

1995

Kay Gneiting; Kerry Rick Hubble; and Wilderness Building Systems, Inc. v. Vance : Brief of Appellee

Utah Court of Appeals

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KAY GNEITING; KERRY RICK)
HUBBLE; and WILDERNESS)
BUILDING SYSTEMS, INC.,)

Case No. 950342-CA

UTAH SUPREME COURT

47 NT

K. BRIEF

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DOCKET NO. 950342CA

APPEAL FROM A JUDGMENT IN THE THIRD JUDICIAL
DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE HOMER F. WILKINSON, PRESIDING
ARGUMENT PRIORITY CLASSIFICATION 15

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FILED

OCT 18 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

KAY GNEITING; KERRY RICK)	
HUBBLE; and WILDERNESS)	
BUILDING SYSTEMS, INC.,)	
)	
Third-Party Plaintiffs)	
and Appellees,)	Case No. 950342-CA
)	
vs.)	
)	
DENNIS VANCE,)	
)	
Third-Party Defendant)	
and Appellant.)	

**BRIEF OF APPELLEES - KERRY RICK HUBBLE
AND WILDERNESS BUILDING SYSTEMS, INC., a Utah corporation**

APPEAL FROM A JUDGMENT IN THE THIRD JUDICIAL
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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Section 78-2(a)-3, Utah Code Ann. 1953 as amended.

DETERMINATIVE STATUTES

RULE 60(b) UTAH RULES OF CIVIL PROCEDURE

Rule 60(b). Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

(b) 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; . . . (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reason[] (1) . . . not more than 3 months after the judgment, order, or proceeding was entered or taken.

RULE 11(e) UTAH RULES OF APPELLATE PROCEDURE

Rule 11(e). The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

(1) **Request for transcript; time for filing.** Within 10 days after filing the notice of appeal, the appellant shall request from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary. The request shall be in writing, and, within the same period, a copy shall be filed with the clerk of the trial court and the clerk of the appellate court. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect with the clerk of the trial court and a copy with the clerk of the appellate court. If there was no reporter but the proceedings were otherwise recorded, the appellant shall request from a court transcriber certified in accordance with the rules and procedures of the Judicial Council a transcript of such parts of the proceeding not already on file as the appellant deems necessary. By stipulation of the parties approved by the

appellate court, a person other than a certified court transcriber may transcribe a recorded hearing. The clerk of the appellate court shall, upon request, provide a list of all certified court transcribers. The transcriber is subject to all of the obligations imposed on reporters by these rules.

(2) **Transcript required of all evidence regarding challenged finding or conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

. . . .

STATEMENT OF RELEVANT FACTS

1. On May 8, 1992, an action was filed by Leon and Arlene Robinson (*hereinafter collectively referred to as the "Robinson's"*) against Kay Gneiting, Kerry Rick Hubble and Wilderness Building Systems, Inc. (*hereinafter collectively referred to as the "Hubble Plaintiffs"*) relative to a real property transaction in Summit County. (R. 2-10).

2. In turn, the Hubble Plaintiffs filed a counterclaim against Defendant Dennis Vance (*hereinafter referred to as "Vance"*), the Appellant in this Appeal, seeking damages and indemnification resulting from Vance's initiation of a fraudulent scheme carried out without their knowledge. (R. 12-29).

3. On June 1, 1994, a trial was held in the Third District Court on the Hubble Plaintiffs' counterclaim against Defendant Dennis Vance. (R. 429).

4. The trial court ruled in favor of the Hubble Plaintiffs and against Defendant Dennis Vance, and entered its initial order orally during a telephone conference call on August 18, 1994. (R. 478).

5. The trial court's oral ruling was reduced to a written order and entered with the

clerk of the Third District Court on October 20, 1994. (*See Judgment attached hereto as Exhibit "A"*). (R. 420-422).

6. On or about October 20, 1994, Defendant Vance filed a Motion to Set Aside Judgment, and specifically indicated that the Motion was based on Rule 60(b) of the Utah Rules of Civil Procedure. (*See Motion to Set Aside Judgment attached hereto as Exhibit "B"*). (R. 410-411).

7. In response to the Vance Motion to Set Aside Judgment, Pursuant to Rule 60(b), the Hubble Plaintiffs filed a Memorandum in Response to Third-Party Defendant Dennis Vance's Motion to Set Aside Judgment and Countermotion for Compensatory Damages. (*See Memorandum and Countermotion attached hereto as Exhibit "C"*). (R. 431-435).

8. Defendant Vance thereafter filed a document with the trial court entitled, Third-Party Defendant's Response to Third-Party Plaintiffs' Countermotion for Compensatory Damages. (R. 473-476).

9. On January 13, 1995, the trial court heard extensive oral argument on Defendant Vance's Rule 60(b) Motion to Set Aside Judgment and the Hubble Plaintiffs' Countermotion for Compensatory Damages. (R. 572).

