

1995

Kay Gneiting; Kerry Rick Hubble; and Wilderness  
Building Systems, Inc., a Utah Corporation v.  
Dennis Blaine Vance : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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

Third-Party Plaintiffs  
and Appellees

vs.

DENNIS BLAINE VANCE,

Third-Party Defendant  
and Appellant.

Case No. 950342-CA

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**APPELLANT'S REPLY BRIEF**

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**Appeal from the Third Judicial District Court,  
In and For Salt Lake County  
The Honorable Homer F. Wilkinson  
Argument Priority Classification 15**

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**NOV 17 1995**

**COURT OF APPEALS**

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**IN THE UTAH COURT OF APPEALS**

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

Third-Party Plaintiffs  
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and Appellant.

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Case No. 950342-CA

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**APPELLANT'S REPLY BRIEF**

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Appellant Dennis Vance ("Mr. Vance") submits the following Brief in Reply to the Brief Of Appellees Kerry Rick Hubble and Wilderness Building Systems, Inc. (collectively, the "Hubble Plaintiffs") dated October 18, 1995.

**THE HUBBLE PLAINTIFFS' CHARACTERIZATION OF  
THEIR NOVEMBER 1, 1994 MOTION AS ONE UNDER  
UTAH RULE OF CIVIL PROCEDURE 60(b) IS UNAVAILING**

In the Opposing Brief, the Hubble Plaintiffs are at pains to deflect attention from the fact that they filed their "Memorandum in Response to Third-Party Defendant Dennis Vance's Motion to Set Aside Judgment and Countermotion for Compensatory Damages, November 1, 1994, (the "Countermotion"), R. 431-435; see also

Exhibit "C" to Appellant's Opening Brief, 12 days after entry of the final judgment that the Countermotion was crafted to amend. For example, in the Opposing Brief's introductory "Statement of Relevant Facts," the Hubble Defendants curiously omit all reference to the chronology pertaining to their submission of the Countermotion to the District Court. See Brief of Appellees, October 18, 1995, at 2-4.

The Hubble Plaintiffs ignore the tardy filing of the Countermotion for two reasons. First, doing so perpetuates the fallacy that the lapse of time between the entry of the October 20 Judgment and the filing of the Countermotion has no bearing on the Countermotion's legal capacity to amend the Judgment. Second, affecting a seeming disinterest in accounting for this passage of time strengthens the Hubble Plaintiffs' contention that they always intended to have the Countermotion received and evaluated by the District Court under Utah Rule of Civil Procedure 60(b).

It is worth noting that in their campaign to link the Countermotion with Rule 60(b), the Hubble Plaintiffs steer well clear of the text of the Countermotion itself. Indeed, the Countermotion, the centerpiece of this dispute, is relegated to Exhibit C to the Opposing Brief and is never cited by the Hubble Plaintiffs. From the Hubble Plaintiffs' perspective at least, there is a sound reason for shunning the Countermotion. Nothing about that document, not its title, not its text, and not its

prayer for relief, even hints at an invocation of Rule 60(b). Thus, aside from being most unhelpful in aiding the Hubble Plaintiffs' cause, the Countermotion runs foul of Utah Rule of Civil Procedure 7(b)(1) which obliges a party applying for an Order from the trial court to state the grounds for its motion "with particularity."

Though the Countermotion exhibits no ties to Rule 60(b), the Hubble Plaintiffs maintain that the evidentiary standards of Rule 60(b) are applicable to it by default. On this solitary procedural point, the Hubble Plaintiffs are only partly correct. As the United States Court of Appeals for the Seventh Circuit has explained, a post-judgment motion served within 10 days following the entry of a judgment is evaluated under the criteria of Rule 59(e). U.S. v. Deutsch, 981 F.2d 299, 300-01 (7th Cir. 1992); accord Van Skiver v. U.S., 952 F.2d 1241, 1243 (10th Cir. 1991).<sup>1</sup> On the other hand, a motion submitted more than ten days after entry of the Judgment is assessed under the standards of Rule 60(b).<sup>2</sup>

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<sup>1</sup> Federal rules and cases may be used in the interpretation of Utah Rules of Civil Procedure 59(e) and 60(b). Kunzler v. O'Dell, 855 P.2d 270, 273 (Utah App. 1993).

