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Glen D. Wardle and Thora Wardle v. Lester Romero : Brief of Appellant

Utah Court of Appeals

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L&M Case No. X0045

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated §78-2a-3(2)(k).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Adequacy of Service of Process: Is service of process by publication adequate where the party seeking service of process knows the correct address of the opposing party but no copy of the summons or complaint are mailed to that address?

Standard of Appellate Review: This issue is a matter of law, and the Court of Appeals should review for correctness the legal conclusions of the District Court.[1]

Preservation of Issue in District Court: This issue was presented to the District Court in Appellant's Memorandum and Reply Memorandum in support of Appellant's Motion to Set Aside Judgment and Decree Quieting Title.

2. Setting Aside Default Judgment: Should a default judgment be set aside where (a) the defendant did not receive actual notice of the action until after the default judgment was entered, (b) service of process was given by publication and by mailing to an inadequate address, and (c) although the attorney seeking to serve process knew of the defendant's correct address, no notice was mailed there?

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[1] Graham v. Sawaya, 632 P.2d 851 (Utah 1981.)

Standard of Appellate Review: The District Court's decision on this issue should not be disturbed absent an abuse of discretion.[2]

Preservation of Issue in District Court: This issue was presented to the District Court in Appellant's Memorandum and Reply Memorandum in support of Appellant's Motion to Set Aside Judgment and Decree Quieting Title.

APPLICABLE RULES

The following rules are relevant in deciding this case: Utah Rules of Civil Procedure 4(e)(1), 4(g), 60(b)(1), 60(b)(3), 60(b)(4), 60 (b)(5) and 60(b)(7)[3].

STATEMENT OF THE CASE

Nature of Case and Disposition in District Court

This action was brought by Respondents ("Plaintiffs" or "Wardles") to quiet title to certain real property in Davis County, Utah. After unsuccessful attempts to serve the summons and complaint on Appellant ("Defendant" or "Romero") personally, Plaintiffs sought and obtained an order allowing service by publication and by mailing to Defendant's last known address. Plaintiffs misstated Defendant's last known address, however, so that the summons and complaint were mailed to an inaccurate address and Defendant did not receive actual notice of the action. When Defendant failed to answer the complaint, a default judgment was entered. Upon learning of the judgment, Defendant

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[2] Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989.)

[3] The relevant rules are quoted in full in Addendum 1.

filed a timely motion to set it aside. This is an appeal from the District Court's denial of Defendant's motion to set aside the default judgment.

Statement of Relevant Facts

1. On March 1, 1960, Defendant Lester Romero sold a parcel of real property (the "Property") located in Davis County to the Plaintiffs. He received a promissory note for $6,000, secured by a deed of trust on the Property. He also received a signed quitclaim deed conveying the Property back to him, which he could record if Plaintiffs did not pay as promised.

2. During the next 33 years Plaintiffs were rarely prompt in paying their obligations as required by the promissory note. Consequently, Mr. Romero was forced to constantly work with them to receive the required payment. He never allowed more than three (3) years to elapse without collecting a payment.

3. Although Plaintiffs paid the property taxes as required by the deed of trust and made occasional payments to Mr. Romero, the promissory note remained constantly delinquent. For the past several years, Plaintiffs have disputed the amount due on the promissory note.

4. On May 24, 1993, Mr. Romero, being unable to convince Plaintiffs of their remaining obligation, recorded the quitclaim deed.

5. On or about November 18, 1993, Plaintiffs' attorney,

George K. Fadel, mailed a letter to Mr. Romero.[4] The letter was addressed to Mr. Romero at two locations: his residence at 6270 Margray Drive, West Jordan, UT 84084, and a "General Delivery" address which is the address for the United States Post Office in Salt Lake City. The letter requested that Mr. Romero deed the Property back to Plaintiffs. Mr. Romero received the copy addressed to his residence and responded in writing, suggesting that Mr. Fadel speak with his clients to get all the facts so they could settle the matter. Mr. Romero heard nothing further from either the Plaintiffs or their attorney until after the default judgment had been entered in this case.

6. Plaintiffs filed their complaint in this action in January, 1994. Mr. Fadel attempted to obtain personal service on Mr. Romero at his residence at 6270 South Margray Drive. A sheriff's deputy made numerous attempts between January 13, 1994 and March 11, 1994, but he was not successful in obtaining personal service.

7. On June 14, 1994, Mr. Fadel prepared and filed with the District Court a Motion and Order allowing Service of Process by Publication. The Order required service to be made by publication of summons and "by mailing to the defendant a copy of Summons and Complaint at his last known address: 1760 West 2100 South, Salt Lake City, Utah 84111" (emphasis added.) This address was not Mr. Romero's last known address, nor was it the

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[4] A full copy of the letter is attached to the Affidavit of Lester Romero contained in Addendum 2.

address where the deputy had attempted personal service. Instead, it is the address of the main United States Post Office for Salt Lake City. The District Court signed and entered the order which Mr. Fadel had prepared.

8. Acting pursuant to the Order, Mr. Fadel caused a summons to be published, and attempted twice to mail copies of the summons and complaint to Mr. Romero at 1760 West 2100 South. Both mailings were returned to Mr. Fadel unclaimed.

9. Based on Mr. Romero's failure to appear, a default judgment was entered on June 16, 1994.

10. In July 1994, Mr. Romero made a trip to the Davis County Courthouse to determine what, if anything he needed to do further since filing his quitclaim deed. To his surprise, he discovered the default judgment quieting title to the Property in the Plaintiffs. On September 7, 1994, less than 3 months after the entry of the default judgment, Mr. Romero filed a Motion to set aside the judgment and decree quieting title in the Plaintiffs, claiming that he had not been properly served according to Utah Rules of Civil Procedure (URCP) 4(e) and citing URCP 60(b) as grounds for setting aside the default judgment.