10. Ruling from the bench on January 13, 1995, the trial court denied Defendant Vance's Motion to Set Aside the Judgment and granted the Hubble Plaintiffs' Countermotion for Compensatory Damages. A written Order to that effect was entered by the Court on January 24, 1995. Although Vance has failed to secure a transcript or record of those proceedings, Judge Homer Wilkinson indicated on the record and in open court that it was his original intention that Vance be responsible for compensatory damages related to the earlier judgment,

particularly when the Court considered Vance's orchestration and furtherance of a scheme to defraud the Plaintiffs (*See Order Denying Vance's Motion to Set Aside Judgment and Granting Third-Party Plaintiffs' Countermotion for Compensatory Damages attached hereto as Exhibit "D"*). (R. 588-590).

11. On March 13, 1995, the Court entered Amended Findings of Fact and Conclusions of Law and an Amended Judgment incorporating the compensatory damages in favor of the Hubble Plaintiffs. (R. 661-673).

12. On April 11, 1995, Vance filed his Notice of Appeal from the trial court's judgment. (R. 682-683).

13. Vance's Brief on Appeal was due on or before July 17, 1995. Apparently, Vance was granted an initial extension of time by the court clerk to file his brief no later than August 10, 1995.

14. On August 8, 1995, Vance's attorney, although claiming not yet to have been retained by Vance to represent his interest on appeal, filed a motion on behalf of Vance seeking a second extension to September 15, 1995 in which to file a brief.

15. In the second Motion for Enlargement of Time, Vance's counsel stated that Vance had previously discussed getting a copy of the trial transcript with the court reporter, but that he did not engage the court reporter to actually prepare the transcript until ten days prior to August 8, 1995¹.

16. On August 10, 1995, Appellees filed an objection to the second Motion for Enlargement of Time.

¹ Ten days prior to August 8, 1995 would have been Sunday, July 30, 1995.

17. On August 18, 1995, the Court of Appeals entered an Order denying the Appellant's second Motion for Enlargement of Time. In the Order, the Court held as follows:

The motion for enlargement of time alleges that additional time is needed to file appellant's brief because the transcript is not completed. Despite, Mr. Dingivan's representation that the transcript has been requested, this court has not received a copy of such request as required under Rule 11(e)(1), Utah Rules of Appellate Procedure, nor has the court reporter filed an acknowledgement of the request as required under Rule 12(a)(1), Utah Rules of Appellate Procedure.

The court questions the authority of counsel to file the motion for enlargement since they have not been retained by appellant to represent him in the appeal. Additionally, the court is concerned with appellant's consistent failure to comply with the requirements of the Utah Rules of Appellate Procedure in pursuing this appeal.

Now, therefore, it is hereby ordered that the Motion for Enlargement of time is denied.

(A true and correct copy of the Court of Appeals' Order is attached hereto as Exhibit "E".)

18. Appellant failed to timely file his brief before the August 10, 1995 deadline as ordered by the Court.

19. The Hubble Plaintiffs filed a Rule 26(c) Motion to Dismiss the Vance Appeal which was denied on September 19, 1995.

20. The record before the Court of Appeals is still incomplete.

SUMMARY OF ARGUMENT

The trial court properly had jurisdiction to correct its October 20, 1994 judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. Accordingly, the Amended Judgment entered on March 13, 1995 must be upheld.

ARGUMENT

I.

THE TRIAL COURT HAD JURISDICTION AND PROPERLY CONSIDERED VANCE'S RULE 60(b) MOTION TO SET ASIDE JUDGMENT AND THE HUBBLE/WILDERNESS BUSINESS SYSTEMS' COUNTERMOTION FOR COMPENSATORY DAMAGES

On October 20, 1994, the trial court entered its original judgment against Vance and in favor of the Hubble Plaintiffs. Vance filed a Motion to Set Aside the Judgment citing specifically to Rule 60(b) as the basis of his motion. Vance argued that because the trial court awarded punitive damages against him without reference to compensatory damages, the judgment should be set aside.

The Hubble Plaintiffs timely filed their Memorandum in Response to the Vance Rule 60(b) Motion to Set Aside Judgment and Countermotion for Compensatory Damages. In essence, the parties each sought the trial court's correction to the original judgment to address their respective concerns about the issue of compensatory damages. In reply to the Rule 60(b) Countermotion for Compensatory Damages, Vance filed his Response to Third-Party Plaintiffs' Countermotion for Compensatory Damages.

The trial court heard oral argument on both Rule 60(b) Motions on January 13, 1995. The court denied Vance's Motion to Set Aside the Judgment and granted the Countermotion of the Hubble Plaintiffs for Compensatory Damages. The court specifically stated as part of its ruling that it had intended that Vance be responsible for compensatory damages related to the earlier judgment, particularly when the court considered Vance's orchestration and furtherance of a scheme to defraud the Plaintiffs.

Rule 60(b) of the Utah Rules of Civil Procedure provides for relief from a final judgment:

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

Rule 60(b) Utah Rules of Civil Procedure.

