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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 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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

Appellees/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,

Appellants/Defendants.

Appellate Case No. 20040772-CA

Civil No. 990906932
Honorable Roger S. Dutson

Oral Argument Requested
Priority 15

APPELLANT'S REPLY BRIEF

APPEAL FROM SUMMARY JUDGMENT

IN THE THIRD JUDICIAL DISTRICT COURT OF

SLAT LAKE COUNTY, STATE OF UTAH
The Honorable Roger S. Dutson, District Judge

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Civil No. 990906932
Honorable Roger S. Dutson

ARGUMENT

This appeal is brought pursuant to the due process clause of the fifth amendment of the U.S. Constitution and rules of fundamental justice and fair play. A court may "relieve a party ... from a final judgment" because of "mistake, inadvertence, surprise, or excusable neglect." Utah R. Civ. P. 60(b). To obtain relief from a default judgment, a defendant must show: (i) "that the judgment was entered against him through excusable neglect (or any other reason specified in rule 60(b)), (ii) "that his motion to set aside the judgment was timely," and (iii) "that he has a meritorious defense to the action." Erickson v. Schenkers Int'l Forwarders,

Inc., 882 P.2d 1147, 1148 (Utah 1994) (citing State ex rel. Utah State Dep't of Soc. Servs. v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983) (plurality opinion)). Hernandez v. Baker, 104 P.3d 664, 514 Utah Adv. Rep. 23, 2004 UT App 462 (2004).

Mr. Critchfield has demonstrated in his Motion to Set Aside Judgment that there was a factual mistake by the court and counsel in this action which gave rise to excusable neglect by Mr. Critchfield since he was not informed about the trial date even after he made inquiry. See Motion to Set Aside Default, Memorandum of Points and Authorities, Affidavit of Lawrence Critchfield at par. 12 and Affidavit of Alan Mecham, R. at 760-809 (Counsel notes for the court that Mr. Mecham's Affidavit does not appear on the Index provided by the court of appeals, however it is reflected as filed in the District Court file on February 3, 2004).

Plaintiffs/Appellees, represented by VanCott Bagley, et al., filed a complaint on October 8, 1999 in the trial court below. Mr. Critchfield, appellant, was represented throughout the litigation by Wesley Sine. Another defendant, WESPAC Holdings, LLC, was represented at trial by Parsons, Behle & Latimer but does not participate in this appeal. After this case had been litigated for 3-1/2 years, a request was made for a pretrial conference. The court scheduled the telephonic conference a month later on May 13, 2003. (Notice of this pretrial conference is not in the record; Appellant will make a motion to the court to add this to his Addenda as D). However, Mr. Critchfield was neither told that the conference had been requested nor that during the telephone conference, the court had scheduled a trial date. See Affidavit of Lawrence Critchfield at

par. 8-11, R. At 777-809. On June 17, 2003 a Notice to Appear and Appoint was filed and served on Mr. Critchfield.

On June 19, 2003 a Motion to Allow Withdrawal of Counsel was filed by Wesley Sine. This motion was served on both Van Cott, Bagley, et al., and Parsons, Behle & Latimer. However, Mr. Critchfield did not receive a copy of the motion. None of the parties filed any responsive pleadings to the Motion to Allow Withdrawal of Counsel. None of the parties filed a Notice to Submit the Motion to Allow Withdrawal of Counsel for decision. The court failed to rule on the Motion to Allow Withdrawal of Counsel, but mistakenly assumed at trial that Mr. Sine had withdrawn. This mistake resulted in a complete lack of notice to Mr. Critchfield of the trial setting, even after through his business attorney, he inquired of counsel for both parties on July 7, 2003. See Affidavit of Alan Mecham attached as Appellant's Addendum A. At trial the court entered judgment for over \$400,000.00 on a corporate obligation against Mr. Critchfield personally, including attorneys fees and punitive damages. (See the February 1, 2005 Notice of Filing Pleadings for the Docketing Statement Exhibit A; This judgment is not attached to the record on appeal; Appellant will seek by motion to add this document as Appellant's Addenda E).

