damages and the sufficiency of the evidence, would have been the subject of a Rule 59(a) Motion ("excessive or inadequate damages," (a)(5), "insufficiency of evidence to justify verdict" (a)(6)), which was required to be brought within ten days of the judgment. As such, this issue was not timely raised, and is not properly before the Court on appeal, and does not provide a basis for reversal or remand.

Moreover, even if Appellant has somehow preserved this argument for appeal, Appellant has failed to marshal the evidence in support of the trial court's findings.

To successfully challenge an ultimate finding of fact, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." An appellant "must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." Moreover, an appellant may not simply review the evidence presented at trial, nor may she "re-argue the factual case [she] presented in the trial court." If an appellant argues that no evidence supports a factual finding, the burden to marshal does not then shift to the appellee; rather, the appellee may prove that the appellant did not meet her marshaling burden by presenting a "scintilla" of evidence supporting the district court's finding.

Parduhn v. Bennett, 2005 UT 22 , ¶ 25, 112 P.3d 495 (citations omitted).

In this case, in addition to the testimony of Michael Hendry and Douglas Longfellow, there was documentary evidence introduced to support the trial court's findings, including, among other things, a Trust Deed Note signed by G. Lawrence Critchfield individually [Trial Exhibit 1]; and a letter from a New York law firm acknowledging receipt of Plaintiffs' \$150,000.00, and indicating that such funds were to be dispersed rather than held. Critchfield acknowledged this letter individually and on behalf of Western Real Estate Investment Trust [Trial Exhibit 11]. Such evidence is sufficient to support the trial court's findings. See Parduhn v. Bennett, 2005 UT 22 , ¶ 25, 112 P.3d 495.

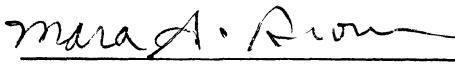
Accordingly, there is no basis to reverse or remand this case for the reason that the damages awarded by the Court were not supported by adequate findings. Thus, Appellant's appeal must be denied with respect to this issue.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the trial court's denial of Critchfield's Rule 60(b) Motion for Relief from Judgment, and affirm the decision of the trial court in all other respects.

DATED this 1st day of September, 2005.

VAN COTT, BAGLEY, CORNWALL & McCARTHY



Timothy W. Blackburn
Mara A. Brown
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of September, 2005, I caused two copies of the foregoing ***BRIEF OF APPELLEES*** to be mailed in the United States mail, first class postage prepaid to the following:

Steve S. Christensen
HIRSCHI, CHRISTENSEN, PLLC
136 East South Temple, Suite 850
Salt Lake City, Utah 84111-3156



LIST OF EXHIBITS

- A. Utah R. Jud. Admin. 4-506 (2003).
- B. Letter from Wesley Sine [R. 837-891, page 2 of Exhibit “M” thereto].
- C. Withdrawal of Counsel, Motion to Withdraw and Order of Withdrawal from Attorney Sine [R. 837-891, and Docket entries dated 6-19-03 and 6-20-03, attached as Addendum “A” to Appellant’s Brief].
- D. Notice to Appear or Appoint [R. 872-890].
- E. Critchfield’s Affidavit in Support of Motion to Set Aside Judgment [R. 777-809] .

Tab A

augmentation of attorney fees awarded pursuant to this rule, it shall consider the attorney time spent prior to the entry of judgment, the amount of attorney 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 withdrawal shall include a statement by the attorney that no motion has been

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. *Loperto 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:

(1) At the time of depositing with the Clerk of the Court any proceeds from a trustee's sale in accordance with Utah Code Ann. Section 57-1-29, the trustee shall file an affidavit with the clerk setting forth the facts of the deposit and a list of all known claimants, including known addresses. The clerk shall notify the listed claimants within 10 days of receiving the affidavit of deposit.

(2) Any claimant may then file a petition for adjudication of priority to these funds and request a hearing before the court. The petitioner may then file a

Tab B

— HENDRY VS. UNIDYN FIN. MGMT. CORP. —

Attorney and Counselor At Law
IBM BUILDING SUITE 355- 420 East South Temple Street, Salt Lake City, Utah 84111
Tel: (801) 364-5125 Fax: (801) 521-0732

COMMUNICATION

DATE: June 12, 2003
TO: Derek Langton
PARSONS BEHLE & LATIMER
201 South Main Street, suite 1000
Salt Lake City, Utah 84145-0898
FAX NO: 801 536 6111
FROM: Wesley F. Sine
REGARDING: HENDRY VS. UNIDYN FINANCIAL MANAGEMENT CORP.
TOTAL PAGES: (Including Cover Sheet): 1
MESSAGE:

Dear Derek:

I have not received a Notice of Deposition of Mr. Critchfield although I have calendered for June 16, 2003 and have faxed a communication to Mr. Critchfield's last known Fax number informing him of it. I have called his telephone number but have not been able to speak with anyone.