It is the unquestioned prerogative of the trial court, either upon its own motion, or upon application of a party, to change or correct any order which it judges to have been entered incorrectly when it acts timely and within the provisions of the rule governing such changes or corrections of orders. Richins v. Delbert Chipman & Sons Co., Inc., 817 P.2d 382, 387 (Utah App. 1991); Rees v. Albertsons Inc., 587 P.2d 130, 131-132 (Utah 1978).

The Utah Supreme Court specifically held in the Rees v. Albertsons, Inc., *supra*, case as follows:

Considerable tempest has been engendered in this case because the trial court first denied a motion for summary judgment made by the defendant, but upon subsequent proceedings decided to vacate that order, then reconsidered and granted defendant's motion. It would serve no useful purpose to go into any extended detail as to the proceedings. It is sufficient to say that it is the unquestioned prerogative of the court, either upon its own motion, or upon the application of a party, to change or correct any order which it judges to have been entered by "mistake, inadvertence, surprise, or excusable neglect" as provided by Rule 60(b), U.R.C.P. when it acts timely and within the provisions of that rule. The actions of the court were within that prerogative.² 587 P.2d at 131-132.

²See 60 C.J.S. Motions & Orders § 62(1); Meagher v. Equity Oil Co., 5 Utah 2d 196, 299 P.2d 827 (1956); Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662 (1966); Luke v. Coleman, 38 Utah 383, 113 P. 1023 (1911).

Similarly, in the 1993 Utah Court of Appeals decision in Kunzler v. O'Dell, 855 P.2d 270 (Utah App. 1993), this Court addressed the propriety of a motion filed within the trial court by Appellee to obtain relief from an incorrect judgment. The Appellants in that case also joined in the motion requesting similar relief on their behalf. The Court of Appeals held that:

. . . Appellees' Motion to "clarify" the trial court's original order allowed the trial court to change the deficient judgment under Utah Rule of Civil Procedure 60(b).

Kunzler v. O'Dell, 855 P.2d 270, 273 (Utah App. 1993)

The Court based its ruling on the language found in Rule 60(b) which provides in pertinent part that "On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party . . . from a final judgment, order, or proceeding for the following reasons . . . (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . ." Utah R.Civ.P. 60(b); 855 P.2d at 273.

In the Kunzler v. O'Dell, *supra*, case, the Court went on to point out that the title of a motion is not dispositive as to whether a court can grant relief under that motion. When the substance of a mislabeled motion is in essence the same as a motion under Rule 60(b), courts can use the rule to grant relief.³ 855 P.2d at 274. *See also* Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1064 (Utah 1991); Darrington v. Wade, 812 P.2d 452, 457 (Utah App.1991) (the court did not elevate form over substance by refusing to allow a timely objection to a judgment invoking Rule 60(b) relief).

³The Court of Appeals has further held that correcting its judgment is one manner of relief available the trial court. *See, e.g.*, Baker v. Western Sur. Co., 757 P.2d 878, 881 (Utah App. 1988).

It is well settled that Courts should give liberal construction to Rule 60(b). 7 James W. Moore, et al., *Moore's Federal Practice* ¶ 60.18[8], at 60-138 to -139 (2d ed. 1992) (footnote omitted). Because "nomenclature is unimportant, moving papers that are mislabeled in other ways may be treated as motions under Rule 60(b) when relief would be proper under that rule." Id. A Court may grant relief under subsection seven of Rule 60(b) for any reason other than the first six enumerated by the rule if relief is justified, and the motion is made within a reasonable time. Utah R.Civ.P. 60(b); Richins v. Delbert Chipman & Sons Co., Inc., 817 P.2d 382, 387 (Utah App. 1991). The precedent of law in Utah further grants to the trial court jurisdiction to consider Rule 60(b) motions even where an appeal is pending. White v. State, 795 P.2d 648 (Utah 1990); Baker v. Western Sur. Co., 757 P.2d 878 (Utah App. 1988). In White v. State, supra, the Utah Supreme Court stated that "[U]nder Rule 60(b) the district court has the power to relieve a party of a judgment even though it may be a final judgment."⁴

A trial court's decision to grant or deny a 60(b) motion will not be overturned absent a clear abuse of "discretion." Fackrell v. Fackrell, 740 P.2d 1318, 1320 (Utah 1987), as cited in Baker v. Western Sur. Co., 757 P.2d 878, 881 (Utah App. 1988). More recently, this Court has held that "We will not interfere with the trial court's broad discretion to rule on a 60(b) motion absent a showing of abuse of that discretion." Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989) as cited in Richins v. Delbert Chipman & Sons, Co., 817 P.2d 382 (Utah App. 1991); Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986).

⁴Indeed, it has been observed that the rule provides a "nice balance between the interest in finality [of judgments], and the desire to achieve justice." Wright & Miller, 11 Federal Practice and Procedure, § 2872 (1973).

