1972

Raymond Stewart v. John L. Sullivan And Richard Monk Allen : Respondent's Brief On Appeal

Utah Supreme Court

In The Supreme Court of the State of Utah

RAYMOND STEWART,

Plaintiff and Respondent,

-vs-

JOHN L. SULLIVAN and
RICHARD MONK ALLEN,

Defendants and Ap[illegible]

Appeal from a Judgment [illegible]
of Salt Lake County, Hon. [illegible]

Respondent's [illegible]

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In The Supreme Court of the State of Utah

RAYMOND STEWART,
Plaintiff and Respondent,

-vs-

JOHN L. SULLIVAN and
RICHARD MONK ALLEN,
Defendants and Appellants.

Case No. 12958

Respondent's Brief on Appeal

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries arising out of an automobile accident.

DISPOSITION IN THE LOWER COURT

The action was dismissed by the District Court because of the failure of plaintiff's former counsel to answer interrogatories. The Order of May 25, 1972, from which defendants appeal, provides that the dismissal is to be "without prejudice". After the dismissal, plaintiff filed a new action against defendants in the District Court.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to affirm the Order of Dismissal without prejudice so that he might proceed with his action against the defendants.

STATEMENT OF FACTS

Plaintiff was seriously injured in an automobile accident which occurred on November 22, 1968. The details of the accident and injuries may be found in a comprehensive case evaluation which is part of an affidavit of plaintiff's counsel (R-72). There is no opposing affidavit, and for purposes of this appeal, it can be assumed that both defendants are guilty of either negligence or willful misconduct, and that the injuries to plaintiff were extreme and disabling (special damages and loss of wages alone totaling some $121,581.72).

Plaintiff has never had his day in court, the case having been dismissed for failure on the part of his counsel to answer interrogatories. The sole question on appeal is whether the dismissal was with or without prejudice.

Plaintiff's counsel at the time of filing the action herein was J. Lambert Gibson. Mr. Gibson represented the plaintiff throughout the early stages of the proceeding. After a notice of readiness for trial had been filed, the defendant served Mr. Gibson with written interrogatories. Mr. Gibson failed to answer the interrogatories and failed to notify his client about them.

After several attempts were made by defendants to get the answers, the matter was noticed for hearing and eventually on April 2, 1971, Judge Stewart M. Hanson dismissed plaintiff's complaint (R-50). Mr. Gibson did not appear at the hearing. The order did not specify whether it was to be with or without prejudice.

In September of 1971, plaintiff contacted a new attorney, Neil D. Schaerrer, and advised him that he could not get Mr. Gibson to explain the status of the case; he also requested Mr. Schaerrer at that time to take over the case (R-67). After some difficulty, the plaintiff was able to locate Mr. Gibson to obtain the file, at which time Mr. Gibson informed him that the case had been dismissed without prejudice (R-68). Up to that time, the plaintiff was completely unaware of any dismissal (R-95). After obtaining Mr. Gibson's file, Mr. Schaerrer telephoned David K. Winder and was advised that Mr. Winder represented defendant Allen and State Farm Mutual Insurance Company (R-68). Mr. Winder told Mr. Schaerrer that he had prepared the order of dismissal and that the case had been dismissed without prejudice; Mr. Winder suggested that an attempt be made to settle the case and suggested that Mr. Schaerrer prepare and provide for him a detailed case evaluation supplying among other things the information requested in the interrogatories which Mr. Gibson had failed to furnish (R-68). Mr. Winder also told Mr. Schaerrer that after the dismissal had been signed, he discussed the matter with Mr. Gibson and told Mr. Gibson of the court's ruling and that

Mr. Gibson advised him that he was heavily involved in the legislature and had been unable to answer the interrogatories and that he would furnish the answers to interrogatories to Mr. Winder at a later date (R-69). Mr. Winder also told Mr. Gibson that there was no problem about the dismissal because the action could always be refiled within a year and that the Statute of Limitations had not run anyway (R-85). It might be noted at this point that Mr. Winder at pages 8 through 10 of appellant Allen's brief admits that at the time, he thought the dismissal was without prejudice, but now concludes on page 10 he was erroneous in interpreting the legal effect of the document which he himself prepared and that Mr. Gibson could have done his own research, and that he owed no fiduciary duty to Gibson.

