Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1970

W. P. Harlin Construction Company v. The Continental Bank & Trust Company : Respondent's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Albert J. Colton; Attorney for Respondent

Recommended Citation
Brief of Respondent, *Harlin Construction v. Continental Bank & Trust*, No. 12180 (1970).
https://digitalcommons.law.byu.edu/uofu_sc2/5324

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE

SUPREME CO[illegible]

OF THE

STATE OF U[illegible]

W. P. HARLIN CONSTRUCTI[illegible]
COMPANY,

vs.

THE CONTINENTAL BANK [illegible]
TRUST COMPANY,

Cross Claimant and R[illegible]

vs.

GEORGE STANLEY,

App[illegible]

RESPONDENT'S BRI[illegible]

Appeal from District Court of Salt L[illegible]

The Honorable Stewart M. Ha[illegible]

FABIAN & CLENDENIN[illegible]
By Albert J. Colton
Attorneys for R[illegible]
800 Continental Bank Bldg.
Salt Lake City, Utah 84101

FILED
NOV 4 - 1970
Clerk Supreme Court, Utah

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	6
POINT I. THIS MATTER HAS ALREADY BEEN ADJUDICATED	6
POINT II. THE COURT HAD APPROPRIATE JURISDICTION TO ENTER THE JUDGMENT	6
POINT III. GEORGE STANLEY HAS NOT BROUGHT HIS MOTION WITHIN A "REASONABLE TIME" AS REQUIRED BY RULE 60(b)	9
POINT IV. THE JUDGMENT CONFORMED TO THE EVIDENCE AND IT WAS UNNECESSARY TO FORMALLY AMEND THE CROSS CLAIM	11
POINT V. THE ORDER OF REINSTATEMENT WAS PROPER	13
POINT VI. CONTINENTAL'S JUDGMENT WAS NOT OBTAINED EX PARTE	15
CONCLUSION	18

CASES CITED

Amalgamated Casualty Insurance Co. v. Winslow, 135 F. 2d 663 (D. C. Cir. 1943)	12
Bowen v. Olson, 122 Utah 66, 246 P. 2d 602 (1952)	8
Decker v. Korth, 129 F. 2d 732, 739, (9th Cir. 1955), cert. den., 350 U. S. 830 (1955)	12
Drury v. Lunceford, 18 Utah 2d 74, 415 P. 2d 662	14
Hanson v. Hanson, 20 P. 736, (Cal. Supreme Court, 1889)	15

TABLE OF CONTENTS—Continued

Page

Luke v. Coleman, 38 Utah 383, 113 P. 1023, (1911) 15

Utah Sand & Gravel v. Tolbert, 16 Utah 2d 407, 402 P. 2d 703, (1965) 15

W. P. Harlin Construction Company v. Continental Bank & Trust Company, et al., 23 Utah 2d 422, 464 P. 2d 585 (1970) 1

West v. Shurtliff, 28 Utah 336, 79 P. 180 (1904) 7

AUTHORITIES CITED

7 Moore, Federal Practice, (2d Ed.) ¶60.25[4] p. 275, Note 9 10

3 Moore, Federal Practice, (2d Ed.) ¶15.13[2] pp. 990-991 12

7 Moore, Federal Practice, 299 14

RULES CITED

Rule 15(b) Utah Rules of Civil Procedure 11

Rule 15(b)(1) Utah Rules of Civil Procedure 8

Rule 59(e) Utah Rules of Civil Procedure 9

Rule 60(b) Utah Rules of Civil Procedure 10

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

W. P. HARLIN CONSTRUCTION COMPANY, vs. THE CONTINENTAL BANK & TRUST COMPANY, *Cross Claimant and Respondent,* vs. GEORGE STANLEY, *Appellant.*	Case No. 12180

RESPONDENT'S BRIEF

NATURE OF THE CASE

George Stanley appeals from an order reinstating judgment against him personally.

RELIEF SOUGHT ON APPEAL

George Stanley seeks to vacate the judgment of the District Court in favor of Continental Bank.