<sup>2</sup> The application of Rule 59(e) to motions served within ten days of judgment is limited to "substantive" judgments, *i.e.*, those that "if granted would result in a substantive alteration in the judgment. . . ." Deutsch, 981 F.2d at 301 n.2; accord Dalton v. First Interstate Bank of Denver, 863 F.2d 702, 703-04 (10th Cir. 1988).



The Hubble Plaintiffs maintain that a "ten-day breakpoint" rule, such as that announced in Deutsch, settles the question of whether the Countermotion was properly heard by the District Court. Because the Countermotion was filed twelve days after October 20, the Hubble Plaintiffs insist, Rule 60(b) automatically confers procedural legitimacy on their ambiguous drafting and the only outstanding issue is abuse of judicial discretion. See Brief of Appellees, October 18, 1995, at 8 (citing Kunzler v. O'Dell, 855 P.2d 270, 274 (Utah App. 1993)). This proposed rule of decision is simplistic and unknown in federal or Utah jurisprudence.

As the Kunzler court correctly observed, the character of a post-judgment motion is never determined by reference to the motion's title. But neither is it established solely by reference to a calendar. Whether a post-judgment motion is governed by Rule 59(e) or Rule 60(b) is determined ultimately by the function of the motion. U.S. v. Accounts Nos. 3034504504 and 144-07143, 971 F.2d 974, 987 (3d. Cir. 1992) (Emphasis added.); Darrington v. Wade, 812 P.2d 452, 457 (Utah App. 1991) (defendant's supplemental statement of objections was the functional equivalent of a Rule 60(b) motion). This comprehensive rule of construction, though ignored in the Opposing Brief, is central to a proper assessment of the character of a post-judgment motion. As the U.S. Court of Appeals explained in

Deutsch, adoption of the rule urged by the Hubble Plaintiffs in this appeal "effectively reads the ten-day time limit out of Rule 59(e) because untimely 59(e) motions will now be analyzed under Rule 60(b) instead of being dismissed. Deutsch, 981 F.2d 301. But when the purpose of the motion at issue is taken into account, the Seventh Circuit Court observed, the ten-day breakpoint rule does not immunize untimely Rule 59(e) motions from a summary dismissal.

[S]ubstantive motions served from the eleventh day on must be shaped to the specific grounds for modification or reversal listed in Rule 60(b) -- they cannot be general pleas for relief. . . . Consequently Rule 59(e) and Rule 60(b) will retain their distinct characters, and litigants should not expect to employ our rule as a Trojan horse for sneaking what are actually tardy Rule 59(e) motions into the courtroom under the guise of Rule 60(b). Nor will our rule burden District Judges with agonizing over whether a motion asserts grounds for relief included in Rule 60(b); it is the movant's task to make its contentions clear.

Deutsch, 981 F.2d at 301-02; compare U.R.C.P. 7(b)(1). Thus, "when a motion can fairly be characterized as one under Rule 59(e) (i.e., lacking any special circumstances justifying relief under Rule 60(b)) it must be filed within the 10-day period and will not be treated under Rule 60(b)(1)." Reyher v. Champion International Corp., 975 F.2d 483, 488 (8th Cir. 1992) (quoting 7 James W. Moore, Moore's Federal Practice 2d ed. ¶ 60-22[3])).

**THE FUNCTION OF THE COUNTERMOTION IS FOREIGN TO RULE 60(b).**

The Opposing Brief gives preciously few clues about which of the several legal grounds available under Rule 60(b) sustain the District Court's consideration of the Countermotion. The Opposing Brief's "Summary of Argument" excerpts subsection (1) (mistake, inadvertence, surprise, or excusable neglect) and (7) (any other reason justifying relief from the operation of the judgment). The "Argument" section of the Opposing Brief sets out an extended quotation from Rees v. Albertons, Inc., 587 P.2d 130, 131-32 (Utah 1978), for the proposition that a trial court may correct any order entered by mistake, inadvertence, surprise or excusable neglect. The difficulty in analyzing the argument of the Opposing Brief is that even considering these fleeting references to Rules 60(b)(1) and 60(b)(7), it contains absolutely no application of any subsection of Rule 60(b) to the facts of this case. See Brief of Appellees at 6-14. As a result, as this Court analyzes the Opposing Brief, it is put in the same unfortunate position as the District Court on November 1, 1994, upon receipt of the Countermotion. In both circumstances, the reviewing court is forced to agonize over the proper application of procedural rules in response to the Hubble Plaintiffs' vague call for relief from the October 20 Judgment. But at least in these proceedings, the reviewing court may bypass that fulsome task by observing that the function of the Countermotion was to

amend the October 20 Judgment and its corresponding findings of fact and conclusions of law and therefore has no relation to Rule 60(b).