After the conversation with Mr. Winder, Mr. Schaerrer went to work obtaining the voluminous medical, hospital and other records and information necessary to prepare the case evaluation, which required some considerable time (R-69). After the case evaluation had been prepared, Mr. Schaerrer presented copies to counsel for both of the defendants. At that time, he was advised for the first time by Mr. Schoenhals, counsel for defendant Sullivan and USF&G Insurance Company, that the dismissal was with prejudice (R-70) since under Rule 41(b) of the Utah Rules of Civil Procedure, a dismissal for failure to answer interrogatories would operate as a matter of law as an adjudication upon the merits unless the court otherwise specifies. Mr. Schaerrer later discussed the matter with Judge Han-

son who told him it was intended that the order be without prejudice (R-71); Judge Hanson directed Mr. Schaerrer to prepare an order for his signature correcting the error so as to properly reflect the way the order should have been entered (R-71). Such an order was prepared and entered on March 16, 1972, (R-55).

Following the entry of the Amended Order of Dismissal on March 16, 1972, both of the defendants made motions to set aside the Amended Order and to determine that the original dismissal was with prejudice. At the same time, the plaintiff moved that the court grant relief from the original judgment on additional grounds under Rule 60(b)(7) Utah Rules of Civil Procedure which provides for relief from a judgment or order for any reason justifying relief from the operation of the judgment. These motions were heard on April 13, 1972, and defendants convinced Judge Hanson that he had no power to grant relief from the original judgment; accordingly, he set aside the Amended Order of Dismissal and denied plaintiff's Motion to Amend on additional grounds (R-84, 97).

After the hearing on April 13, 1972, and after Judge Hanson had announced his ruling, but before the preparation and entry of the actual order on May 3, 1972, plaintiff learned that J. Lambert Gibson had been suspended by the Utah State Bar Commission from the practice of law on the 14th of May, 1971, (R-93), that the client was never aware of the suspension (R-95), and that Mr. Gibson could not have taken any im-

mediate action after the entry of the original order of dismissal to protect his client's interest. Plaintiff, therefore, made a motion to receive further affidavits and hear further arguments before making entry of the April 13th ruling (R-88). This matter was noticed for hearing on May 16; however, defendants prepared and caused to have signed and entered Judge Hanson's ruling of April 13; this was done on May 3, 1972 (R-97).

When the matter was again heard before Judge Hanson on May 16, 1972, after the additional affidavits had been filed, the Judge correctly concluded that his prior ruling of April 13 (Order entered on May 3, 1972) was erroneous; that a substantial injustice would be done if that ruling were allowed to stand; and that he did in fact have the authority under the Utah Rules of Civil Procedure to grant relief to the plaintiff from the original judgment of dismissal in April of 1971. Accordingly, Judge Hanson set aside his Order of May 3, 1972, and ruled that the original dismissal of plaintiff's complaint was to be "without prejudice." (R. 102) It is this order that plaintiff seeks to have affirmed on appeal.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED PLAINTIFF RELIEF UNDER RULE 60(b)(7) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 60(b) of the Utah Rules of Civil Procedure provides as follows:

> "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), nuisrepresentation, 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), (4), not more than 3 months after the judgment, order, or proceeding was entered or taken."

Since the motion of plaintiff's new counsel was made more than three (3) months from the date of the first order of dismissal, plaintiff must come within Subsection (7) which allows relief for "any other reason justifying relief from the operation of the judgment." It is plaintiff's position that the facts here clearly justify relief under this subsection.

Rule 60(b)(7) has been construed by the Utah Supreme Court on several occasions. One of the leading cases wherein the Court invoked Subsection (7) of the rule is *Dixon -vs- Dixon,* 121 Utah 259, 240 P.2d 1211. In that case, the Court held that a formal order signed and entered upon the erroneous assumption that it conformed to a direction of the Court is more than a mere inadvertence and can be set aside more than three (3) months after its entry. The Court in noting that it would work a "grave injustice to permit the order to stand" also noted that even in the absence of Rule 60(b)(7), the Court would have inherent power to set aside the formal order. This case is somewhat similar to the instant case in that here the parties, including plaintiff's counsel, defendants' counsel and the District Judge, were all under the erroneous assumption that the original Order of Dismissal was without prejudice.