In the unusual instance where all of the safeguards of notice fail, as was the case in this matter, Mr. Critchfield should be entitled to relief under rule 60 (b) of the Utah Rules of Civil Procedure. This section provides for relief from a judgment taken by mistake, inadvertence, misrepresentation of counsel (whether negligent or intentional) or for any

other reasons that would make the judgment unjust. This appeal is brought because no notice of the trial was given to Mr. Critchfield by the court or by its officers and because the court thereafter abused its discretion by refusing to grant relief from an extremely large judgment against Mr. Critchfield pursuant to Mr. Critchfield's timely Motion to Set Aside Judgment under Utah Rules of Civil Procedure Rule 60 (b)(1), (3) and (6) (2004).

In Appellees Brief, Appellees neither allege that the Motion to Set Aside Judgment was not timely nor that Mr. Critchfield had a meritorious defense in the action.

ISSUE ONE: Pursuant to Rule 60(b)(1), the Court erred when it failed to set aside the judgment in this case which was rendered after the court mistakenly assumed that Mr. Critchfield's attorney had withdrawn when this mistaken assumption resulted in a lack of notice to Mr. Critchfield of trial.

Generally the standard of review of a Rule 60(b) motion is under an abuse of discretion standard. Franklin Covey Client Sales, Inc. V. Melvin, 2000 UT App 110, Par. 9, 2 P. 3d 451. However, as the court found in Oseguera v. Farmers Ins. Exch., 68 P.3d 1008, 467 Utah Adv. Rep. 29, 2003 UT App 46 (Ut App. 2003), there are "situations where 'the result [under rule 60(b)] is foreordained and it would be an abuse of discretion . . . to deny relief.'" Id. (Citation omitted). In the present case, Mr. Critchfield asserts that the lack of notice of trial to him due to confusion of the court and counsel as to the procedural standing of the case gives rise to such a case where it would be an abuse of discretion to deny him relief.

Mr. Critchfield has lived at the same address throughout the proceeding. He was

served at that address initially. All of the parties had Mr. Critchfield's address, at least as of June 17, 2003, as indicated by the service of the Notice to Appear and Appoint.

Attached as Appellee's Addendum D. After June 20, 2003, the attorneys assumed that Mr. Sine had withdrawn as counsel; perhaps including, as Appellee argues, Mr. Sine. Mr. Sine had submitted his Motion to Withdraw as Counsel with an Order. It appears that Mr. Sine was not sent any ruling denying his motion. It is likely that he would assume the motion is granted in the absence of a denial. However, Mr. Sine's improper withdrawal and the lack of notice of the scheduled trial to Mr. Critchfield severely prejudiced Mr. Critchfield.

The only pleadings filed between June 20, 2003 and October 1, 2003 were sent by both adverse attorneys in the matter to Mr. Critchfield directly but not to Mr. Sine as would be required by Rule 5(b)(1) of the Utah Rules of Civil Procedure. However, the clerk's office did not make this same assumption. The clerk's office sent a request for trial briefs on July 1, 2003. This correspondence was directed to Mr. Sine, not Mr. Critchfield. The result was that Mr. Critchfield received no service of his attorney's notice of withdrawal, no notice of the trial from his attorney and no correspondence regarding the trial from the court. The mailings to him from counsel came just a few days before trial when Mr. Critchfield was out of town.

In the event that an attorney, such as Mr. Sine in this case should fail to notify his client of a pretrial conference or a trial setting before withdrawing as counsel, clients are provided procedural safeguards set up by the Utah Rules of Civil Procedure to make sure

that they receive notice of trial dates.

First, rule 4-506 of the Rules of Judicial Administration, the predecessor of Rule 74 of the Utah Rules of Civil Procedure, requires an attorney who seeks to withdraw to give notice of any pending trial dates.

Second, any withdrawal of counsel after a certificate of readiness has been filed, which presumably includes a request for a pretrial conference as was the case herein, must be done pursuant to noticed motion and court permission.