The trial court's correction of the judgment to include compensatory damages was proper and within the jurisdictional purview of the court under Rule 60(b). The trial court did not abuse its discretion when it corrected the judgment to include compensatory damages against Vance, and the Amended Judgment must be affirmed.

II.

APPELLANT'S FAILURE TO SECURE A TRANSCRIPT AND RECORD OF THE TRIAL COURT'S PROCEEDINGS REQUIRE THAT THE JUDGMENT OF THE TRIAL COURT BE AFFIRMED AND UPHELD

Rule 11(e)(2) of the Utah Rules of Appellate Procedure provides that, "[i]f the appellant intends to urge on appeal that a *finding* or *conclusion* is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." Sampson v. Richins, 770 P.2d 998 (Utah App. 1989); Bevan v. J.H. Constr. Co., 669 P.2d 442, 443 (Utah 1983) (in the absence of a transcript, the Court must presume the trial proceedings were proper and judgment was supported by the evidence); Utah R. App. P. 11(e)(2).

As the Appellant, Vance, has the burden of providing the Court of Appeals with an adequate record from the trial court for review. Jacobs v. Hafen, 875 P.2d 559 (Utah App. 1994); Mark VII Fin. Consultants, Corp. v. Smedley, 792 P.2d 130, 134 (Utah App. 1990); Onyeaber v. Pro Roofing, Inc., 787 P.2d 525, 527 (Utah App. 1990); Utah R. App. P. 11(e)(2). Vance further has the responsibility to marshal all of the evidence that supports the trial court's findings and conclusions of law, and must demonstrate that despite the evidence, the findings

and conclusions are so lacking in support as to be "against the clear weight of the evidence."

In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

Vance has failed to provide the Court with a transcript of the proceedings below. Without all of the relevant evidence bearing on the issues raised on appeal, as required by Utah R. App. P. 11(e)(2), "we [the Court of Appeals] can only presume that the judgment was supported by sufficient evidence." Horton v. Gem State Mut. of Utah, 794 P.2d 847, 849 (Utah App. 1990); State v. Nine Thousand One Hundred Ninety-Nine Dollars, 791 P.2d 213, 217 (Utah App. 1990).

Without an appropriate record and transcript of the proceedings which took place before the trial court, not only during the June 1, 1994 trial, but at the January 13, 1995 hearing on the Rule 60(b) motions, the only presumption that can be made is that the trial proceedings were proper and judgment appropriately entered.

III

VANCE IS PRECLUDED FROM RAISING AN OBJECTION TO THE TRIAL COURT'S RULING RAISED FOR FIRST TIME ON APPEAL

This Court has consistently refused to consider arguments raised by Appellants for the first time on appeal. "Appellants cannot assert new grounds for their motion for the first time on appeal without having afforded the trial court an opportunity to rule on those grounds or to correct any alleged deficiency." Meyer ex rel. Meyer v. Bartholomew, 690 P.2d 558 (Utah 1984); Atkins v. Household Finance Corp., 581 P.2d 193 (1978) *as cited in* Katz v. Pierce, 732 P.2d 92, 95-96 (Utah 1986); (*See also*, Richins v. Delbert v. Chipman & Sons Co., Inc., *supra*,

817 P.2d at 387).

The very crux of Vance's argument on appeal is that the trial court did not have the authority to amend its October 20, 1994 judgment. (*See* Brief of Appellant Point I). The basis cited by Vance for this proposition focuses on a fallacious assumption that the trial court improperly amended its original judgment after the Rule 52 and Rule 59 ten day bar date.

It is interesting to note, however, that when the Hubble Plaintiffs filed their Memorandum in Response to Third-Party Defendant Vance's Rule 60(b) Motion and Countermotion for Compensatory Damages on November 1, 1994, Vance nor his counsel ever objected to or challenged the trial court's authority to consider the Rule 60(b) Countermotion. In fact, rather than raise the issue, Vance merely argued in his Reply to the Countermotion that the Court had already considered the Hubble Plaintiffs' Countermotion arguments. Vance's own Docketing Statement filed in the Court of Appeals does not even support this belated challenge of the trial court's action.

The vulnerability of Vance's argument that the trial court had no authority to correct or amend its October 20, 1994 judgment, improperly raised here for the first time on appeal, is additional, if necessary, support for the premise that the decision of the trial court must be affirmed.

IV.

APPELLANT'S FAILURE TO COMPLY WITH OTHER ASPECTS OF THE UTAH RULES OF APPELLATE PROCEDURE PROVIDE, IF NECESSARY, ADDITIONAL CAUSE NOT TO DISTURB THE TRIAL COURT'S DECISION

Rule 26(c) of the Utah Rules of Appellate Procedure states as follows:

- (c) **Consequence of failure to file brief.** If an appellant fails to file

a brief within the time provided in this rule, or within the time as may be extended by order of the appellate court, an appellee may move for dismissal of the appeal. . .

Rule 26(c) U.R.A.P.