Another case in point is *Ney -vs- Harrison,* 5 Utah 2d 217, 299 P.2d 1114 where the Court set aside a default judgment some eleven (11) months after the date of judgment. The only ground stated was that defendant was under the mistaken belief that she was fully protected under a Divorce Decree ordering her ex-husband to pay certain obligations. The Court concluded that Rule 60(b) (7) was intended to govern this type of situation, and pointed out the strong policy of the law to liberally construe the statutes and rules of procedure in favor of trial on the merits. The Court also recognized the latitude of discretion given the trial court in such matters and stated as follows:

> "The Utah decisions relied upon by plaintiff recognize the firmly established principle that it is largely within the discretion of the trial court whether a default should be relieved, which discretion will not be disturbed unless there is a patent abuse thereof."

The *Ney -vs- Harrison* case is on all fours with the instant case, as here we have a mistaken belief as to the effect of an order, plus the exercise of discretion on the part of the trial court in plaintiff's favor.

A case not involving Subsection (7) of Rule 60(b) but which strongly sets forth the policy of the law in granting relief from defaults is *Mayhew -vs- Standard Gilsonite Company,* 14 Utah 2d 52, 376 P.2d 951. In that case, the Supreme Court found an abuse of discretion and reversed the trial court for failing to grant

relief. In speaking for a unanimous court, Justice Crockett wrote as follows:

> "It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason, it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside."

Utah cases cited by the appellant do not support their position but, in fact, support the position of the respondent. *Warren -vs- Dixon Ranch Company,* 123 Utah 416, 260 P.2d 741, upon which both defendants rely, involves a situation where the court refused to set aside a default judgment. The case simply stands for the proposition that the Supreme Court will not reverse a decision of the trial court unless an abuse of discretion is clearly shown. Although in this case (which involved an entirely different fact situation) the Su-

preme Court refused to substitute its judgment for that of the trial court. The court commented that,

> "Discretion must be exercised in furtherance of justice and the court will incline toward granting relief in a doubtful case to the end that a party may have a hearing."

As to the matter of discretion, the court also stated as follows:

> "The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense. * * * Equity considers factors which may be irrelevant in actions at law, such as the * * * hardship in granting or denying relief. Although an equity court no longer has complete discretion in granting or denying relief it may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and this court on appeal will reverse the trial court only where an abuse of this discretion is clearly shown."

In the case of *Board of Education of Granite School District -vs- Cox,* 14 Utah 2d 385, 384 P.2d 806, the trial court set aside a default judgment entered against one defendant, but refused to set aside the default of another defendant because the court did not believe the defendant's excuse and believed the default was

deliberate; again, the Supreme Court refused to interfere with the discretion of the trial judge. In the case of *Shaw -vs- Pilcher,* 9 Utah 2d 222, 341 P.2d 949, the court held that the plaintiff could maintain an independent action to set aside a Decree of Adoption on the grounds of fraud upon the court even though seventeen (17) months had elapsed since the entry of the decree and even though under Rule 60(b)(3), a motion for relief based upon fraud must be filed within three (3) months.

Rule 60(b) of the Utah Rules of Civil Procedure is patterned after Rule 60(b) of the Federal Rules of Civil Procedure. Subsection (7) of the Utah rule is identical to Subsection (6) of the Federal rule, which provides relief for "(6) any other reason justifying relief from the operation of the judgment." Under the Federal rule, motions under Subsections (1), (2) and (3) can be made within one year which differs from the three months limitation under the Utah rule. There are numerous federal cases interpreting Rule 60(b)(6) of the Federal Rules. Many of these cases may be of help to the court here.

The underlying principle of Federal Rule 60(b)(6) is explained by Justice Black in the leading case of *Klapprott -vs- United States,* 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 wherein the plaintiff was granted relief from a default judgment of denaturalization after the judgment had been entered for four years. There it was stated,

> "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

In interpreting the Klapprott and other federal cases, Moore in his work on Federal Practice at Section 60.27(2) sums up the effect of Subsection (6) as follows:

> "Seen in perspective, clause (6) is clearly a residual clause to cover unforeseen contingencies; intended to be a means for accomplishing justice in, what may be termed generally, exceptional situations; and so confined, does not put the finality of judgments generally at large."