Third, the officers of the court in this matter had some responsibility under Utah Rules of Professional Conduct Rule 3.3(a)(1) Candor toward the Tribunal to inform the court of the following: First the proposed Notice of Withdrawal of Mr. Sine which neither contained a certificate of mailing to his specific address, nor an explicit notice of the trial date; second, the lack of any ruling on the Motion to Allow Withdrawal of Counsel; third, that on July 7, 2003, Alan Mecham, esq., had spoken with both the secretary for Mara Brown at Van Cott, Bagley, et al. and Derek Langton of Parsons, Behle & Latimer on behalf of Mr. Critchfield to ascertain the status of the litigation and that neither firm had either disclosed any information about a trial date or made any attempt to follow up with Mr. Critchfield or Mr. Mecham; fourth that both counsel had wrongly assumed that the Motion to Withdraw was granted and had failed to serve a copy of the subpoena notice or trial brief to Mr. Sine; and fifth and finally, that neither counsel as a matter of professional courtesy (which should be of such importance, especially with pro se litigants, to the smooth operation of the courts, to the image of the legal profession and to

the responsibility of the legal system to administer laws fairly) had forwarded to Mr. Critchfield a courtesy copy of the court's letter to counsel dated July 1, 2003, fourteen days after the Notice to Appear and Appoint.

Mr. Critchfield does not raise these points to argue that counsel have violated the Rules of Professional Conduct. Rather, Mr. Critchfield strongly argues that the system of justice failed to give him notice of a trial date in this case despite numerous procedural safeguards. This failure was due to the oversights of counsel to give the court notice of the above cited failings. The failure was also due to the apparent oversight of the court in assuming it had granted a Motion to Withdraw when it had not. This oversight resulted in the lack of notice of the trial to Mr. Critchfield which, absent the court's error, would at least have come through the court's request for trial briefs on July 1, 2003. It appears that even though the court is not sending notices to Mr. Critchfield, the court presumes that Mr. Critchfield was given notice of the trial. Therefore, the court proceeded with trial in the absence of Mr. Critchfield to his substantial detriment.

The factual mistake of the court as to whether Mr. Critchfield's attorney had withdrawn, placed Mr. Critchfield in a void. On the one hand the court appears to assume that Mr. Critchfield's attorney successfully withdrew on or about June 16, 2003 and that appropriate notice to appear counsel was given. On the other hand, because the Motion to Withdraw as Counsel was still pending, the clerk's office of the court continued to send correspondence to Mr. Critchfield's attorney, Mr. Sine, who had filed the Notice of Withdrawal. See Appellee's Addendum C. If Mr. Critchfield is going to be held

responsible for representing himself before the court, he should also be entitled to copies of the correspondence from the court in the action.

Appellee argues that Mr. Critchfield's case has asserted a mistake of law. However, Mr. Critchfield argues that the Court's mistake at trial which gave rise to the Motion to Set Aside Judgment was a mistake of fact. This mistake is documented in the trial minutes on October 1, 2003 at the outset of trial. See the Docket for this date attached as Appellant's Addendum A. On page 10 of the Appellees brief footnote 1, Appellee claims that Mr. Critchfield "characterizes the first issue as a question of law, reviewed for correctness, involving the Court's interpretation of the statute, rule or ordinance". Any mistake of law being alleged in this appeal by Critchfield was made in the court's ruling on the Motion to Set Aside Judgment. The citations to the court on the issue of mistake by the Appellee relate to mistakes of law at trial and are not relevant to the issue before the Court. Rule 60(b)(1) contemplates the availability of relief when factual mistakes are made, as in this case.

The factual mistake in this case was not harmless. Rather the mistake went to the heart of due process. As a result of the mistake, the court's request for a trial brief went to Mr. Sine instead of Mr. Critchfield. The court was not informed that Mr. Critchfield had not received the Notice of Withdrawal of Counsel. Mr. Critchfield had no notice of trial.

Mr. Critchfield did not assert in his brief that the court had made a mistake in interpreting Rule 4-506 of The Utah Rules of Judicial Administration. If so, the Motion to Set Aside Judgment would have been a Rule 59 motion. The case of Fisher v. Bybee, 2004 UT 92,104 P.3d 1198, involved a mistake of law on the trial court level and is not relevant

to the argument raised by the Mr. Critchfield on appeal. Rather, Mr. Critchfield asserts that the Court properly understood Rule 4-506 but mistakenly believed that Mr. Sine's Motion to Withdraw had been ruled on.