STATEMENT OF FACTS

This case has been before this Court before. *W. P. Harlin Construction Company* v. *Continental Bank & Trust Company, et al.,* 23 Utah 2d 422, 464 P. 2d 585 (1970). The case was commenced by Harlin Construction Company on

December 21, 1966, which filed a complaint against the Continental Bank, Stanley Title Company, George Stanley and Zions First National Bank. Zions Bank was subsequently dropped from the case. Harlin claimed against Continental for paying an unauthorized check and claimed against Stanley Title Company and George Stanley, jointly and severally, for conversion of the proceeds of the same check. Harlin alleged that the check was delivered upon certain conditions, and that Stanley Title Company and George Stanley retained the check, failed to return the same, and without authority and in direct violation of the conditions of delivery converted the same by depositing it and using the proceeds.

Continental filed a cross claim against Stanley Title Company alone, alleging that if Continental was liable to Harlin, then Stanley Title Company was liable over to it. Stanley Title Company and George Stanley filed a joint answer and counterclaim to Harlin's complaint.

On December 9, 1968, a non-jury trial lasting several days was commenced. Stanley Title and George Stanley were represented by the same counsel. George Stanley was personally present and testified in the action.

On January 16, 1969, the court entered its Findings of Fact and Conclusions of Law and Judgment. Paragraph 8 of the Findings of Fact held that:

> "Stanley Title Company and George Stanley, without authority and in direct violation of the conditions upon which they received said check, wilfully converted the same to their own use." (R. p. 184)

Judgment was entered: (a) in favor of plaintiff Harlin against Continental, Stanley Title and George Stanley, jointly and severally; (b) "upon payment of this judgment by Continental Bank and Trust Company to plaintiff, Continental Bank and Trust Company do have and recover from Stanley Title Company and George Stanley, jointly and severally, the sum of $10,503.60 . . ." (R. p. 189)

On February 5, 1969, Notice of Appeal was filed by both the Stanley Title Company and George Stanley from both; (a) judgment in favor of plaintiff, *and* (b) judgment "in favor of the defendant, The Continental Bank and Trust Company, and against the *defendants, Stanley Title Company and George Stanley*". (R. p. 194)

On appeal Continental expressly raised and argued in its brief the question of affirmance of its judgment against both co-defendants Stanley Title Company and George Stanley. (Pages 28-29 of brief of Continental Bank in this Court's Case No. 11504.)

On January 22, 1970, the Utah Supreme Court expressly affirmed both judgments of the lower court. This Court concluded:

> "The findings and judgment of the trial court in favor of plaintiff, Harlin Construction Company, against Continental Bank and against George Stanley and Stanley Title Company are sustained; *and the same order is made as to the findings and judgment in favor of Continental Bank on its cross complaint against George Stanley and Stanley Title Company.*" 464 P. 2d 589 (emphasis added).

On February 24, 1970, Continental satisfied plaintiff's judgment against it and a Satisfaction of Judgment was filed. (R. p. 655) Upon filing of the Satisfaction of Judgment and pursuant to the provisions of the original judgment, the District Court on February 26, 1970 entered judgment against Stanley Title Company and George Stanley and in favor of Continental Bank (R. p. 652-653) and a copy of such judgment was mailed to counsel for Stanley Title Company and George Stanley. (R. p. 653)

On April 20, 1970, George Stanley filed a Motion to Vacate the judgment against him alleging the court had no jurisdiction over the person of George Stanley on the cross claim of the Continental Bank and its subsequent judgment, and that the cross claim did not name George Stanley as a cross defendant.

George Stanley's Motion to Vacate was argued on May 8, 1970. After the court had indicated its intention to grant such motion, but prior to the signing of a formal order, Continental on May 11th filed a motion to reconsider Stanley's Motion to Vacate judgment and moved to amend its cross-complaint to conform to the evidence. (R. p. 673-674) On May 21, 1970, the Honorable Stewart M. Hanson signed an order holding that the judgment against George Stanley and in favor of the Continental Bank was null and void because "this court had no jurisdiction of the person of the said George Stanley" and the judgment was vacated and set aside. (R. p. 676)

The matter was reargued on June 10, 1970, and on June 12th the same court issued a Memorandum Decision which stated in part:

> "The matter was again argued before this court, authorities submitted, and the court now being fully advised in the premises, and having fully reconsidered the order heretofore made, finds and concludes that the court was in error and that the order made on the 21st day of May, 1970, should be, and the same is hereby set aside, it being the feeling of the court that said judgment should stand." (R. p. 677)

Continental had filed a Notice of Appeal from the District Court's order of May 21 vacating the judgment against Stanley (R. p. 678) but on June 22, 1970, pursuant to the Memorandum Decision of the District Court, "an order reinstating judgment" was entered. (R. p. 683) By that order the court decreed:

> "1. That the order of May 21, 1970 be and hereby is set aside and vacated.
>
> 2. That the judgment of February 26, 1970 in favor of Continental Bank and Trust Company and against George Stanley . . . be and hereby is reinstated."

