1995

Rallet C. Lund v. Elton W. Hall : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT

STATE OF UTAH

RALLET C. LUND,	:	
Plaintiff/Appellant,	:	
vs.	:	Case No.: 950248
ELTON W. HALL,	:	Oral Argument Priority 15
Defendant/Appellee.	:	

BRIEF OF APPELLEE

APPEAL FROM THE FINAL JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
THE HONORABLE RAY M. HARDING, SR.

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JURISDICTION OF THE COURT

The Utah Supreme Court has jurisdiction to hear this matter pursuant to Utah Code Annotated § 78-2-2(3)(j) (Supp. 1994).

STATEMENT OF THE ISSUES PRESENTED AND STANDARD OF REVIEW

Did the trial court properly deny plaintiff's motion for relief from judgment pursuant to Utah Rule of Civil Procedure 60(b)?

A denial of a Rule 60(b) motion for relief from judgment is reviewed for abuse of discretion. Trial courts have discretion to determine whether a mistake of law existed, and the appellate court shall reverse only if there has been an abuse of that discretion. Thus, reversal is only indicated where the trial court's ruling is based upon a misunderstanding or misapplication of the law and where a correct application would have produced a different result. Ferris v. Jennings, 595 P.2d 857 (Utah 1979).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Annotated § 78-12-35 and Utah Rule of Civil Procedure 60(b) are implicated in this matter and reproduced in full in Addendum A of Appellee's brief.

STATEMENT OF THE CASE

This is an appeal from a final judgment in a civil case wherein the plaintiff sought damages for personal injuries allegedly sustained in an automobile accident. Plaintiff filed her

complaint on January 10, 1994. (R. 3). Defendant filed an answer on March 28, 1994. (R. 6). Defendant's Answer included the following affirmative defense:

> Further pleading, Defendant maintains that the present action is barred by the Statute of Limitations. (R. 6).

Defendant filed a motion for summary judgment claiming the action was barred by the statute of limitations on April 20, 1994. (R. 19). Plaintiff opposed defendant's motion for summary judgment arguing that defendant's answer had not adequately raised the statute of limitations defense. Such Memorandum in Opposition was filed May 20, 1994, thirty days after defendant's initial motion for summary judgment. (R. 39).

Defendant moved for leave to amend his answer to allege the statute of limitations with more particularity. (R. 41). The court granted defendant's motion for leave to amend (R. 76) and defendant filed his amended answer on July 7, 1994. Plaintiff has not appealed the trial court's granting leave to amend defendant's answer. Although defendant gave notice and took the deposition of plaintiff, plaintiff made no effort to depose the defendant. (R. 17).

Subsequent to the defendant filing his amended answer, defendant once again moved for summary judgment. (R. 87). On review of the motion, the trial court granted defendant's motion for summary judgment by memorandum decision on September 6, 1994, almost nine months after plaintiff's complaint was filed and six months after defendant's initial answer alleging the statute of limitations defense was filed. (R. 126). The final order in this matter was

entered on September 30, 1994. (R. 128). No Rule 56(f) affidavit setting forth the basis for further discovery was ever filed.

On October 11, 1994, plaintiff filed a motion for relief from judgment pursuant to Utah Rule of Civil Procedure 60(b). (R. 130). The trial court by memorandum decision denied that motion, and a final order thereupon was entered April 26, 1995. (R. 160). Plaintiff filed her notice of appeal on May 25, 1995. (R. 162).

In plaintiff's principal brief, plaintiff sets forth a statement of facts which is essentially irrelevant to this matter. The case was decided on procedural grounds, and therefore the foregoing outline of the course of proceedings constitutes the only relevant facts. It is important to note however that the plaintiff admits that she retained an attorney in the spring of 1992, almost a year before the statute of limitations expired. (R. 90, 102, 107-08). Plaintiff's recitation of the facts evidences that she received two letters from State Farm Mutual Automobile Insurance Company, both pertaining to Personal Injury Protection Benefits. However, both letters were in reference to plaintiff's first party claim for no-fault benefit and had nothing to do with plaintiff's third party claim against defendant Hall. Both letters reference claim number 44-0676-200, which lists the insured as Marion Lund. (R. 24) The present action is against Elton Hall for personal injuries, a third party claim. Therefore, whether the letters from State Farm Mutual Automobile Insurance Company advised Rallet Lund of any deadline for submitting an application for PIP benefits or any statute of limitations applying to the PIP benefits is irrelevant.