I just received a fax from him which terminated me as legal counsel in this matter. I am told that someone else will handle the Deposition for him.

Yours truly,

Wesley F. Sine

Tab C

Wesley F. Sine #2967
Attorney For Defendant
IBM Building Suite 355
420 East South Temple
Salt Lake City, Utah 84111
Telephone 801 364-5125
Fax: 801 521-0732

COPY

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

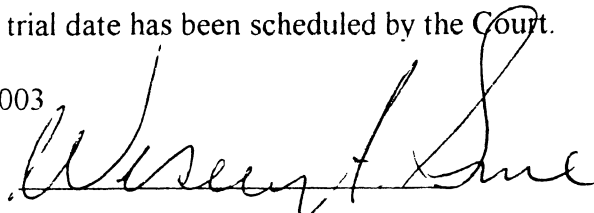
STATE OF UTAH

MICHAEL L. HENDRY, DOUGLAS]	
BASSETT, & FIVE "T" CORPORATION]	
]	
Plaintiffs,]	WITHDRAWL OF COUNSEL
]	
vs.]	
]	
UNIDYN FINANCIAL MANAGEMENT]	Civil # 990906082
CORPORATION, DOUGLAS]	
LONGFELLOW, G LAWRENCE]	
CRITCHFIELD, PAUL CHRISTENSEN]	
WESTERN REAL ESTATE INVEST-]	
MENT TRUST, and DOES 1-10]	
]	Judge Roger S Dutson
Defendants]	

COMES now Wesley F Sine attorney for G Lawrence Critchfield and Western Real Estate Investment and hereby withdraws from the case as he has been terminated as legal counsel by Mr. Critchfield both for himself and for Western Real Estate Investment

No motions are pending which have not been ruled upon and a notice of readiness for trial has not been filed although a trial date has been scheduled by the Court.

Dated this 12th day of June 2003



Wesley F Sine #2967
Attorney For Defendant
IBM Building Suite 355
420 East South Temple
Salt Lake City, Utah 84111
Telephone 801 364-5125
Fax 801 521-0732

**IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH**

MICHAEL L HENDRY, DOUGLAS
BASSETT, & FIVE "T" CORPORATION

Plaintiffs,

vs

UNIDYN FINANCIAL MANAGEMENT
CORPORATION, DOUGLAS
LONGFELLOW, G LAWRENCE
CRITCHFIELD, PAUL CHRISTENSEN
WESTERN REAL ESTATE INVEST-
MENT TRUST, and DOES 1-10

Defendants

**MOTION TO ALLOW
WITHDRAWAL OF COUNSEL**

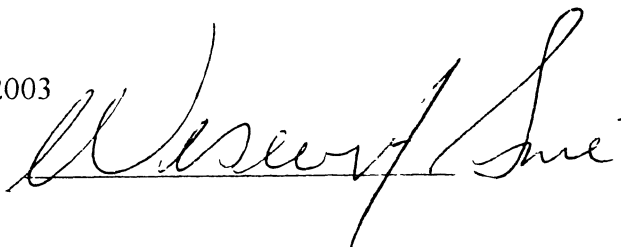
Civil # 990906082

Judge Roger S Dutson

COMES now Wesley F Sine and MOVES the Court for permission to withdraw as attorney for G Lawrence Critchfield and Western Real Estate Investment as Defendants have terminated Wesley F Sine as their attorney From the tenor of the Termination Letter, it would be impossible for Wesley F Sine to continue as counsel

The case presently has been scheduled for trial in October 2003 although no Notice of Readiness for trial has been filed. There are no pending motions to Sine's knowledge with are pending

Dated this 12th day of June 2003



Wesley F. Sine #2967
Attorney For Defendant
IBM Building Suite 355
420 East South Temple
Salt Lake City, Utah 84111
Telephone: 801 364-5125
Fax: 801 521-0732