The Hubble Plaintiffs argue, correctly, that Rule 60(b) is to be liberally construed. Brief of Appellees at 9; See Kunzler v. O'Dell, 855 P.2d 270, 273 (Utah App. 1993). Nonetheless, relief under Rule 60(b) is discretionary with the trial court and may be granted only if the movant demonstrates exceptional circumstances "by satisfying one or more of Rule 60(b)'s seven grounds for relief from judgment. Van Skiver v. U.S., 952 F.2d 1241, 1244 (10th Cir. 1991). Assuming the Hubble Plaintiffs intend to invoke Rule 60(b)(1), they must be prepared to show by reference to the record in this case that the District Court's award of no compensatory damages against Mr. Vance was a consequence of mistake or inadvertence. But the record simply will not allow the Hubble Plaintiffs to demonstrate that point. As the transcript of the August 18, 1994, proceedings before the Honorable Homer Wilkinson make clear, the District Court's award of only punitive damages against Mr. Vance was a deliberate (though voidable) ruling. At that point in the August 18 proceedings, the following exchange occurred between the Honorable Homer Wilkinson and Mr. Vance:

THE COURT: Mr. Vance, any questions sir,

MR. VANCE: There's no compensatory damages.

There's punitive damages against me from the Third Party Plaintiff; is that correct?

THE COURT: Yes, punitive damages, only.

MR. VANCE: Okay, I understand.

Transcript, Telephone Conference, August 18, 1994, at 7 (R. 362). Where the Hubble Plaintiffs find either mistake or inadvertence lodged in this dialogue is unfathomable.

Beyond showing that the District Court did not act out of mistake or inadvertence within the meaning of Rule 60(b)(1), this transcript excerpt demonstrates that the error of which the Hubble Plaintiffs complained in the Countermotion, is not one that may be corrected under Rule 60(b)(1). After all, "'mistake, inadvertence, surprise, or excusable neglect' does not include errors of law." Elias v. Ford Motor Co., 734 F.2d 463, 467 (1st Cir. 1984); McNight v. United States Steel Corp., 726 F.2d 333, 338 (7th Cir. 1984) (Rule 60(b) is not intended to correct errors of law made by the District Court in the underlying decision which resulted in a final judgment).

The Hubble Plaintiffs' alternate recourse to Rule 60(b)(7) yields the same result. While generally Rule 60(b) is construed liberally, that is not the case with respect to subsection 60(b)(7). One resorting to subsection (7) first must demonstrate that its claim for relief from the judgment is not more appropriately addressed to the six alternative legal grounds

available under subsections (1)-(6). 7 James W. Moore, Moore's Federal Practice ¶ 60.27[1] at 60-266 (2d ed. 1992) (citing cases). But here, neither the Countermotion nor the Opposing Brief takes the trouble to make any such showing. As noted above, the Brief of Appellees mounts absolutely no argument tying any subsection of Rule 60(b) to the facts of this case. In addition, the Opposing Brief makes no effort to point up the unavailability of relief under subsections 60(b)(1) through 60(b)(6). Indeed, as explained above, the Opposing Brief appears to embrace Rule 60(b)(1). In any event, the Hubble Plaintiffs may not couch their request for relief under Rule 60(b)(7), the "grand reservoir of equitable power to do justice in a particular case." Van Skiver, 952 F.2d at 1244. Rule 60(b)(7) may be invoked only in exceptional and compelling circumstances, and may not be used as a substitute for appeal. Ackermann v. United States, 340 U.S. 193 (1950); Moore's Federal Practice ¶ 60.27[1] at 269. Thus where a party attempts to secure relief under that subsection it must state clearly why relief is unavailable under the alternate grounds available under Rule 60(b) and, in addition, why a correction of legal error by appeal was not available. Moore's Federal Practice at 60-270 to 271.