SUMMARY OF THE ARGUMENT

This Court granted summary disposition limiting plaintiff to raising issues arising out of the denial of her Rule 60(b) motion. Normally, the standard of review for the denial of a Rule 60(b) motion is for abuse of discretion. Nonetheless, the plaintiff has claimed that the standard of review for this appeal is for correctness. In reality, two standards of review should be applied to the trial court's denial of the 60(b) motion in this case. Only the court's application or understanding of the applicable law is to be reviewed for correctness. All other issues attendant thereto should be reviewed for an abuse of discretion. Otherwise, this Court's order as to the summary disposition would be in reality meaningless.

The trial court's conclusion that Utah Code Ann. § 78-12-35 is not applicable must be sustained. The statute is inapplicable because the defendant was not "absent" from the state. There is absolutely no evidence below to support the contention that the defendant departed or was absent from the state. Further, under this Court's analysis in Snyder v. Clune, 390 P.2d 915 (Utah 1964), applying the Utah Non-Resident Motor Vehicle Act, § 78-11-35 cannot be used to toll the applicable statute of limitations.

As stated, there exists no evidence that the defendant was at any time absent from the state. The plaintiff has countered that she was not given the opportunity to discover if the plaintiff was ever absent. However, the plaintiff failed to file a Rule 56(f) affidavit, and such

failure forecloses application of Utah Code Ann. § 78-12-35. At no time has the plaintiff alleged that she was precluded from filing a Rule 56 affidavit, and although the defendant conducted discovery including taking the deposition of the plaintiff, the plaintiff at no time made any effort to propound any discovery upon the defendant.

This Court should not accept the plaintiff's invitation to overrule Snyder v. Clune. As the Utah Court of Appeals recognized in Van Tassell v. Shaffer, 742 P.2d 111 (Utah Ct. App. 1987), the majority position in the country, and the preferred rule by the Utah Court of Appeals, would be that a defendant's absence does not toll the statute of limitations where the defendant is amenable to personal jurisdiction. Such holding would be more consistent with the purposes of statutes of limitation.

The plaintiff complains that at the time the statute ran she was in negotiations with defendant's insurance carrier, and that therefore the defendant should be estopped from asserting the statutes of limitations. The plaintiff's position must fail. First, there is absolutely no evidence of any ongoing negotiations. Second, the plaintiff herself has filed an affidavit which indicated that settlement negotiations had not yet commenced. Lastly, and most importantly, the plaintiff failed to raise this issue below. No arguments or allegations of estoppel can be found below. The Rice v. Granite School District case upon which the plaintiff relies is not cited below. Because the matter was not raised below, this Court should not consider it.

The plaintiff has failed to show that the trial court abused its discretion. Because the plaintiff has stated no viable reason for reversal, the trial court should be affirmed.

ARGUMENT

I. THIS COURT GRANTED SUMMARY DISPOSITION LIMITING PLAINTIFF TO RAISING ISSUES ARISING OUT OF THE DENIAL OF HER RULE 60(b) MOTION

On October 2, 1995, this Court entered an order in response to defendant's motion for summary disposition. That order provided:

> Defendant's motion to dismiss this appeal for lack of jurisdiction in this Court due to untimeliness of the appeal is granted with respect to issues concerning the summary judgment only. Plaintiff is limited to raising issues arising out of the denial of her 60(b) motion. The appeal was filed in a timely manner following entry of that order.

See Order on file herein. The plaintiff in this matter essentially argues that because she has claimed that a mistake of law was made below, the standard of review for the entire appeal is one of correctness, instead of the usual abuse of discretion standard applied to the review of Rule 60(b) motions. The standard of review to be applied in this case is not that simple.