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

MICHAEL L HENDRY, DOUGLAS]	
BASSETT, & FIVE "T" CORPORATION]	
Plaintiffs,]	ORDER ALLOWING
]	WITHDRAWAL OF COUNSEL
vs.]	
]	
UNIDYN FINANCIAL MANAGEMENT]	Civil # 990906082
CORPORATION, DOUGLAS]	
LONGFELLOW, G LAWRENCE]	
CRITCHFIELD, PAUL CHRISTENSEN]	
WESTERN REAL ESTATE INVEST-]	
MENT TRUST, and DOES 1-10]	
Defendants.]	Judge Roger S. Dutson

THE COURT, good cause appearing, hereby Orders that Wesley F Sine be allowed to withdraw as Counsel for G Lawrence Critchfield and Western Real Estate Investment in the above titled case.

Dated this day of June 2003

BY THE COURT

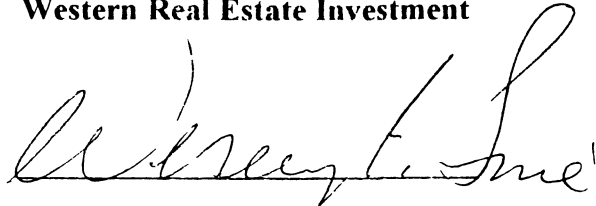
CERTIFICATION OF MAILING

I here by certivy that a true and correct copy of the above Withdrawal of Counsel. Motion
To Allow Withdrawal of Counsel, and Order Allowing Withdrawal of Counsel were sent
this 12th day of June 2003 postage prepaid to

Derek Langton
PARSONS BEHLE & LATIMER
201 South Main Street, suite 1000
Salt Lake City, Utah 84145-0898

Timothy Blackburn
Van Cott Bagley
2404 Washington Blvd. #900
Ogden Utah 84401

G Lawrence Critchfield
Western Real Estate Investment

A handwritten signature in black ink, appearing to read "G. Lawrence Critchfield", written over a horizontal line.

Tab D

2003 JUN 17 P 1:56

SECOND DISTRICT COURT

DEREK LANGTON (4068)
SHANE D. HILLMAN (8194)
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

Attorneys for Defendant WESPAC Holdings, LLC

IN THE SECOND JUDICIAL DISTRICT COURT

WEBER COUNTY, STATE OF UTAH

MICHAEL L. HENDRY, DOUGLAS BASSETT,
and FIVE "T" CORPORATION,

Plaintiffs,

vs.

UNIDYN FINANCIAL MANAGEMENT
CORPORATION; DOUGLAS LONGFELLOW;
G. LAWRENCE CRITCHFIELD; PAUL
CHRISTENSEN, WESPAC HOLDINGS, L.L.C.;
KEN MORGAN; WESTERN REAL ESTATE
INVESTMENT TRUST, INC.; AND DOES 1-10,

Defendants.

**NOTICE TO APPEAR OR APPOINT
COUNSEL**

Case No. 990906932

Judge Roger S. Dutson


TO: LAWRENCE G. CRITCHFIELD
40 North State Street, Suite 3G
Salt Lake City, Utah 84103

Pursuant to Rule 4-506(4) of the Utah Code of Judicial Administration, **NOTICE IS**
HEREBY GIVEN to said defendant, Lawrence G. Critchfield, that he has the responsibility to

retain another attorney or appear in person in the above-captioned case. Such notice is given as the result of the Withdrawal of Counsel filed by Wesley F. Sine, dated June 12, 2003. Pursuant to said Rule 4-506(4), no further proceedings shall be held in this matter until twenty (20) days from the date of this notice, unless said Lawrence G. Critchfield waives the time requirement or unless otherwise ordered by the Court.

DATED this 16th day of June, 2003.

PARSONS BEHLE & LATIMER


DEREK LANGTON
SHANE D. HILLMAN
Attorneys for Defendant WESPAC Holdings, LLC

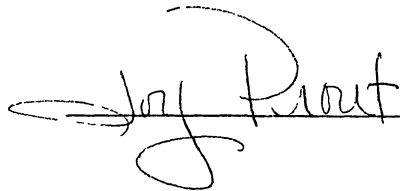
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2003, I caused to be mailed. first class, postage prepaid, a true and correct copy of the foregoing **NOTICE TO APPEAR OR APPOINT COUNSEL** to:

Timothy W. Blackburn
Mara A. Brown
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
2404 Washington Boulevard
Ogden, Utah 84401
Telephone: (801) 394-5783
Fax: (801) 627-2522

Wesley F. Sine
IBM Building, Suite 355
420 East South Temple
Salt Lake City, Utah 84111

Lawrence G. Critchfield
40 North State Street, Suite 3G
Salt Lake City, Utah 84103



A handwritten signature, appearing to read "Jay R. Rount", is written over a horizontal line.