On the same day upon execution of the Order of Reinstatement of Judgment, Continental withdrew its appeal. (R. p. 681)

On July 8, 1970, George Stanley filed his Notice of Appealf rom the order reinstating the judgment.

ARGUMENT

POINT I.

THIS MATTER HAS ALREADY BEEN ADJUDICATED.

George Stanley seeks relief from a personal judgment against him which was granted to Continental after a full trial in which Stanley was personally present and represented by counsel.

No objections were made at the time of the entry of Findings of Fact, Conclusions of Law or the judgment against him. The very issue of his personal liability to Continental was before this Court on Stanley's appeal from that judgment, and it was expressly affirmed by this Court.

This matter is now *res judicata* on its merits.

POINT II.

THE COURT HAD APPROPRIATE JURISDICTION TO ENTER THE JUDGMENT.

Stanley contends that despite the determination on the merits, the judgment is void for lack of jurisdiction. Stanley's motion to vacate the judgment was raised on the ground that the court lacked jurisdiction over the *person* of George Stanley. (R. p. 669) No claim was then made that the court lacked jurisdiction over the subject matter, and the order of the trial court which vacated the Continental judgment was on the specific ground that "this Court had no jurisdiction of the *person* of said George Stanley". (R. p. 676) Now, for the first time, Stanley in

his brief to this Court claims lack of jurisdiction over the subject matter. Stanley's failure to raise this issue below and his desultory treatment of it in his brief are indicative that this issue is a make-weight.

There is no merit at all to the allegation that there was not subject matter jurisdiction of Continental's cross claim. It was part and parcel of the claim of plaintiff and legally flowed from it. Assuming that there was liability to the plaintiff, as the trial court found, it was perfectly proper to allocate this liability between the several defendants. Plaintiff had claimed that Continental was liable to it for cashing an unauthorized check and that defendants Stanley Title and George Stanley were jointly and severally liable for converting the proceeds of the check. Given these facts, the trial court was indeed the only tribunal that did have subject matter jurisdiction.

To this extent, George Stanley's reliance upon *West v. Shurtliff*, 28 Utah 336, 79 P. 180 (1904), is clearly misplaced. The *Shurtliff* decision was based upon the absence of jurisdiction over the *subject matter*, ~~now~~ NOT over the person. The Court in this ancient decision, well prior to the adoption of the new rules of procedure and pleading, pointed out that it was not enough that the parties were properly in court, but that the subject matter must be properly presented. The Court concluded, "It is only over those particular interests which they choose to bring in issue by proper pleadings that the power of jurisdiction arises." Yet the issue of jurisdiction over subject matter was not raised by George Stanley. Nor would *Shurtliff* any longer

be effective precedent even on this question. The adoption of the Utah Rules of Civil Procedure in 1950 carried with it adoption of the notice theory of pleading and relegated to legal history the pleading technicalities discussed in *Shurtliff.* Rule 15(b) of the Utah Rules of Civil Procedure has supplanted such definitions of jurisdiction over subject matter, and as shown in Point IV below the rule covers the alleged pleading defect upon which Stanley relies.

Nor can Stanley validly contest the question of the court's jurisdiction over his person. A simple answer to such contention was that he was present and voluntarily submitted himself to the determination of this issue by the court. Indeed he made no objection to the jurisdiction of the trial court at the time that judgment was entered against him and on appeal merely argued that such liability was improper on its merits.

Appellant arguest that George Stanley was not served with summons. But, of course, under present Utah rules this is unnecessary. Valid process is obtained merely by mailing to counsel of record (U. R. C. P. Rule 15(b)(1)), and issues may be raised in open court where defendant and his counsel are present.