The well established rule is that the trial court is afforded broad discretion in ruling on a motion for relief from judgment under subdivision (b) of Rule 60, and its determination will not be disturbed absent an abuse of discretion. State v. Vijil, 784 P.2d 1130 (Utah 1989); Katz v. Pierce, 732 P.2d 92 (Utah 1986); Russel v. Martell, 681 P.2d 1193 (Utah 1984). However, when

a trial court's application of law is involved, the appellate court will review that application for correctness. For example, this Court in Ferris v. Jennings, 595 P.2d 857 (Utah 1979) held:

> [W]hen the trial court has based its ruling upon a misunderstanding or misapplication of the law, where a correct one may have produced a different result, the party adversely effected thereby is entitled to have the error rectified and a proper adjudication under correct principles of law.

Id. at 859. The Utah Court of Appeals in Bishel v. Merritt, 907 P.2d 275 (Utah Ct. App. 1995) explained:

> Trial courts have discretion to determine whether a mistake of law existed, and we will reverse only if there has been an abuse of that discretion.

Id. at 277. As the Ferris decision explains, even if there is a misapplication or misunderstanding of the law it will merit reversal only "where a correct one may have produced a different result...." Ferris v. Jennings, 595 P.2d at 859.[1]

Thus, there are really two standards of review to be applied to the trial court's denial of the Rule 60(b) motion in this case. As to all decisions of the trial court, except its interpretation and application of the law, such decisions are review for an abuse of discretion. As to any claim by the plaintiff that the trial court misapplied or misunderstood the applicable law, the plaintiff is entitled to a reversal only if the plaintiff can show both that the court misapplied the law and that

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[1]See for example Gaw v. State by and through DOT, 798 P.2d 1130 (Utah Ct. App. 1990) (Where the Court of Appeals held that although a court had erroneously excluded testimony on a legal basis, since the testimony would not have resulted in a different verdict the error was harmless).

such misapplication of the law would have brought about a different result. This the plaintiff cannot do.

II. THE TRIAL COURT'S CONCLUSION THAT UTAH CODE ANNOTATED §78-12-35 WAS NOT APPLICABLE MUST BE SUSTAINED

There is no dispute in this matter that the automobile accident at issue occurred on January 12, 1989. See plaintiff's complaint at R. 3. There is likewise no dispute that the plaintiff filed her complaint on January 10, 1994, almost five years after the subject accident. (See plaintiff's Brief at R. 3). Plaintiff claims she had filed a previous and identical complaint on January 22, 1993, four years and four days after the subject accident. As a result, it is clear on its face that plaintiff's complaint was filed after the applicable statute of limitations, Utah Code Ann. § 78-12-25[2], had run.

In denying plaintiff's Rule 60(b) motion, the trial court held that § 78-12-35 was not applicable. This was a correct conclusion. Because this conclusion is correct, the court's ruling must be sustained. The trial court did state that under § 78-12-35 the time of any absence from the state would not toll the time for commencement of the action. (R. 157). The second sentence of the statute simply provides otherwise.[3] However, the court's overall conclusion that the

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[2]Salt Lake City v. Industrial Comm., 81 Utah 213, 17 P.2d 239 (1932) (cause of action for personal injury sounding in negligence must be brought within four years).

[3]Such a minor deviation does not mandate reversal. In questioning whether a trial court has abused its discretion in denying a Rule 60(b) motion, the trial court should be sustained if the ruling can be sustained on any ground, even one not relied upon by the trial court. See e.g. re:

statute does not apply is correct for several reasons. The statute is inapplicable in this case because the defendant was not "absent" from the state under this Court's decision in Snyder v. Clune, 390 P.2d 915 (Utah 1964). Likewise, Utah Code Ann. § 78-12-35 cannot be applied to this matter because there is absolutely no evidence in the record that the defendant was absent from the state at any time. Accordingly, the trial court's conclusion that § 78-12-35 did not apply was correct. The trial court did not abuse its discretion in denying the motion.

III. PLAINTIFF'S FAILURE TO FILE A RULE 56(f) AFFIDAVIT FORECLOSES APPLICATION OF UTAH CODE ANNOTATED §78-12-35

In order for the court to even apply Utah Code Ann. § 78-12-35, the court must first find that there is some evidence in the record to indicate that the defendant was absent from the state. There simply exists no such evidence. The plaintiff's complaint establishes that the accident at issue occurred on January 12, 1989. The face of plaintiff's complaint indicates that it was filed on January 18, 1994.[4] defendant's motion for summary judgment was therefore supported by the record in that four years had run since the date of the accident without a complaint being filed. This was the basis for the defendant's motion for summary judgment.