Moore also points out that in most cases, litigation is handled by lawyers and whatever negligence is involved in the losing of cases is theirs, not the personal negligence of their clients. It is pointed out that the federal decisions have shown considerable sympathy in invoking Rule 60(b)(6) in favor of an innocent litigant who has had an incompetent or a sloppy lawyer. Many courts have held that gross negligence of a lawyer is sufficient to afford relief under Rule 60(b)(6). See *Barber -vs- Turberville,* 215 F.2d 34; *Lucas -vs- City of Juneau,* (D. Alaska) 20 F.R.D. 407; *In Re: Estate of Cremidas* (D. Alaska) 14 F.R.D. 15 where attack on judgment came some three years after it was entered.

A leading case is *L. P. Steuart, Inc. -vs- Matthews*, 329 F.2d 234 where plaintiff's case was dismissed for failure to prosecute due to negligence of counsel. Two years later, through different counsel, plaintiff filed a motion to vacate the judgment. The District Court denied the motion and on appeal, the Court of Appeals held that the District Court had abused its discretion in denying relief under Rule 60(b)(6). The court wrote:

> "Clause (6) is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a client's case and mislead the client."

Other cases following the Steuart decision and granting relief for neglect of counsel are *King -vs- Mordowanec* (D. R. I.) 46 F.R.D. 474 (motion filed one year and nine months after entry of judgment); *Transport Pool Division of Container Leasing, Inc. -vs- Joe Jones Trucking Company,* (N.D. Ga.) 319 F.Supp. 1308. Under the federal cases, there is no question but what plaintiff is entitled to the relief he seeks. It would seem that the Utah rule ought to be construed more, and not less, liberal than the federal rule because our limitation period for coming under the other subsections of the rule is much shorter.

It would seem that under the federal interpretations that gross negligence of counsel alone is sufficient to grant relief. Under the Utah decisions, a mistaken belief as to the effect of an order is sufficient to grant

relief. Plaintiff here qualifies under both reasons. However, there are even additional reasons in this case to justify the invoking of Rule 60(b)(7).

Mr. Gibson in his affidavit alleges that he relied upon statements made by Mr. Winder in not taking prompt action to obtain relief from the order (R-86). Thus, the element of estoppel comes into existence as counsel for both defendants seem to acknowledge that there would have been no problem in setting the order aside had the motion been made within three months. In *Rice -vs- Granite School District,* 23 Utah 2d 22, 456 P.2d 159, this court said,

> "Where the delay in commencing an action is induced by the conduct of the defendant, or his privies, or an insurance adjuster acting in his behalf, it cannot be availed of by any of them as a defense.
>
> One cannot justly or equitably lull an adversary into a false sense of security, thereby subjecting his claim to the bar of limitations, and then be heard to plead that very delay as a defense to the action when brought. Acts or conduct which wrongfully induce a party to believe an amicable adjustment of his claim will be made may create an estoppel against pleading the Statute of Limitations."

In this case, the delay in taking action to seek relief from the judgment was thus attributable to defendant's own conduct.

In summing up the reasons why plaintiff is entitled to relief, we find all of the following elements existing:

1. Gross negligence on the part of plaintiff's counsel in failing to answer interrogatories after having been given many opportunities to do so.
2. A bona fide mistaken belief on the part of all parties as to the legal effect of the order of dismissal.
3. Estoppel resulting from reliance upon statements made by defendant's counsel.
4. Extreme, severe and totally disabling injuries to plaintiff and clear liability against the defendants.
5. Complete innocence on the part of plaintiff himself.
6. No claimed prejudice on the part of either defendant resulting from the delay.
7. Policy of law to liberally construe the rules of procedure in favor of deciding cases on the merits.
8. Liability insurance coverage by both defendants and the policy of law to provide protection to accident victims and not allow dismissals for unprejudicial technicalities.
9. Ruling of the trial court in favor of the plaintiff.

If there were ever a case where Rule 60(b)(7) ought and should be properly invoked, it is this case.

POINT II

THE RELIEF GRANTED BY THE TRIAL COURT IS ALSO PROPER UNDER RULE 60(a) OF THE UTAH RULES OF CIVIL PROCEDURE.