Appellant Vance was previously granted an extension to file his brief in this appeal no later than August 10, 1995. He thereafter filed a second motion for another extension of time to file his brief on or before September 15, 1995. The Court, after considering all of the circumstances surrounding the Appellant's request for a second extension of time, denied the request. (*See Exhibit "E" Court of Appeals' Order entered August 18, 1995*).

In his second Motion for Enlargement of Time, Appellant represented that he had made arrangements with the court reporter for a transcript ten days prior to filing the second Motion for Enlargement of Time. In its ruling on Appellant's motion, the Court, however, pointed out that despite counsel for Appellant's representation that additional time was needed to file the brief because the transcript was not yet complete and that the transcript had been requested, the Court of Appeals has never received a copy of such a request as required under Rule 11(e)(1), Utah Rules of Appellate Procedure, nor has the court reporter filed an acknowledgement of the request as required under Rule 12(a)(1), Utah Rules of Appellate Procedure. (*See Exhibit "E" Court of Appeals' Order entered August 18, 1995*).

In denying Appellant's second request for an enlargement of time, this Court appropriately pointed out that **"...[t]he court is concerned with appellant's consistent failure to comply with the requirements of the Utah Rules of Appellate Procedure in pursuing this appeal." *Id.***

All litigants have a right to rely on the precise language of a court order. Of course the rules provide relief, namely a procedure for timely seeking appropriate extensions when there is just and good cause. A failure to properly avail oneself of that procedure is an intentional and voluntary waiver of any right to that relief. The rules are grounded in fairness - carefully articulated to protect all litigants. When the rules are ignored, the result is unfairness to those litigants who comply.

Throughout this appeal, Appellant Vance has failed to comply with the Rules of Appellate Procedure, neglected to request the transcript, and has disregarded the filing due date for his brief. Allowing Vance to submit his brief beyond the court-ordered deadline and in violation of the Court of Appeals' August 18, 1995 Order flaunts the rules and orders of this Court and makes a mockery of fairness and justice to the other litigants.

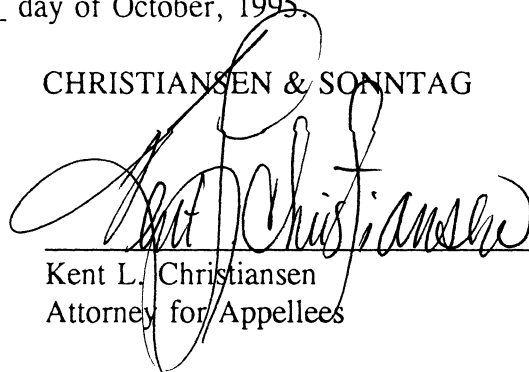
CONCLUSION AND RELIEF SOUGHT

The trial court properly corrected its October 20, 1994 Judgment pursuant to Rule 60(b) U.R.C.P. Moreover, because Appellant Vance has failed to provide the Court of Appeals an appropriate record of the proceedings below as required by Rule 11(e) U.R.A.P.; has inappropriately challenged the trial court's action in correcting the judgment for the first time

on appeal; and based upon the other reasons stated herein, the judgment of the trial court must be affirmed.

Respectfully submitted this 18 day of October, 1995.

CHRISTIANSEN & SONNTAG




Kent L. Christiansen
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I delivered a true and correct copy of the foregoing Brief of Appellees by depositing a copy thereof in the U.S. Mails, postage prepaid, this 18 day of October, 1995, and properly addressed as follows:

JEFFREY WESTON SHIELDS (#2948)
LAWRENCE R. DINGIVAN (#5193)
PURSER EDWARDS & SHIELDS
215 South State Street, #800
Salt Lake City, Utah 84111



Michelle Childs

EXHIBIT "A"

KENT L. CHRISTIANSEN of
CHRISTIANSEN & SONNTAG
345 IBM Plaza
420 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 359-3762

FILED DISTRICT COURT
Third Judicial District

OCT 20 1994

JUDGMENT

By D. [Signature]
Deputy Clerk

Attorneys for Hubble and Wilderness Building Systems

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LEON W. ROBINSON and
ARLENE ROBINSON,

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC., a
Utah corporation,

Defendants,

JUDGMENT

2195658
10-24-94-806am

Civil No. 920902754

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC., a
Utah corporation,

Third Party Plaintiffs,

vs.

DENNIS VANCE,

Third Party Defendant.