**THE HUBBLE PLAINTIFFS WERE OBLIGED TO SEEK RELIEF  
FROM THE OCTOBER 20 JUDGMENT UNDER RULE 59(e)**

The "best evidence" of which procedural rule must govern consideration of the Countermotion is found in the text of the Countermotion. That document, four pages in length, is a summary recital of proceedings before the District Court on June 1, 1994. The Countermotion reviews and vouches for the evidence the Hubble Plaintiffs mounted against Mr. Vance on June 1 and thereafter asks the Court to enter a different judgment based upon that evidence. Because the function of the Countermotion was to revisit the Hubble Plaintiffs' claims for relief and supporting evidence, and, in addition, to suggest that the ruling on those claims in evidence was legal error, the Countermotion must be brought under Rule 59(e). In Van Skiver v. U.S., 952 F.2d 1241 (10th Cir. 1991), the plaintiff/appellants appealed from the District Court's Order denying their "Motion to Reconsider" the Court's judgment against them. The Tenth Circuit Court of Appeals noted that the plaintiffs failed to classify their motion as one under either Rule 59(e) or under 60(b) and further observed that the plaintiff's motion was not served within ten days of the District Court's Judgment. Van Skiver, 952 F.2d at 1243.

In affirming the District Court's denial of the plaintiff's motion the Tenth Circuit Court declared that the plaintiffs had

failed to demonstrate any bases for Rule 60(b) relief. Id. That court explained the legal bases for its ruling:

Plaintiffs' motion did not recite any of the exceptional circumstances warranting relief under Rule 60(b), nor does our reading of the record disclose any. In essence, plaintiffs' motion reiterated the original issues raised in their complaint and sought to challenge the legal correctness of the District Court's Judgment by arguing that the District Court misapplied the law or misunderstood their position. Such arguments are properly brought under Rule 59(e) within ten days of the District Court's judgment or on direct appeal but do not justify relief from the District Court's Judgment pursuant to Rule 60(b).

Van Skiver, 952 F.2d at 1244.

The Hubble Plaintiffs, both through their Countermotion and again in their Opposing Brief, are on the same tack as the plaintiffs in Van Skiver. They submitted an ambiguous Motion for Reconsideration and sought to reargue their case to the District Court through the vehicle of the Motion. Just as the Appellate Court in Van Skiver determined that Rule 59(e) governed such a motion, this Court must declare the same result as well. Given the relief sought by the Hubble Plaintiffs, their only recourse for post-judgment reconsideration was through Rule 59(e). They failed to satisfy the jurisdictional requirement of that rule that such a motion be filed within ten days of entry of final judgment. They failed to meet that deadline and as a result, "the District Court [lost] jurisdiction over that motion and any



ruling on it becomes a nullity." Reyher v. Champion International Corp., 975 F.2d 483, 489 (8th Cir. 1992).

**THE DISTRICT COURT'S CONSIDERATION OF THE  
COUNTERMOTION IS NOT A MATTER VESTED IN  
THE DISCRETION OF THAT COURT**

The Hubble Plaintiffs argue that a District Court's consideration of a Rule 60(b) motion is discretionary and that Court's ruling will not be disturbed on appeal absent an abuse of discretion. See Brief of Appellees at 9. This legal analysis simply begs the question. The principal issue before this Court is which procedural guideline, either Rule 59(e) or Rule 60(b), governs the District Court's consideration of the Countermotion. The fact that the District Court elected to rule on the Countermotion is squarely before this Court; how the District Court ruled on the Countermotion is not. Accordingly, this Court may dismiss this aspect of the Hubble Plaintiffs' argument out of hand.

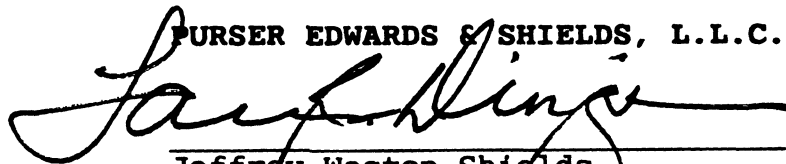
**CONCLUSION**

In the proceeding Brief, Mr. Vance has shown that there is no legal basis available to the Hubble Plaintiffs for maintaining the Countermotion under Rule 60(b). Given the type of relief that the Hubble Plaintiffs were seeking through the Countermotion, they were obligated to observe the strictures of Rule 59(e). Given the function of the Countermotion, Rule 60(b) simply has no application in this case.