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summary judgment involving a higher standard of review, White v. Deseelhorst, 879 P.2d 1371 (Utah 1994); West v. Thomson Newspapers, 872 P.2d 999, 1012 n. 22 (Utah 1994).

[4]Of course, the plaintiff maintains that she filed an earlier complaint on January 22, 1993, after the statute of limitations had run.

In opposition to the motion for summary judgment, the plaintiff argued that the statute of limitations had been tolled pursuant to Utah Code Ann. § 78-12-35. However, the plaintiff provided absolutely no evidence that the defendant had been absent from the state at any time. Alternatively, the plaintiff argued that the statute of limitations had been not properly pled and had been waived as a defense. Lastly, the plaintiff argued that the parties were in settlement negotiations and that the defendant's insurer acted in bad faith and that since the eventual lawsuit should not have come as a surprise to the defendant, the statute of limitations should not be applied.

Of course, the plaintiff could cite no legal authority for such a conclusion. Interestingly, the affidavit filed by the plaintiff in opposition to summary judgment highlights that no ongoing settlement negotiations were occurring. In paragraph six of her affidavit, the plaintiff states:

> Your affiant expected, from her accounts with State Farm Insurance, that after my medical condition had stabilized and I presented the medical costs to State Farm Insurance Company, that they would enter into settlement negotiations for my claim for personal injuries.

(R. 27). In other words, settlement negotiations had not even commenced. The plaintiff indicates that in 1992 she contacted State Farm Insurance Company, specifically the PIP adjuster, and was told that her file was still open. This may or may not have been the case. In any event, the status of her personal injury protection file at her own insurance company is not germane to the present lawsuit.

In the four years following the accident which is the subject of this litigation, neither plaintiff nor her attorney took any steps to protect her rights, although the opportunity to act was always present. Even if settlement negotiations had commenced, a reasonable attorney would have ensured that his client's claim was protected. Plaintiff's counsel had ample opportunity to protect plaintiff's rights before the statute of limitations ran. Had plaintiff's counsel acted prudently, plaintiff would not now come before this Court asking that the statute of limitations be weakened to cure a perceived injustice.

The plaintiff did suggest in her pleadings that further discovery might show that the defendant had been absent from the state. However, the plaintiff herself stated:

> If plaintiff does not discover that defendant has been out of the state as believed, defendant can renew its motion.

(R. 36). Thus, the plaintiff did not really have any basis to believe that the defendant had, in fact, been absent from the state. More importantly, the plaintiff failed to provide any basis for the court to deny the motion for summary judgment. Specifically, the plaintiff never filed an affidavit stating what additional discovery was needed as required by Rule 56(f) of the Utah Rules of Civil Procedure. This Court should note that defendant's initial answer alleging the statute of limitations as a defense was filed on March 28, 1994. (R. 6). Defendant's motion for summary judgment was not ruled on until his answer had been amended several months later. In all of this time, the plaintiff never propounded a single interrogatory upon the defendant, never gave notice of a deposition, or in any way attempted to conduct any discovery whatsoever. In

contrast, the defendant took the opportunity to depose the plaintiff. (R. 17). Additionally, the defendant propounded upon the plaintiff both a set of interrogatories and requests for production of documents. (R. 9 and 10). The plaintiff in this matter simply did not attempt to make the discovery she now claims is critical.

Even if the plaintiff had purposely chosen not to make discovery during the time between the filing of defendant's initial answer and the court's ruling on the motion for summary judgment, at a minimum the plaintiff should have filed a Rule 56 affidavit as required by the Utah Rules of Civil Procedure. In Sandy City v. Salt Lake County, 794 P.2d 482 (Utah Ct. App. 1990), the Utah Court of Appeals held:

> A Rule 56(f) movant must file an affidavit to preserve his or her contention that summary judgment should be delayed pending further discovery.