For George Stanley validly to argue absence of jurisdiction over his person, he must show facts similar to those in *Bowen* v. *Olson,* 122 Utah 66, 246 P. 2d 602 (1952). In that case attempts at procurement of service of process upon the defendant were clearly a sham, and a default judgment was entered without any knowledge at all by the defendant.

The question of George Stanley's personal liability to plaintiff was hotly argued at the trial. George Stanley was held personally liable. As a correlary to such personal liability, Continental's judgment over on the basis of subrogation or unjust enrichment against George Stanley personally was also determined. Any other result would have led to a clearly inequitable situation. Thus, no one can dispute that plaintiff could have satisfied his judgment by levying against Stanley personally. Merely because it chose the easier way of levying against a bank should not release Stanley of his ultimate liability.

POINT III.

GEORGE STANLEY HAS NOT BROUGHT HIS MOTION WITHIN A "REASONABLE TIME" AS REQUIRED BY RULE 60(b).

As the record shows, George Stanley made no attempt to alter or amend the judgment against him within the ten (10) day period provided in Rule 59(e). Not one suggestion of an alleged lack of jurisdiction escaped his lips. The personal judgment was argued on its merits before the Supreme Court.

It was only one year and two months after the trial court's determination of personal liability that he raised the issue at all. This jurisdictional question was only raised on April 20, 1970, when four years had elapsed since the date of the issuance of the check in question in this case (April 1, 1966).

If this Court's order to vacate is affirmed, Continental

would not only be required to commence a new action against George Stanley to litigate a question already argued and decided, but will doubtless be met with a defense of the statute of limitations. This is procedural gamesmanship. George Stanley had full knowledge of this judgment from its date of entry on January 16, 1969. He at no time raised this issue until April 20, 1970.

The means provided for seeking relief from a judgment is set forth in Rule 60(b). Rule 60(b) provides that a court may relieve a party from a final judgment for the reason that such judgment is void if such motion is made "within a reasonable time". A three month time limit is imposed for other reasons, such as mistake, newly discovered evidence, or fraud; but on the grounds asserted here such motion must be made within a "reasonable time".

It is surely not reasonable nor equitable for George Stanley, himself a member of the Bar, and at all times here represented by counsel, to be allowed to raise such an issue for the first time only after such time had elapsed that a defense of the statute of limitations could now be asserted. Such procedure only results in preventing a determination on the merits. Surely one test of what constitutes a reasonable time is one within which a matter may be determined on its merits.

Moore has stated, "Faced with a situation where the voidness of the judgment is highly questionable, a court might properly consider the diligence which the person seeking relief proceeds". 7 Moore, *Federal Practice,* (2d Ed.) ¶60.25[4] at p. 275, Note 9.

POINT IV.

THE JUDGMENT CONFORMED TO THE EVIDENCE AND IT WAS UNNECESSARY TO FORMALLY AMEND THE CROSS CLAIM.

It is true that the formal cross claim filed by Continental mentions only Stanley Title Company. Yet the issue and the evidence to justify the judgment against George Stanley were both before the trial court.

It is submitted that Rule 15(b) of the Utah Rules of Civil Procedure exactly covers this situation.

Rule 15(b) provides as follows:

> "Amendments to Conform to the Evidence. — When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the eivdence and to raise these may be made upon motion of any party at any time, even after judgment; but *failure so to amend does not affect the result of the trial of these issues.* If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence."

With slight amendments, the Utah rule is similar to the federal rule. Moore in his commentary on the federal rule points out that the directive contained in this rule "has been applied over and over again by the courts . . . Rule 15(b) does not even limit the amendment to the transaction or occurrence set forth in the pleadings; the only apparrent limitation is that the court have jurisdiction over the matter tried, although as a matter of practice issues tried by implied or express consent ordinarily do arise from the same general set of facts set forth in the complaint . . . An amendment to conform to evidence may be made at any time on motion of any party, even in the appellate court, although it has been held that the appellate court will not allow such amendments by the losing party to bring about the reversal of judgment otherwise correct. In any event, the lack of amendment does not affect the judgment in any way. In effect, therefore, the parties may, by express consent, or by the introduction of the evidence without objection, amend the pleadings at will." 3 Moore, *Federal Practice,* (2d Ed.) ¶ 15.13[2], at pp. 983-991.