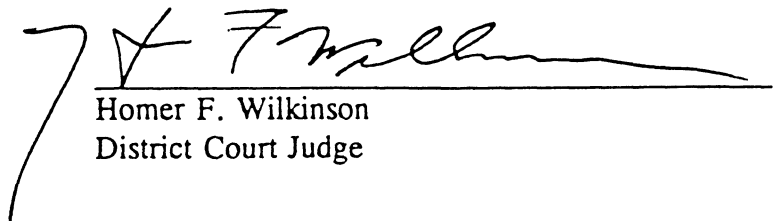
Judge Homer F. Wilkinson

This matter came on regularly before the Court for a non-jury trial on the Third-Party Complaint filed by Kerry Rick Hubble and Wilderness Building Systems, against Third-Party Defendant, Dennis Vance, on June 1, 1994, the Honorable Homer F. Wilkinson, Third District Court Judge, presiding; and was again before the court for a hearing on Third-Party Plaintiffs' Motion for Clarification of Judgment Against Third-Party Defendant Dennis Vance on September 23, 1994. Kent L. Christiansen of the law firm of Christiansen & Sonntag, appeared on behalf of the Third-Party Plaintiffs, Kerry Rick Hubble and Wilderness Building Systems, Inc. Scott Mitchell of the law firm of Lehman, Mitchell & Waldo, appeared on behalf of the Plaintiffs, Leon and Arlene Robinson (hereinafter "Robinsons"). Dennis Vance, Third-Party Defendant, appeared pro se. The parties having adduced evidence by way of testimony and documentary exhibits, and having argued the matter to the Court, and the Court having reviewed the file, exhibits, and memoranda submitted by the parties, the Court having entered its Findings of Fact and Conclusions of Law, the Court being fully advised in the premises, and good cause appearing therefore, it is hereby:

ORDERED, ADJUDGED, AND DECREED that judgment upon the merits be entered in favor of the Third-Party Plaintiffs Kerry Rick Hubble and Wilderness Building Systems, Inc., and against Third-Party Defendant, Dennis Vance, in the amount of \$24,780.56, together with interest thereon as allowed by Utah Code Annotated § 15-1-4.

DATED this 2^o day of October, 1994.

BY THE COURT:


Homer F. Wilkinson
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Judgment by placing a true and correct copy thereof in the U.S. Mails, postage prepaid, this 6 day of October, 1994, and properly addressed as follows:

Scott B. Mitchell
LEHMAN, MITCHELL & WALDO
An Association of Sole Proprietorships
Kearns Building, Suite 721
136 South Main Street
Salt Lake City, Utah 84101

Dennis Vance
7702 West 13090 South
Herriman, Utah 84065

Bunde Biddle

EXHIBIT "B"

Michael G. Barker (6475)
MICHAEL G. BARKER, P.C.
56 E. Broadway, Suite 600
Salt Lake City, Utah 84111
Telephone: (801) 363-3334

Attorney for Third-Party Defendant

FILED
DISTRICT COURT

94 OCT 19 PM 2:49

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

BY James Coughlin
Clerk of Court

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

LEON W. ROBINSON and
ARLENE ROBINSON,

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC.,
a Utah Corporation,

Defendants,

MOTION TO SET ASIDE JUDGMENT

Civil No. 920902754

Judge Homer F. Wilkinson

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC.,
a Utah Corporation,

Third-Party Plaintiffs,

vs.

DENNIS VANCE,

Third-Party Defendant.

COMES NOW Third-Party Defendant, by and through counsel, and moves the Court for an order setting aside the judgment for punitive damages entered against Third-Party Defendant in favor of Third-Party Plaintiffs. This motion is based on Rule 60(b)(1), (5) of the Utah R. Civ. Pro. and is supported by the

accompanying Memorandum of Points and Authorities.

DATED this 11th day of October, 1994.

MICHAEL G. BARKER, P.C.



Michael G. Barker
Attorney for Third-Party Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of October, 1994 I mailed, first class, postage prepaid, a copy of the foregoing Motion to Set Aside Judgment to the following attorneys of record:

Kent L. Christiansen, Esq.
CHRISTIANSEN & SONNTAG
345 IBM Plaza
420 East South Temple
Salt Lake City, UT 84111

Scott B. Mitchell, Esq.
LEHMAN, MITCHELL & WALDO
Kearns Building, Suite 721
136 South Main Street
Salt Lake City, UT 84101



EXHIBIT "C"

BY M. J. [Signature]
[Signature]

Attorneys for Third-Party Plaintiffs

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LEON W. ROBINSON and
ARLENE ROBINSON,

Plaintiffs,

VS.

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC.,
a Utah corporation,

Defendants,

**THIRD-PARTY PLAINTIFFS'
MEMORANDUM IN RESPONSE
TO THIRD-PARTY DEFENDANT
DENNIS VANCE'S MOTION
TO SET ASIDE JUDGMENT
AND COUNTERMOTION FOR
COMPENSATORY DAMAGES**

Civil No. 920902754

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC., a
Utah corporation,

Third Party Plaintiffs,

VS.

DENNIS VANCE,

Third Party Defendant.