When the District Court considered the late-filed Countermotion, it acted beyond its jurisdiction. Its ruling on that motion is therefore a nullity and of no legal effect on Mr. Vance. Though typically an Appellate Court does not visit the merits of the judgment underlying a post-judgment motion, in this case it must. As Mr. Vance pointed out in his Opening Brief, the District Court's October 20 Judgment is one for punitive damages only. Such a result is contrary to established Utah law. The analysis on this point is simply this: the District Court determined that Mr. Vance inflicted no injury on the Hubble Plaintiffs for which compensatory damages were warranted. In other words, the Hubble Plaintiffs failed to make out their cause of action against Mr. Vance. If there is no culpable conduct, let alone conduct that evidences a conscious disregard for the rights of the Hubble Plaintiffs, there may be no award of punitive damages. This Court must either vacate the award of punitive damages against Mr. Vance or in the alternative direct the District Court to conduct new trial proceedings and enter a lawful ruling against Mr. Vance.

DATED this 17<sup>th</sup> day of November, 1995.

PURSER EDWARDS & SHIELDS, L.L.C.

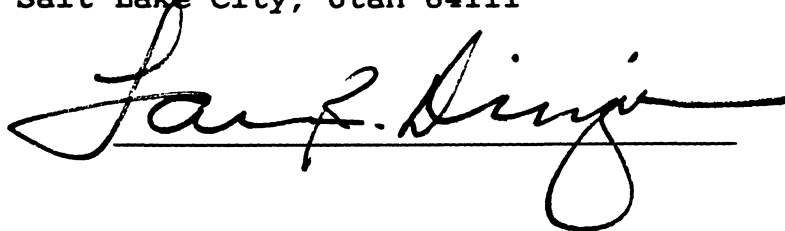


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**CERTIFICATE OF MAILING**

I hereby certify that on the 7<sup>th</sup> day of November, 1995, I served a true and correct copy of the foregoing Appellant's Reply Brief by depositing copies thereof in the United States mail, postage prepaid, and addressed to:

Kent L. Christiansen, Esq.  
CHRISTIANSEN & SONNTAG  
420 East South Temple, No. 345  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

Tab A

## 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.

**Compiler's Notes.** — This rule is similar to Rule 60, F.R.C.P.

### NOTES TO DECISIONS

#### ANALYSIS

"Any other reason justifying relief."  
 —Default judgment.  
 —Impossibility of compliance with order.  
 —Incompetent counsel.  
 —Lack of due process.  
 —Merits of case.  
 —Mistake or inadvertence.  
 —Mutual mistake.  
 —Real party in interest.  
 —*Refund of fine after dismissal.*  
 Appeals.  
 Clerical mistakes.  
 —Computation of damages.  
 —Correction after appeal.  
 —Date of judgment.  
 —Void judgment.  
 —Estate record.  
 —Inherent power of courts.  
 —Intent of court and parties.  
 —Judicial error distinguished.  
 —Order prepared by counsel.  
 —Predating of new trial motion.  
 Court's discretion.  
 Default judgment.  
 Effect of set-aside judgment.  
 —Admissions.

Form of motion.  
 Fraud.  
 —Burden of proof.  
 —Divorce action.  
 Independent action.  
 —Constitutionality of taxes.  
 —Divorce decree.  
 —Fraud or duress.  
 —Motion distinguished.  
 Invalid summons.  
 —Amendment without notice.  
 Inequity of prospective application.  
 Jurisdiction.  
 Mistake, inadvertence, surprise or excusable neglect.  
 —Default judgment.  
 —Illness.  
 —Inconvenience.  
 —Meritorious.  
 —Merits of claim.  
 —Negligence of attorney.  
 —No claim for relief.  
 —Delayed motion for new trial.  
 —Factual error.  
 —Failure to file cost bill.  
 —Failure to file notice of appeal.  
 —Nonreceipt of notice and findings.