An additional ground for supporting the order of the District Court is Rule 60(a) of the Utah Rules of Civil Procedure which provides for the correction of clerical errors.

In the Order of March 16, 1972, (R-55) Judge Hanson recites on his own motion that a clerical error was made and that the order should have been prepared "without prejudice as directed by the court." Affidavits were then filed by defendants' counsel to rebutt the recital in the order. Mr. Schoenhals states that the court simply granted a motion without comment (R-80); and Mr. Winder states he cannot remember exactly what was said, but would have prepared the order accordingly if the court had specifically directed that it be without prejudice (R-60). They thereupon rely upon the case of *Richards -vs- Siddoway*, 24 Utah 2d 314, 471 P.2d 143 which seems to hold that unless the court actually makes a specific pronouncement, any error, regardless of intent, would be judicial error rather than a clerical error and not subject to correction under Rule 60(a).

It would seem that the recital of the District Judge in a formal order as to what was pronounced, ought to

prevail over the rather inconclusive affidavits of counsel. This type of error, that is, the mode of disposition of an action, is generally held to be subject to correction as a clerical error. See 46 Am. Jur. 2d, Judgements, Section 204.

POINT III

THERE WAS NO ERROR IN THE TRIAL JUDGE RECONSIDERING AND CHANGING HIS RULING, AND THIS POINT IS NOT A BONA FIDE ISSUE ON APPEAL.

When Judge Hanson first heard the arguments of defendants, he was apparently convinced that he could not legally amend the original Order of Dismissal and, therefore, ruled that it must stand as entered, the legal effect of which would be to deprive plaintiff of his day in court. Plaintiff, after discovering other information and filing additional affidavits, moved that this ruling be reconsidered and after further hearing, Judge Hanson recognized that the prior ruling was wrong. Both defendants now claim that under the Utah Rules of Civil Procedure, the District Judge is powerless to correct an error of law, even though the motion for reconsideration was made within ten (10) days as provided by Rule 59, Utah Rules of Civil Procedure. Plaintiff would submit that this is not a bona fide issue on appeal, because if Judge Hanson had not reconsidered and changed his ruling, his erroneous order would have constituted an abuse of discretion under the cases

cited in Point I herein, from which plaintiff would have appealed; if such had been the case, the appellate court would still have been faced with the identical basic issue on appeal, and under the extraordinary facts of this case, plaintiff would, in that event, have been entitled to a reversal.

The only case relied upon by defendants is *Utah State Employees Credit Union -vs- Riding,* 24 Utah 2d 211, 469 P.2d 1. In that case, the court did make a dicta statement that it was unaware of a motion under our rules for reconsideration of a judgment. The court went on, however, to decide the case on entirely different grounds and expressly assumed in the opinion that such a motion could be entertained. There was no discussion in the Riding case as to the applicability of Rule 59 or Rule 60, nor was there any reason to discuss them, as the case was decided on other grounds. Rule 59(e) specifically gives the court power to "alter or amend the judgment."

It must be conceded that under some circumstances, it would be improper for a trial judge to entertain a motion to reconsider his ruling. Such was the case in *Drury -vs- Lunceford,* 18 Utah 2d 74, 415 P.2d 662, wherein it was held that the trial court after once considering and granting to a litigant a new trial, could not later vacate the new trial. It is important to note that

the Drury case was decided in favor of preventing an injustice and giving all of the parties the right to a new trial on the merits where errors had been claimed. The court also stated as follows:

> "It should be observed that what we have said herein is intended to apply to the fact situation shown in the instant case where, pursuant to regular procedure, the court has acted deliberately and advisedly in granting the new trial. However, we also recognize that there may be situations where an order denying or granting a new trial may have been made by inadvertence or mistake, or where there was some irregularity in connection with the obtaining or the granting of the order, in which instance, the court could, of course, act to correct any such mistake or irregularity."

At the end of the above quotation, the court made reference by footnote to Rule 60, which is the same rule upon which plaintiff in this case relies. The real issue in this case is whether Rule 60 could be properly invoked to grant plaintiff relief. These issues are fully covered under Points I and II of this brief.

CONCLUSION

Based upon all of the arguments and authorities as cited herein, plaintiff respectfully requests the court to affirm the judgment of the trial court.

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