Judge Homer F. Wilkinson

Third-Party Plaintiffs, Kerry Rick Hubble, and Wilderness Building Systems, Inc., a Utah corporation, by and through their attorney, Kent L. Christiansen of the law firm Christiansen & Sonntag, and pursuant to Rule 4-501 of the Utah Code of Judicial Administration, hereby responds to the Third-Party Defendant, Dennis Blaine Vance's Motion to Set Aside Judgment, and submits this Countermotion requesting that this honorable court enter judgment for compensatory damages against Third-Party Defendant Dennis Vance in conjunction with the award for punitive damages previously entered in this matter. In response to Vance's Motion to Set Aside the Judgment, and in support of their Countermotion, said Third-party Plaintiffs respectfully submit as follows:

1. A trial was held on the Third-Party Complaint against Dennis Vance on June 1, 1994. At the close of that trial, and pursuant to the allegations of the Third-Party Complaint, Third-Party Plaintiffs requested that the court enter judgment against Third-Party Defendant Vance in the amount of \$24,780.56 compensatory damages, together with pre-judgment interest in the amount of \$16,583.97, plus interest at the rate of twelve (12) percent from April 21, 1993--the same amount the court awarded the Robinsons against Defendants and Third-Party Plaintiffs Hubble and Wilderness Building Systems. Third-Party Plaintiffs also sought an award of damages on their conversion claim in the amount of \$9,800.00, plus punitive damages against Defendant Vance.

2. As a result of the evidence presented at trial, the court granted Third-Party Plaintiffs judgment for punitive damages against Dennis Vance in the amount of \$24,780.56. No amount for compensatory damages was included in the judgment.

3. The evidence supports the fact, and the court so found, that Third-Party Plaintiffs

were damaged by the willful and malicious acts of Dennis Vance. As a direct and proximate result of Vance's actions, Third-Party Plaintiffs have been damaged in that judgment was entered against them and in favor of the Plaintiffs for compensatory damages totalling \$41,364.53 plus interest at twelve percent (12%) from April 21, 1993.

4. Movants herein respectfully submit that in addition to the award for punitive damages, they are entitled to compensatory damages against Third-Party Defendant Vance, and that existing law dictates that compensatory damages be awarded incident to an award of punitive damages. Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991); Atkin Wright & Miles v. Mountain States Tel., 709 P.2d 330, 337 (Utah 1985); Maw v. Weber Basin Water Conservancy District, 436 P.2d 230 (Utah 1968); Graham v. Street, 270 P.2d 456 (Utah 1954).

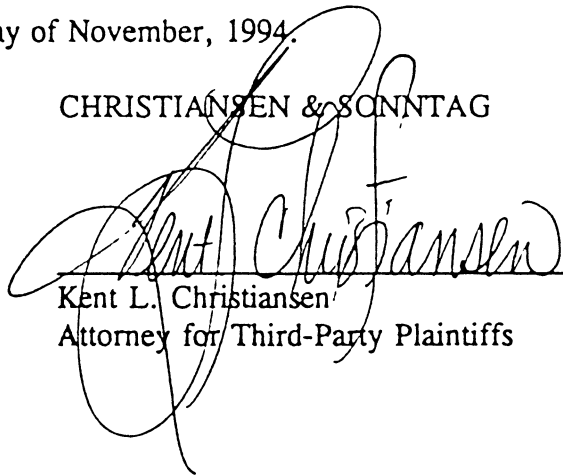
5. Further, the evidence at trial was undisputed that Third-Party Plaintiffs had been damaged in the amount of \$9,000.00 for the Third-Party Defendant's wrongful conversion of their property. Accordingly, Third-Party Plaintiff's request that the judgment against Vance also include the \$9,000.00 damage related to the conversion of the property belonging to Wilderness Building Systems, Inc. Again, evidence on the issue of compensatory damages for conversion against Defendant Vance in the Third-Party Complaint, was presented and not refuted at the time of trial. Therefore, Third-Party Plaintiffs submit that the evidence supports a finding on the fifth cause of action against Defendant Vance for judgment in the amount of \$9,800.00, plus recovery of the \$816.00 Third-Party Plaintiffs paid to Defendant Vance to perform work related to collection of their accounts, which he never did.

WHEREFORE, Third-Party Plaintiffs respectfully request that Third-Party Defendant's Motion to Set Aside the Judgment be denied, and that the court enter judgment for compensatory

damages against Dennis Vance consistent with those rendered against Defendants Hubble and Wilderness Building Systems in the amount of \$24,780.56, plus \$16,583.97 for a total of \$41,364.53, plus interest at the rate of twelve percent (12%) from April 21, 1993; for compensatory damages on Third-Party Plaintiffs conversion claim in the amount of \$9,800.00; and for damages against Defendant Vance for his breach of the services contract and the \$816.00 paid to him for work on lot J-63.

DATED this 15th day of November, 1994.