Tab E

Steve S. Christensen (U.S.B. No. 6156)

HIRSCHI CHRISTENSEN, PLLC

136 East South Temple, Suite 850

Salt Lake City, Utah 84111-3156

Telephone: (801) 322-0593

Facsimile: (801) 322-0594

Attorneys for Defendants Western Real Estate Investment Trust, Inc. and G. Lawrence Critchfield

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

MICHAEL L. HENDRY, DOUGLAS
BASSET, AND FIVE "T"
CORPORATION,

Plaintiffs,

vs.

UNIDYN FINANCIAL
MANAGEMENT CORPORATION,
DOUGLAS LONGFELLOW, G.
LAWRENCE CRITCHFIELD, PAUL
CHRISTENSEN, WESPAC
HOLDINGS, L.L.C., KEN MORGAN,
WESTERN REAL ESTATE
INVESTMENT TRUST, INC., and
DOES 1-10,

Defendants.

**AFFIDAVIT OF G. LAWRENCE
CRITCHFIELD IN SUPPORT OF
MOTION FOR RELIEF FROM
JUDGMENT**

Civil No. 990906932

Honorable Roger S. Dutson

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

G. LAWRENCE CRITCHFIELD, being first duly sworn upon oath, deposes and says that he is an adult resident of Salt Lake County, State of Utah, and that:

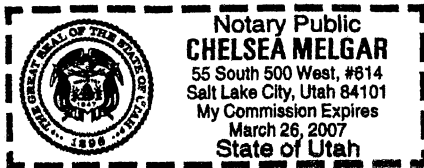
1. Upon the commencement of this lawsuit, I hired Wesley Sine (“Sine”) to represent me.
2. I received a Notice to Appear or Appoint Counsel dated June 16, 2003 from co-defendant’s counsel, Mr. Langton. This notice is attached hereto as Exhibit “A”.
3. This notice contained no statement that a trial date had been set.
4. I did not ever receive a notice to appear or to appoint new counsel from any of the Plaintiffs.
5. I neither received a copy of a notice to withdraw nor any motion for permission to withdraw from Mr. Sine.
6. After I received Mr. Langton’s Notice to Appear or Appoint Counsel, I called Alan Mecham of the law firm of Mackey, Price and Thompson in Salt Lake City, Utah, an attorney, who had represented me in business matters in the past.
7. Mr. Mecham told me that he would make some calls to ascertain the status of the case, but he stated that he was not able to enter an appearance to represent me.

8. While I was out of town at the end of September and beginning of October, 2003, I received word from my wife that a trial brief and a subpoena had come in the mail.
9. Neither document my wife received had a trial date on it.
10. I contacted a friend of mine, Richard Christensen, to look in to the status of trial in this case while I was out of town.
11. After the fact, I learned that the court had proceeded with trial that next day after my wife contacted me about the trial brief and subpoena.
12. At no time did Sine, the court clerk or anyone else notify me or otherwise advise me that a trial on this lawsuit had been scheduled in this case.
13. The court's docket is attached hereto as Exhibit "B".
14. I did not receive the letter of the court dated July 1, 2003 indicating the date trial was set. This letter, copied to Mr. Sine, is attached hereto as Exhibit "C".
15. The court's minutes are attached hereto as Exhibit "D".
16. The court's judgment dated November 13, 2003 is attached hereto as Exhibit "E".

DATED this 30th day of January, 2004.

G. Lawrence Critchfield
G. Lawrence Critchfield

SUBSCRIBED AND SWORN to before me this 30th day of January,
2004.



Chelsea Melgar
Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of February, 2004
a true and correct copy of the above AFFIDAVIT was mailed postage prepaid to the
following:

Timothy W. Blackburn
Mara A. Brown
Attorneys for Michael L. Hendry
Douglas Bassett, and Five "T" Corp.
2404 Washington Boulevard
Ogden, Utah 84401