Id. at 488 (citing Callioux v. Progressive Ins. Co., 745 P.2d 838 (Utah Ct. App. 1987)). Accordingly, plaintiff has wholly failed to preserve her contention that summary judgment should have been delayed pending further discovery, or that the trial court abused its discretion in denying plaintiff's 60(b) motion.

This Court in Jackson v. Layton City, 743 P.2d 1196, 1198 (Utah 1987), refused to consider an argument that further discovery was necessary because the appellant had failed to file a Rule 56(f) affidavit. In fact, this matter should be handled just as the court did in Jackson. In Jackson, the Jackson family had paid a fee and was riding down a hill together on tubes in the snow when Gene Jackson struck a metal pole and suffered serious injuries. This Court held that

the only possible statute of limitations under which the Jacksons could bring their claims was § 78-12-25.5, which applies a seven year statute period of limitations to injuries caused by defective or unsafe improvements to real property. In Jackson, Layton City provided the affidavit of the Parks Foreman for Layton City that all of the improvements on the sledding hill had been put in prior to November 28, 1974 and that therefore by the time the action was commenced on August 14, 1983, the seven year period of limitations had run. This Court explained:

> The Johnsons argue, nevertheless, that the pole was possibly part of a later installation, renovation, or addition which they assert would extend the completion date for the purposes of the statute. They ask this Court to reverse the summary judgment ruling to allow them to conduct discovery of their own. The issue is not properly raised. The Jacksons did not seek a continuance of a summary judgment proceeding pursuant to Utah Rule of Civil Procedure 56(f) in the trial court. The Jacksons do not allege that they were precluded from filing a Rule 56 affidavit. Accordingly, we do not consider the argument.

Id. at 1198. Likewise, in this case this Court should not consider the arguments that further discovery was needed. At no time has the plaintiff alleged that she was precluded from filing a Rule 56(f) affidavit, and there is nothing in the record to indicate that the defendant was at any time absent from the state. For this reason, Utah Code Annotated §78-12-35 simply has no application. The trial court did not abuse its discretion in denying the Rule 60(b) motion.

IV. EVEN IF UTAH CODE ANNOTATED § 78-12-35 WERE APPLICABLE, THE TRIAL COURT'S RULING SHOULD BE SUSTAINED

Utah Code Annotated § 78-12-35 provides:

> Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

This Court in Snyder v. Clune, 390 P.2d 915 (Utah 1964) held that when a defendant leaves the state following a motor vehicle accident, § 78-12-35 does not apply to toll the statute of limitations. In Snyder, a Utah County resident was injured in an automobile accident with a resident of California. The plaintiff did not commence the action until four years and three days later. The plaintiff then sought to avoid the statute of limitations by citing § 78-12-35.

In its analysis, the Snyder court reviewed the Non-Resident Motorist Act and determined that process could have been served on the defendant because the Act authorized service upon an absent defendant by serving the Secretary of State. The Court reasoned that since the defendant was available for service of process through an agent authorized by law to receive service of process, she was not "absent" from the state in the sense contemplated by the statute. Id. Therefore, the plaintiff at no time was prevented from commencing her action and there is no reason to toll the running of the statute. Id.

The Snyder court concluded its decision by stating:

> [W]here the plaintiff could have pursued her remedy at any time she desired, she was obliged to commence her action within the statute of limitations or it is barred.

Id. at 917. It is important to note that the Non-resident Motor Act, currently found in Utah Code Ann. § 41-12a-505, provides in pertinent part:

> The use and operation by a non-resident or his agent, or of a resident who has departed Utah, of a motor vehicle on Utah highways is an appointment of the Division of Corporations and Commercial Code as the true and lawful attorney for service of legal process in any action or proceeding against him arising from the use or operation of a motor vehicle over Utah highways which use or operation results in damages or loss to person or property.

(emphasis added). Thus, if this Court compares the language of § 78-12-35 with § 41-12a-505, one finds that a resident of the State of Utah who has departed Utah can be served through the Division of Corporations and Commercial Code. Accordingly, any time that a resident is within the state following a motor vehicle accident the plaintiff can serve him personally. When that resident departs the State of Utah, such resident can be served via the Division of Corporations and Commercial Code. As a result, at no time is a resident of the State of Utah absent and the Court's holding in Snyder v. Clune is applicable.