Appellee next argues that the Court's decision in Sperry v. Smith, 694 P.2d 581 (UT 1984) is distinguishable from the present case. In Sperry, the Court reversed the trial court's decision denying a Motion to Vacate Judgment. However, Sperry is very factually similar to this case. Both this case and Sperry regard clients who did not receive adequate notice of proceedings because of noncompliance with Rule 4-506. In Sperry, the attorney withdrew properly but the adverse party failed to file and serve a Notice to Appear or Appoint. The appellate court held that the Sperry court had not followed its own rules and had given no explanation justifying the failure. Id. Similarly, the court in this case, due to its own mistaken assumption, either failed to direct its correspondence to Mr. Critchfield after the filing of a Notice of Withdrawal of Counsel or a Notice to Appear and Appoint had been filed (The court's letter is not in the Index of the Record; Appellant will submit a motion to add the letter to the record or to supplement its Addenda to include this letter as Addendum F) or the court failed to recognize at trial that Mr. Sine's Motion was still pending, had not been ruled on and that there was confusion as to the status of representation of Mr. Critchfield as indicated by the failure of counsel to provide a copy of their trial briefs and trial subpoenas to Mr. Sine. Either way, Mr. Critchfield did not get notice of the trial because of the court's mistaken assumed that it had ruled on the Motion to Allow Withdrawal of Counsel.

On the other hand, Appellee cites the court to Sperry at page 582 for the proposition that the Court found that the defense attorney named McCallister “substantially complied” with the rule for withdrawal as attorney. However, there is a significant difference between the withdrawal of attorney in this case and that of Sperry. This case involves a Motion for Withdrawal as attorney by Mr. Sine after trial had been requested by counsel and set by the court. Whereas, in Sperry only a Notice of Withdrawal was required. Further, in Sperry, McCalister had mailed a copy of his Notice of Withdrawal to counsel and sent a letter notifying his client of his withdrawal. Therefore everyone was on notice. In this case, even if Appellee’s argument that Mr. Critchfield was anticipating a withdrawal were accepted, the court clerk was not on notice of the withdrawal and did not send the trial correspondence to Mr. Critchfield. This disconnect failed to give Mr. Critchfield notice of trial.

Mr. Critchfield had participated fully as a Defendant in this action for over three years. He had answered the complaint and had counsel present at every step of the proceeding until after the trial date was set. The only hearing Mr. Critchfield missed was trial itself. The only reason Mr. Critchfield was not present was due to the failure of notice. Therefore it would be fair and equitable for the court to set aside the judgment against Mr. Critchfield and permit him to defend himself at a fair trial on the merits.

Appellee’s suggest that the Appellant Court should assume that the Trial Court granted permission to withdraw on the day of trial because Judge Dutson was aware that Wesley Sine had been present at the trial setting conference and that he was not present at the time of trial. Appellee states “the Court was also aware that counsel had withdrawn after

a trial had been scheduled”. See page 13-14 of Appellee’s Brief. However, this statement is incorrect. The Court assumed that counsel had withdrawn and moved on with trial under that mistaken assumption. In fact counsel had not withdrawn and the Court had not ruled on the Motion to Allow Withdrawal of Attorney. Therefore, the Notice to Appear or Appoint was premature because it gave notice of an event that had not occurred. Therefore it only created confusion—the court clerk believing there was no withdrawal and the attorneys believing the withdrawal had occurred.

Because the failure of compliance with the court rules cause a failure of notice to Mr. Critchfield of the trial in this case, the error caused by a factual mistake of counsel and the court was not harmless. Therefore relief should be granted to Mr. Critchfield under Rule 60 (b)(1).

ISSUE TWO: Even if the appellate court does not find a mistake justifying relief, the failure of notice in this case which was not cured by Mr. Critchfield’s reasonable efforts to ascertain the status of the proceeding do show excusable neglect by Mr. Critchfield in this case.

Appellee argues that any ambiguity in the proceedings could have been resolved by additional effort on Mr. Critchfields part. However, Mr. Critchfield did make reasonable effort.

Mr. Critchfield exercised reasonable diligence. First, after receipt of the Notice to Appear and Appoint, Mr. Critchfield asked his business attorney, Alan Mecham to inquire into the status of the matter. See Affidavit of Alan Mecham at Appellant’s Addendum B.