Thus, a court has held that co-defendants "consented to the adjudication of their mutual rights" under Rule 15(b) even though they had filed no cross claims against each other. *Amalgamated Casualty Insurance Co.* v. *Winslow,* 135 F. 2d 663 (D. C. Cir. 1943).

As another federal court has stated, "Failure to formally amend the pleadings will not jeopardize a verdict or judgment based upon competent evidence". *Decker* v.

Korth, 129 F. 2d 732, 739, (9th Cir. 1955), *cert. den.,* 350 U. S. 830 (1955).

It should be observed that George Stanley's personal liability to Continental required no evidence independent of that necessary to find him personally liable to the plaintiff, Harlin, for converting the funds in question. His personal liability to Continental was a legal conclusion arising on the basis of unjust enrichment and subrogation from his liability to plaintiff, Harlin. George Stanley makes no attempt to seek relief from the judgment of Harlin against him, and he cannot. By the same token, he is in no position to challenge Continental's judgment here.

POINT V.

THE ORDER OF REINSTATEMENT WAS PROPER.

Three weeks after the lower court vacated the judgment against George Stanley, upon reargument, the same judge confessed error and issued a memorandum decision stating that his earlier ruling should be set aside and that the judgment was subsequently signed.

Appellant contends that a court cannot change its mind, and apparently the only procedure he would concede for relief from even the most patent error is a time-consuming and expensive appeal to this court.

It should be noted that Continental did file a timely notice of appeal, but withdrew this after the lower court signed the order reinstating the judgment. It then had nothing to appeal from. If appellant were to prevail in his

contention, Continental would now be left without any remedy, as the time for an appeal by it from the trial court's earlier order is now well passed.

Fortunately, Utah procedure does not require such a grotesque result. The order of the lower court vacating the judgment was a final order. Rule 60(b) provides that the court may relieve a praty from a final order, *inter alia,* for "(7) any other reason justifying relief from the operation of the judgment". The court thus did have authority to relieve Continental of the order vacating judgment, and it proceeded to do so on Continental's motion timely brought. Surely the fact that such motion was entitled a "Motion to Reconsider" should not be determinative, when the motion was heard on the merits and within the authority contemplated and granted by Rule 60(b). "Since nomenclature is unimportant, the moving papers may be treated as a motion under 60(b), although mislabelled". 7 Moore's Federal Practice 299.

Appellant cites *Drury* v. *Lunceford,* 18 Utah 2d 74, 415 P. 2d 662, in support of his contention. However, both the facts and the result of this court's ruling in that case are substantially different. In *Drury,* the issue arose over a motion for a new trial which was granted and then upon reconsideration denied. The result of this court's holding that the ruling upon reconsideration was improper was that the case was returned for a new trial. Each party would still have his day in court. The result in the instant case would be totally different. Continental would find itself without any judgment and without any recourse, based

upon a ruling which the very court which granted it concedes was erroneous.

As this court said in *Drury,* "It should be observed that what we have said herein is intended to apply to the fact situation shown in the instant case . . ." 415 P. 2d 664 The court recognized that there might be situations where relief under Rule 60 would be applicable. This is surely one of them.

Other authorities cited by appellant appear either inapplicable (*Utah Sand & Gravel* v. *Tolbert,* 16 Utah 2d 407, 402 P. 2d 703 (1965), involved the setting aside of a default judgment by this Court where the summons had been invalid on its face, reserving a trial on the merits), or were decided prior to the new rules of procedure (*Luke* v. *Coleman,* 38 Utah 383, 113 P. 1023, (1911)), or were from jurisdictions with different rules (*Hanson* v. *Hanson,* 20 P. 736, (Cal. Supreme Coure, 1889).

To accept appellant's contention would be to work manifest injustice to Continental, which would be deprived of its judgment and its right to proceed against Stanley without this Court even passing on the propriety of Judge Hanson's earlier order vacating the judgment.

POINT VI.

CONTINENTAL'S JUDGMENT WAS NOT OBTAINED EX PARTE.

Appellant contends that Continental obtained its judgment against George Stanley ex parte and without a hearing.

This is contrary to the facts. The judgment was obtained at the end of the trial. (R. 188-189) The only thing determined ex parte was the precise amount of such judgment, and appellant has never contended that this was incorrectly computed.