Additionally, the Snyder decision and the policy reasons behind statutes of limitations mandate a conclusion that § 78-12-35 has no application to the present case. In Snyder, the Court looked directly towards § 78-12-35 and stated:

> It is to be conceded that upon a superficial look at this above section, and ignoring all other considerations, its literal wording might seem to indicate that where defendant departs from the state after a cause of action arises, the time of his

> absence should not be counted as a part of the time of limitation. But statutes of necessity must state their objectives in general language. It is not always possible to foresee and prescribe in precise detail for all situations to which they might apply. Attempts to give them universal literal application frequently lead to incongruent results which were never intended. When it is obvious that this is so, the statutes should not be so applied. In order to give a statute its true meaning and significance it should be considered in light of its background and the purpose sought to be accomplished, together with other aspects of the law which have bearing on the problem involved.

Id. at 915-16. The Court then held:

> It is obvious that the objective of the statute above quoted was to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation.

Id. at 916. The Court went on to explain that because the Secretary of State is an agent of the non-resident motorist and may receive process for him the policy of the statute would not be met by tolling the period of limitation. The Court held:

> The defendants thus had an agent within the state upon whom process could have been served for them, and they were thus not "absent" from the state in the sense contemplated by the statute, that is, unavailable for the service of process.

Id. at 916. This Court should note that the language of § 41-12a-505 provides that the Secretary of State is the agent for service of process for residents and non-residents alike. Such a construction comports with this Court's previous views on statutes of limitations.

This Court explained the need for statutes of limitation in Lee v. Gaufin, 867 P.2d 572 (Utah 1993). Generally, concerning statutes of limitation, this Court stated:

> The fixing of a limitations period is highly judgmental and is determined by the Legislature's weighing a number of general policies, such as whether particular

> types of cases require a speedy resolution, the nature of the evidence typically used in litigating the particular type of case, the consequence to putative plaintiffs, defendants, and third persons who might be effected by the litigation, and the interest of society at large in not having disputes resolved for long periods of time. Such policy considerations often suggest different limitations periods for different causes of action, even as to actions within the same general branch of the law. Thus, the legislature has fixed different limitation periods for different types of torts.

Id. at 575. The Court went on to recognize that the legislature has broad latitude to set limitation periods under the state and federal due process clauses.

Statutes of limitation provide an essential function in the legal system of the State of Utah. As the Lee court recognized, the interest of society at large is in not leaving disputes unresolved for long periods of time. When a trial court rules that a statute of limitations should be tolled, such action should not be taken lightly. For at that moment, the bright line test upon which society depends dims and the respective rights of plaintiffs, defendants, and other third parties appear unsettled.

Not only should the Snyder case be affirmed, but this Court should consider the invitation of the Utah Court of Appeals in Van Tassell v. Shafer, 742 P.2d 111 (Utah Ct. App. 1987), and adopt the majority view and the Utah Court of Appeals' more preferred holding:

> We must also assume that proceedings under the Non-Resident Motorist Act are the only Utah proceedings in which the applicable statute of limitations is not tolled by absence from the state until and unless the Utah Supreme Court states otherwise. We observe, however, that the majority view, which holds that a defendant's absence does not toll the statute of limitations where a defendant is amenable to personal jurisdiction, would be preferred by this Court as the Utah rule, as we find it more consistent with the purposes of statutes of limitations.

Id. at 113.

In any event, because this action arose out of a motor vehicle accident, Utah Code Ann. § 78-12-35 has no application. The trial court did not abuse its discretion in denying plaintiff's motion, and therefore its order should be affirmed.

V. THE ISSUE OF ESTOPPEL WAS NOT RAISED BELOW AND IN ANY EVENT IS NOT APPLICABLE TO THE PRESENT MATTER.

In this matter, plaintiff filed an affidavit to support her arguments in opposition to summary judgment that (1) the filing of the complaint should have been no surprise to the defendants insurer, and (2) that defendants insurer acted in bad faith. Neither of those issues were relevant to the motion for summary judgment, nor are they relevant in this Appeal. However, plaintiff now has cited the Court to Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159 (1969) for the proposition that summary judgment should have been denied and the issue of estoppel submitted to the jury for determination. This issue was simply not preserved below.