Mr. Mecham called Mr. Langton, the attorney who sent the Notice of Appear or Appear, and asked him the status of the pending litigation. Mr. Mecham was told that the deposition had not been reset. See Appellant's Addendum B. Mr. Mecham was not given any further information by the attorney, including there was no mention that a trial had been set. See Appellant's Addendum B. From Mr. Mecham's report, Mr. Critchfield would believe that the only pending matter before the Court was a deposition date that had not been noticed. Mr. Critchfield had reasonably attempted to follow up with this matter and was given no direction or assistance by the attorney who was seeking the deposition and no information from Appellee's attorney's office.

Mr. Critchfield heard nothing on the case until the end of September, 2003. Appellee seems to argue that the mere passage of time should have cured the mistake in this case. At page 14 of Appellee's Brief, Appellee argues that because three and a half months passed any failure of the Court was a technicality. If this were a case of numerous documents were being filed and served on Mr. Critchfield which suggested an approaching trial, this argument may have had more strength.

However, it was commonplace in this case for there to be no activity for periods longer than 2-1/2 months. This case was litigated for 3-1/2 years prior to trial being set. Between the dates of 10/3/01 and 1/17/03, the only pleadings filed in the case were on 2/1/02, 2/20/02 and 5/14/02. See Index of the Record. This case had been nearly stagnant for the year and a half before Mr. Critchfield's attorney was asked to withdraw. In this case, the Court had had no filing for over three months after the Withdrawal of Counsel on June

20, 2003. The only filings were immediately before trial and included a Subpoena, which did not specify it was for a trial, and a Trial Brief for an unspecified date. The lack of activity of this case gave no effective notice to Mr. Critchfield that a trial was near.

Second, upon notice from his wife that a trial brief had come in the mail, Mr. Critchfield asked his friend Richard Christensen to check into the status of this case. Mr. Christensen found that the case had been tried in the absence of Mr. Critchfield earlier the same day. See Affidavit of Lawrence Critchfield at par. 8-11, R. At 777-809.

The response of counsel to Mr. Mecham's inquiry was only misleading. Had counsel pointed out the failure of the clerk to copy Mr. Critchfield on the request for briefing or just mentioned that the case was set for trial in 90 days, Mr. Critchfield would have had some notice of trial. Counsel could have given a courtesy copy of the trial notice to Mr. Critchfield when they saw no notice in the Notice of Withdrawal or if they had just mentioned the upcoming trial date. The attorneys were the ones who knew a trial was coming. They also could see from the papers that there was no notice to Mr. Critchfield as required by the rules.

It is note worthy that there was not one effort made by Appellees in this case to give Mr. Critchfield any notice of the pending trial or to make sure that the Court ruled on the motion for Withdrawal of Counsel or that there was a corrected Notice of Withdrawal of Counsel indicating the trial date. There was not even an informal letter to Mr. Critchfield from Appellees in this case to give him notice of the trial date. Mr. Critchfield could reasonably expect that if a trial were pending the adverse attorney would let him know, especially when Mr. Mecham called to ascertain the status of the proceedings. Mr.

Critchfield's efforts in this matter are not disputed. It was reasonable for Mr. Critchfield to assume that if his business attorney called and inquired as to the status of the matter, that he would be given a full disclosure rather than a partial disclosure which occurred in this case.

In the Statement of Fact, Appellee suggests that Mr. Critchfield had not cooperated with having his deposition taken. However, Appellee fully deposed Mr. Critchfield on May 4, 2001, two years before there was a trial set in this matter. On page 123 of the deposition at pages 11 and 12, Mr. Blackburn states "That's all the questions I have." (This deposition is not in the record, but Appellant will move the court to allow Appellant to supplement the record and add it as Addendum G). The deposition of Mr. Critchfield was to be continued so that Mr. Langton could ask questions. However, this was the deposition Mr. Critchfield inquired about on July 7, 2003 and was told it had not been set. Therefore it appears that counsel elected not to go forward with it. Mr. Langton's client is not participating in this appeal. Therefore there can be no claim that the deposition of Mr. Critchfield prejudiced the Appellees in any way.