CHRISTIANSEN & SONNTAG



Kent L. Christiansen
Attorney for Third-Party Plaintiffs

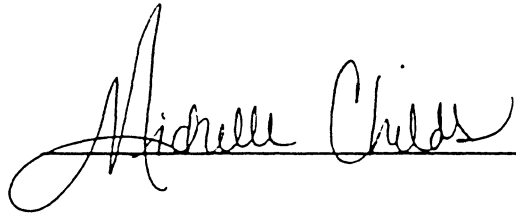
MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Third-Party Plaintiffs' Memorandum in Response to Third-Party Defendant Dennis Vance's Motion to Set Aside Judgment and Countermotion for Compensatory Damages was mailed, postage prepaid this 1st day of November, 1994, to the following:

Michael G. Barker, Esq.
56 E. Broadway, Suite 600
Salt Lake City, Utah 84111

Scott B. Mitchell, Esq.
LEHMAN, MITCHELL & WALDO
An Association of Sole Proprietorships
Kearns Building, Suite 721
136 South Main Street
Salt Lake City, Utah 84101

Kay Gneiting
8194 South 2470 West
West Jordan, Utah 84088



A handwritten signature in cursive script, reading "Michael Childs", is written over a horizontal line.

EXHIBIT "D"

FILED DISTRICT COURT
Third Judicial District

By D. L. [Signature]
Deputy Clerk

00588

This matter came on regularly before the Court for hearing on Third-Party Defendant Dennis Vance's Motion to Set Aside Judgment and Third-Party Plaintiff's Countermotion for Compensatory Damages on January 13, 1995 at the hour of 10:00 a.m. before the Honorable Homer F. Wilkinson, Third District Court Judge, presiding. Kent L. Christiansen of the law firm of Christiansen & Sonntag, appeared on behalf of the Defendants, Wilderness Building Systems, Inc. and Kerry Rick Hubble. Scott B. Mitchell appeared on behalf of the Plaintiffs, Leon W. and Arlene Robinson. Michael G. Barker appeared on behalf of Third-Party defendant, Dennis Vance. The parties having submitted legal Memoranda, and having filed various pleadings and other documents in support of their respective positions, the Court having reviewed the testimony and documentary exhibits presented to the Court, and the parties having argued the matter to the Court, the Court having considered the arguments of the parties, and now being fully advised in the premises, and good cause appearing therefore, it is hereby:

ORDERED, ADJUDGED, AND DECREED that Third-Party Defendant Dennis Vance's Motion to Set Aside the Judgment is hereby denied;

IT IS FURTHER ORDERED that the Third-Party Plaintiff's Motion for Compensatory Damages against Third-Party Defendant Dennis Vance is granted on the basis that the court feels the evidence adduced at trial, the applicable law, and the interests of justice and equity support entry of an order consistent with the Amended Findings of Fact and Conclusions of Law, and the Amended Judgment filed contemporaneously herewith.

DATED this 24 day of January, 1995.

BY THE COURT:



HOMER F. WILKINSON

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Order Denying Vance's Motion To Set Aside Judgment And Granting Third-Party Plaintiff's Countermotion For Compensatory Damages by placing a true and correct copy thereof in the U.S. Mails, postage prepaid, this 13 day of January, 1995, and properly addressed as follows:

Scott B. Mitchell
Attorney at Law
Suite 620
8 East 300 South
Salt Lake City, Utah 84111

Michael G. Barker
Attorney at Law
56 E. Broadway, Suite 600
Salt Lake City, Utah 84111



EXHIBIT "E"

IN THE UTAH COURT OF APPEALS

FILED

-----ooOoo-----

AUG 12 1995
Maury M. Branch
COURT OF APPEALS

Kay Gneiting; Kerry Rick)
Hubble; and Wilderness)
Building Systems, Inc., a Utah)
corporation,)
)
Third-Party Plaintiffs)
and Appellees,)
)
v.)
)
Dennis Blaine Vance,)
)
Third-Party Defendant)
and Appellant.)

ORDER

Case No. 950342-CA

This matter is before the court upon a motion for enlargement of time, filed on August 8, 1995, by Lawrence R. Dingivan and Jeffrey Weston Shields of the law firm of Purser Edwards & Shields, L.L.C., allegedly in behalf of appellant. Appellees filed an objection to the motion on August 10, 1995.

The motion for enlargement of time alleges that additional time is needed to file appellant's brief because the transcript is not completed. Despite, Mr. Dingivan's representation that the transcript has been requested, this court has not received a copy of such request as required under Rule 11(e)(1), Utah Rules of Appellate Procedure, nor has the court reporter filed an acknowledgment of the request as required under Rule 12(a)(1), Utah Rules of Appellate Procedure.

The court questions the authority of counsel to file the motion for enlargement since they have not been retained by appellant to represent him in the appeal. Additionally, the court is concerned with appellant's consistent failure to comply with the requirements of the Utah Rules of Appellate Procedure in pursuing this appeal.

Now, therefore, IT IS HEREBY ORDERED that the motion for enlargement of time is denied.

Dated this 10th day of August, 1995.

BY THE COURT:


Judith M. Billings, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of August, 1995, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Dennis Blaine Vance
7702 West 13090 South
Riverton, UT 84065

Kent L. Christiansen
Christiansen & Sonntag
Attorneys at Law
420 East South Temple, #345
Salt Lake City, UT 84111

Dated this 18th day of August, 1995.

By, 
Deputy Clerk

Case No. 950342

EXHIBIT "F"

Rule 60. Relief from judgment or order.

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

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