A review of the record shows that at no point prior to the court granting summary judgment or in plaintiff's motion pursuant to Rule 60(b) was the issue of estoppel or the Rice case ever mentioned. This is not simply a problem of semantics. No theory of estoppel was argued or alleged.

> To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. "Issues not raised in a trial court in timely fashion are deemed

waived, precluding [the appellate court] from considering their merits on appeal." LeBaron & Associates, Inc. v. Rebel Entertainment, 823 P.2d 479, 482-83 (Utah Ct. App. 1991) (citation omitted) (quoting Salt Lake County v. Carlston, 776 P.2d 653,655 (Utah Ct. App. 1989)).

The plaintiff in this matter gave the trial court absolutely no opportunity to address the issue of estoppel or the case of Rice v. Granite School District. Because this matter was not raised below, this Court should not consider it.

However, even if this Court does consider plaintiff's belated claim that estoppel should be applied, plaintiff's argument fails. As the plaintiff notes, the court in Rice v. Granite School District held that there was an issue of fact concerning whether the defendant was estopped from raising the statute of limitations where the defendant insurer had admitted liability and promised compensation, with the only unresolved issue being the amount of damages. See Plaintiff's Brief at 9. Contrary to the plaintiff's assertion, the present case is far different than Rice. There is absolutely no evidence in the record that the insurer of the defendant admitted liability or promised compensation. In fact, there is no evidence at all of any communication with the defendants insurer. By mere coincidence, both parties in this case have the same insurer. However plaintiff only offers letters from her own no-fault insurance adjustor which showed that she was receiving information regarding first party no-fault insurance coverage, and having nothing to do with the defendant Elton Hall or any liability claim. The present case is further

distinguishable from Rice in that the plaintiff in Rice was not represented by counsel prior to the statute of limitation running.

Subsequent to Rice, this Court decided Cornwall v. Larsen, 571 P.2d 925 (Utah 1977), which considered the situation where a plaintiff asserted that an insurance adjuster had lulled him into a false sense of security by requesting medical information regarding the physical condition of the plaintiff. In opposing summary judgment, both at the trial level and on a appeal, the plaintiff relied on Rice v. Granite School District. This Court in Cornwall found the case to be different from Rice. The Court stated:

> In the present case, the plaintiff had counsel who had timely filed the claim and who was well acquainted with the statute which provided that a complaint must be filed within one year after a claim is denied. The actions of the adjustor under those circumstances were not such as would warrant a conclusion that the clear mandate of the statute may not be followed.

Cornwall, 571 P.2d at 927. In the present case, the plaintiff was represented, as the record reflects, by counsel who handled the case for one year prior to the statute running. Nonetheless, no lawsuit was filed until after the statute ran. Likewise, there were no ongoing negotiations. Since the plaintiff was represented by counsel long before the statute ran, and because there were no assurances made by an adjuster regarding any liability payment, the statute of limitation of four years should not be ignored.

VI. THIS COURT'S ORDER DISMISSING THE APPEAL AS TO SUMMARY JUDGMENT WAS WELL FOUNDED

By order dated October 2, 1995, this Court granted defendant's motion for summary disposition and dismissed plaintiff's appeal from the trial courts' summary judgment. Plaintiff recognized that because Utah Rule of Civil Procedure 60(b) is not specifically listed as a tolling motion under Rule 4(b) of the Utah Rules of Appellate Procedure, Rule 60(b) motions do not toll the time for appeal. The plaintiff claims that such a holding would be inconsistent with this Court's decision in Gallardo v. Bolinder, 800 P.2d 816 (Utah 1990). However, a careful reading of the Gallardo decision shows that this Court, as well as the Utah Court of Appeals, has been consistent in its application of Rule 4(b) of the Utah Rules of Appellate Procedure to post trial motions.

It is true that the Gallardo decision states:

> A motion from relief from judgment, if filed within ten days after the entry of judgment, will be treated as a post judgment motion tolling the time for appeal.