Thus the trial court in its judgment held:

> "1. Plaintiff, W. P. Harlin Construction Company, do have and recover from Continental Bank and Trust Company, Stanley Title Company and George B. Stanley, jointly and severally, the sum of Ten Thousand Five Hundred Three and 60/100 Dollars ($10,503.60) and costs in the sum of $70.00, together with interest on said sums at the rate of 8 percent per annum from the date hereof until paid.
> "2. Upon payment of this judgment by Continental Bank and Trust Company to plaintiff, Continental Bank and Trust Company do have and recover from Stanley Title Company and George Stanley, jointly and severally, the sum of Ten Thousand Five Hundred Three and 60/100 Dollars ($10,503.60) with interest on said sum at the rate of 8 percent per annum from the date hereof until paid."

This court affirmed this judgment on appeal.

> "The findings and judgment of the trial court in favor of plaintiff Harlin Construction Company against Continental Bank and against George Stanley and Stanley Title Company are sustained; and the same order is made as to the findings and judgment in favor of Continental Bank on its cross-complaint against George Stanley and Stanley Title Company." 464 P. 2d at 589

Upon affirmance the plaintiff, Harlin, quite understandably made demand for payment upon the bank, which

presumably would be in a better position to make satisfaction than the other two defendants, who were also jointly and severally liable.

Plaintiff's counsel then executed a satisfaction of judgment (R. 655) and based upon the terms of the original judgment, the proof of payment by Continental and its cost bill (R. 661), Continental obtained from the trial judge payment for this total amount. That judgment read:

> "On the 16th day of January, 1970, (*sic.* This should read 1969), this Court entered judgment in this case in favor of plaintiff W. P. Harlin Construction Company, and against defendants, The Continental Bank and Trust Company, Stanley Title Company and George Stanley for the sum of Ten Thousand Five Hundred Three and 61/100th Dollars ($10,503.61) and costs in the sum of Seventy and no/100th Dollars ($70.00), together with interest on said sums at the rate of eight percent per annum from the date of judgment until paid. This Court's judgment provided that, on payment of said judgment by The Continental Bank and Trust Company to plaintiff, The Continental Bank and Trust Company would be entitled to recover from Stanley Title Company and George B. Stanley, jointly and severally, amounts paid, together with the costs of defendant The Continental Bank and Trust Company. The judgment of this Court was appealed to the Supreme Court and it appears from the Memoranda of Costs and Disbursements filed herein that defendant The Continental Bank and Trust Company incurred costs of $146.42 in this court and that plaintiff has incurred additional costs of $205.82 and defendant The Continental Bank and Trust Company has incurred additional costs of $156.75 on the appeal.

"It now appears from the Satisfaction of Judgment filed herein that defendant The Continental Bank and Trust Company has paid the judgment of this Court, made and entered on the 16th day of January, 1970, together with plaintiff's costs on appeal. "WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that defendant, The Continental Bank and Trust Company do have and recover from defendants George Stanley and Stanley Title Company, jointly and severally the sum of $11,082.60 being the principal amount of the judgment of this Court entered on the 16th day of January, 1970, and the plaintiff's costs and the costs of defendant The Continental Bank and Trust Company in this court and on appeal, and that defendant The Continental Bank and Trust Company recover interest on said sum at the rate of eight percent per annum from January 16, 1970 until paid.

"Dated this 26th day of February, 1970." (R. p. 652-653)

A copy of this judgment for the liquidated amount was mailed to counsel for George Stanley. (R. 654)

The allegedly "ex parte judgment" was merely the necessary procedure followed to fix the amount due upon satisfaction of the initial judgment by Continental. The judgment itself had been obtained long before after an extensive trial and was affirmed by this court on appeal. This is hardly an ex parte procedure.

CONCLUSION

Appellant's liability has already been determined after litigation and affirmed on appeal by a court which had jurisdiction both over the person and subject matter. Ap-

pellant's attempt to avoid the judgment by motion under 60(b) was without merit, and in any event was not raised within the time provided by the rule. The lower court had authority to correct an obvious error in vacating the judgment under Rule 60(b), and to prevent the lower court from correcting its error would work an obvious injustice on Continental which would see the very judgment affirmed by this court vanish.

Respectfully submitted,

FABIAN & CLENDENIN
By Albert J. Colton

Attorneys for Respondent