In footnote 2 of the bottom of page 13 of Appellee's Brief, Appellee argues that Wesley Sine's proof of service indicates the name of G. Lawrence Critchfield. However, the Proof of Service indicates no address to which such a notice was delivered and Mr. Critchfield received no Notice of Withdrawal of Counsel or a Motion to Withdraw as Counsel from Mr. Sine. See Affidavit of Lawrence Critchfield, par. 5, R. 777-809. There was no suggestion to Mr. Critchfield that a trial was approaching.

Appellee rests its entire argument of Notice of Trial on a Subpoena that was sent to

Mr. Critchfield by Appellee and a Trial Brief sent by another party. However, these documents were sent only one week before the trial date when Mr. Critchfield was not in town. There is no basis to put blame on Mr. Critchfield for not checking his mail when he was not in town, especially when he was not anticipating any significant notices to come.

Appellee's claim that there was sufficient notice of trial to Mr. Critchfield the day before trial when he was out of town is unsupported by the law. As demonstrated by the facts in case, Mr. Critchfield was not able to respond to the mailing soon enough to find out that the trial was scheduled the very day he asked Richard Christensen to check on the status of the matter. The factual mistake of the court could have been corrected had counsel brought it to the attention of the Court that the Motion to Withdraw had never been ruled upon. Absent the information of counsel to Mr. Critchfield or the court, Mr. Critchfield's failure to appear at trial should be deemed excusable.

In the alternative, the failure of counsel to bring the pending motion to the Courts attention amounted to misrepresentation or other misconduct of an adverse party which would also afford relief under Rule 60(b)(3).

Admittedly, the attorneys knew how to reach Critchfield. There was no need to give a Notice of Change of Address to the court. Mr. Critchfield did not change addresses. The failure of notice of the trial being sent to Mr. Critchfield was due to the confusion of the court and the court file which was an issue beyond Mr. Critchfield's control.

The Trial Court abused its discretion by denying the Motion to Set Aside Judgement when the basic tenants of due process were not met in this case due to a factual mistake by

the trial court and similar mistakes by both adverse parties by failing to give notice to Mr. Critchfield that a trial was approaching.

The Appellee argues that the failure was the failure of Mr. Sine. However, had Mr. Sine's Motion to Withdraw as Counsel come before the Court, the Court itself would have sent notice to Mr. Critchfield that his attorney had withdrawn and trial was approaching. Mr. Sine's failure was in his failure to file a Notice to Submit his Motion to Allow Withdrawal of counsel. However, any party can submit another parties' motion for decision. Therefore, any error in the failure to submit the Motion to Allow Withdrawal of Counsel must be shared by all counsel. The failure of the court to rule on the withdrawal is significant primarily because it prevented proper notice of the trial to Mr. Critchfield.

After reasonable inquiry of both adverse attorneys, Mr. Critchfield was given no notice of trial in this case. In this case Mr. Critchfield used due diligence to ascertain the status of the lawsuit filed against him by Plaintiff. Had Mr. Critchfield known that a trial was pending he would have used more diligence to obtain a new attorney. However, when the case appeared to be stagnant it was reasonable for Mr. Critchfield to be less diligent in obtaining counsel. This is especially true since in reality Mr. Sine had not yet withdrawn. Due diligence does not require a Defendant to prosecute an action. The real failure in this case was the failure of any notice to Mr. Critchfield from the Appellees. The Appellees were in the best position to see the defects in the notices. Appellees had the responsibility to prosecute this action.

This case is distinguishable from *Valley Leasing v. Houghton*, 661 P.2d 959, 960

(Utah 1983). In that case the party clearly had notice because he sent his wife. In this case, Mr. Critchfield did not even know about trial until it had already passed. Mr. Critchfield was not absent because trial was inconvenient in this case, he was absent due to a failure of notice.

Critchfield, especially after participating in this litigation for several years, is entitled to notice under the Utah Rules of Civil Procedure when the court sets a trial of the matter. When he exercised due diligence, he is entitled to full disclosure from counsel. Failure to give disclosure is a legitimate basis for a finding of excusable neglect by Mr. Critchfield. This court should reverse the trial court's denial of the Motion to Set Aside Judgment.