Id. at 817. However, to rely on that statement without reading the rest of the decision and considering subsequent case law would lead to an improper application of Rule 4(b). Instead, the more salient language from Gallardo is as follows:

> If the nature of the motion can be ascertained from the substance of the instrument, we have heretofore held that an improper caption is not fatal to that motion.

Gallardo, 800 P.2d at 817 (citing Armstrong Rubber Company v. Bastien, 657 P.2d 1346 (Utah 1983) (citing Howard v. Howard, 11 Utah 2d 149,152, 356 P.2d 275, 276 (1960))). It should also be noted that Gallardo stands primarily for the position that an unsigned minute entry is not a final judgment for the purposes of appeal. It is really upon that basis that the Gallardo court held that the notice of appeal was timely.

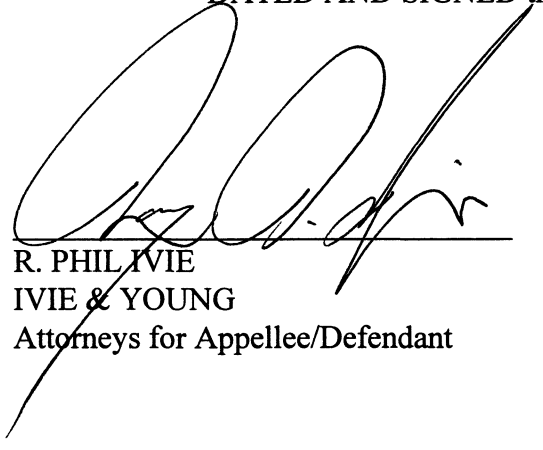
The ruling in this case is consistent with numerous decisions which hold that the appellate courts look to the substance of the pleading in order to determine whether it tolls the time for appeal. See Watkiss & Campell v. FOA & Son, 808 P.2d 1061 (Utah 1991). The differences are easy to identify. In Gallardo, the Court was faced with a pro se litigant who had miscaptioned a pleading. In substance, the motion could have been considered as one for a new trial pursuant to Rule 59 of the Utah Rules of Civil Procedure. In this case, not only was plaintiff's motion styled as one pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, but the memorandum in support of the motion shows that the motion was, in substance as well as form, brought to set aside a judgment. Plaintiff specifically argued in support of her Rule 60(b) motion that she should be granted relief from the judgment pursuant to subsections (1) and (7) of the rule. Unlike the case of Watkiss & Campbell, the trial court in this case did not treat plaintiff's motion as a motion for a new trial, but it is clear from the order that the court treated the motion as one under Rule 60(b). (R. 157) Given these facts, this Court is not presented with a miscaptioned pleading, and therefore this Court was correct in concluding that the 60(b)

motion did not toll the time for appeal. As a result, the underlying summary judgment is not at issue.

CONCLUSION

Because plaintiff has stated no viable reason for reversal, the trial court should be affirmed. The trial court's conclusion that Utah Code Ann. § 78-12-35 is not applicable was correct. The courts conclusion was correct because (1) there was no evidence in the record to support any conclusion that the defendant was absent from the state at any time, and (2) § 78-12-35 does not apply to toll the statute of limitations because of the Non-Resident Motor Vehicle Act. This Court's order dismissing the appeal as to summary judgment was well founded, and now this Court should sustain the trial court's denial of plaintiff's Rule 60(b) motion. Accordingly, the trial court should be affirmed.

DATED AND SIGNED this 22nd day of May, 1996.



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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellee with postage prepaid thereon this 22nd day of May, 1996, to the following:

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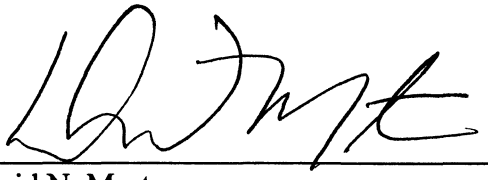

David N. Mortensen

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Addendum A

Rule 60. Relief from judgment or order.

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

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6)the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason within a reasonable time and for reasons (1), (2), (3), or (4), not more that 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court the entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

78-12-35. Effect of absence from state.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.