ISSUE THREE: The trial court committed error when it gave no explanation as to the reasons or the basis for its decision denying the Motion to Set Aside Judgment.

Appellee does not dispute in its reply brief that, if the judgment were set aside, Mr. Critchfield would have a meritorious defense in the trial court action. Appellee's assertions under Appellant's issue three go only to the question of whether the adequacy of the trial court's factual findings were preserved for appeal.

On this point it appears that Appellee is confused by Appellant's brief. Appellant apologizes if the issue was not clear. However, the assertions under issue three are intended to address the failure of the trial court in its ruling on the Motion to Set Aside Judgment, not the findings of fact at trial. In the 2004 case of Hernandez v. Baker, 104 P.3d 664, 514 Utah Adv. Rep. 23, 2004 UT App 462 (2004), the court of appeals held that a motion to set aside judgment pursuant to Rule 60(b) must show three factors: excusable neglect, a timely filing

and a meritorious defense. Id. In Hernandez, the court address the meritorious defense but was silent on the first two issues. Id. The court of appeals vacated and remanded that case in part because the trial court had failed to rule on each element of the motion specifically. Id.

Mr. Critchfield argues in his Issue Three that the court's order on Motion to Set Aside Judgment lacks specificity. It states only that on the basis of "the findings of fact and conclusions of law herein" [referring to findings and conclusions at trial], the motion is hereby denied. It is undisputed that the Motion to Set Aside Judgment was timely and that Mr. Critchfield has asserted a meritorious defense. Therefore the denial should not be for those reasons. However, the court does not state whether the motion is being denied because there was no mistake, no excusable neglect, no lack of disclosure by the attorneys or no demonstration that the judgment against Mr. Critchfield personally is unjust.

Because the appellate court has no guidance as to the basis for the denial in this case, it is difficult for the appellate court to know even what standard of review to apply. The appellate court has applied the abuse of discretion standard of review of some determinations of excusable neglect while determination of a meritorious defense has been reviewed under a correctness standard. In In re Adoption of B.T.D., 68 P. 3d 1021, 470 Utah Adv. Rep. 41, 2003 UT App 99, **40 (Ut. App. 2003), the court held, referring to a Rule 60(b) motion that our "the standard of review we apply may differ depending on the type of motion. Id.

The assertions in the Appellant's primary brief under Issue Three further show that Mr. Critchfield did have a viable defense before the trial court. Mr. Critchfield acted as an

officer of a corporation in all matters alleged below. See Affidavit of Lawrence Critchfield at par. 2-5, R. 925-944. He should not have been subject to a personal judgment. Further, Mr. Critchfield at all times expected the corporate parties responsible for the loan from Plaintiffs to pay that loan. See Affidavit of Lawrence Critchfield at par. 12-24, R. 925-944. Mr. Critchfield did not agree to personally guarantee any debts. See Affidavit of Lawrence Critchfield at par. 27, 33-34, R. 925-944. Further, Mr. Critchfield's expectation of a Nevada property to secure the loan of Plaintiffs fell through for reasons beyond his control. See Affidavit of Lawrence Critchfield at par. 32, R. 925-944. The appellate court should reverse and set aside the trial court's judgment.

ISSUES TO BE DECIDED

This court is to decide whether there was a mistake which would justify relief under Rule 60(b)(1) when no notice of the trial was sent to Mr. Critchfield after a Notice to Appear and Appoint was filed prematurely and the Notice of Withdrawal was defective to give notice of the trial and neither the court nor opposing counsel recognized the defect.

In the alternative, whether there was excusable neglect which would justify relief under Rule 60(b)(1) and (3) when Mr. Critchfield did not receive notice of the trial even after he made contact with both counsel in the matter following receipt of a Notice to Appear and Appoint; when Mr. Critchfield was led to believe by opposing counsel that he would receive correspondence regarding his deposition and he was justifiably surprised by the court's action when it entered a substantial judgment against Mr. Critchfield personally without notice to him of a trial.

Finally, whether the failure of the court to set out in its opinion the basis of its ruling is reversible error.

DATED this 8th day of November, 2005.



Steve S. Christensen
Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S REPLY BRIEF** was mailed via first class U.S. mail, postage prepaid, on the 8th day of November, 2005 to the following:

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