11. Without a hearing, the District Court judge denied Defendant's Motion, ruling that the attempted personal service by the sheriff and the publication in the Davis County Clipper for three (3) weeks was reasonably calculated to apprise the defendant of the action as required by URCP 4(e) and 4(g).

SUMMARY OF THE ARGUMENT

I. SERVICE OF PROCESS WAS NOT ADEQUATE.

Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950) requires that any means other than personal service used to effect service of process must not be substantially less likely to give actual notice than other feasible substitutes. Where a defendant's actual address is known, it is incumbent on the plaintiff to give notice at that address.

In Carlson v. Bos, 740 P.2d 1269 (Utah 1987), the Utah Supreme Court held that a plaintiff who relies on alternate means of service of process must meet two diligence requirements. First, the plaintiff must show diligence in determining that personal service cannot be obtained and service by alternate means is appropriate. Second, the plaintiff must use diligence in using the alternate means of service in order to give actual notice to the defendant.

Plaintiffs have failed to comply with the requirements of Mullane, because Plaintiffs mailed the summons and complaint in this action to an address where Defendant was unlikely to receive it, instead of mailing to Defendant's correct address which was known to Plaintiffs. Plaintiffs have failed to comply with the requirements of Carlson by failing to exercise diligence in implementing the alternate means of service allowed by the District Court.

The Utah cases of Guenther v. Guenther, 749 P.2d 628 (Utah 1988); Heath v. Mower, 597 P.2d 855 (Utah 1979); and Weber v.

Snyderville West, 800 P.2d 316 (Utah App. 1990) all involve facts similar to the present case. In each of these cases, the court required greater diligence in effecting service of process than was exercised by Plaintiffs in this case.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT'S MOTION UNDER RULE 60(b).

Assuming, arguendo, that service of process was adequate, the District Court should nevertheless have set aside the default judgment under URCP 60(b). Defendant is entitled to relief (a) under subpart (1) of the Rule, due to surprise; (b) under subpart (3), due to the fact that Plaintiffs misrepresented Defendant's address to the District Court; (c) under subpart (4), since process was not personally served in this case; and (d) under subpart (7), because in spite of Defendant's diligence, default judgment was entered through circumstances beyond Defendant's control.

In Naisbitt v. Herrick, 290 P. 950 (Utah 1930), the Utah Supreme Court held that where a defendant (1) has not been served personally, (2) has no actual notice of pendency of the action in time to present his defense, (3) is injuriously affected by the judgment, and (4) has tendered an issue on the merits, he has an absolute right to have the judgment set aside. Defendant meets all of these criteria.

Defendant's Motion to set aside this default judgment was filed within three months after the entry of the judgment and was therefore timely.

Defendant has a meritorious defense which he should be permitted to present in court. If Defendant establishes the allegations contained in his affidavit, Defendant will be entitled to a ruling that there are still sums owed to him and that he has a valid lien against the Property securing those sums.

In the alternative, this case should be remanded to the District Court with instructions to consider Defendant's grounds for relief under URCP 60(b). While the District Court addressed sufficiency of service of process, it failed to recognize that even if Defendant was legally served with process, URCP 60(b) may require setting aside the default judgment and addressing this case on its merits.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY RULED THAT SERVICE OF PROCESS WAS SUFFICIENT UNDER URCP 4(e) AND 4(g).

Rule 4(e)(1) of the URCP states that personal service on an individual must be made by delivering a copy of the summons and complaint to the individual personally or by leaving it at the individual's residence with someone of suitable age and discretion. Mr. Romero lives alone. Personal service was attempted unsuccessfully at his residence at 6270 Margray Drive, West Jordan, UT 84084. When Plaintiffs were unable to obtain personal service on Defendant, they resorted to alternative service pursuant to Rule 4(g) of the URCP.

If a party to be served cannot be identified, located or served, Rule 4(g) of the URCP allows service of process "by publication, by mail from the clerk of the court, by other means, or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable.

The constitutional requirements relating to service of process were explained by the U.S. Supreme Court in Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950), as follows:

> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected... or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. 339 U.S. at 315. (Citations omitted.)

Mullane involved notice of a final accounting and termination of a trust. A New York statute allowed the trustee of the trust to notify all beneficiaries by simply publishing notice in a local newspaper. The Supreme Court used a balancing approach to analyze the validity of the New York statute, balancing the rights of the trust beneficiaries against the interests of the state in effecting a final settlement of the trust. The court reasoned that it would not be practicable to require personal notice to every beneficiary (some of whom may not be locatable), nor would it be equitable to allow notice by

publication only to beneficiaries who could easily be located and who could be informed by surer means. The court concluded that different forms of notice would be permissible for different classes of beneficiaries. Referring particularly to beneficiaries with known addresses, the court stated:

> As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing.... Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.
>
> The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. 339 U.S. at 318 (emphasis added.)

In Carlson v. Bos, 740 P.2d 1269 (Utah 1987), the Utah Supreme Court applied the Mullane principles and established important Utah guidelines governing alternative means of service of process. Carlson involved service of process on a non-resident motorist. The plaintiff had given notice by mail to a two and one-half year old address. No effort was made to determine the defendant's current address. The court considered the competing interests of the parties. First and foremost among those was the defendant's right to be informed of pending legal action and to be provided with an opportunity to defend. Id. at 1271. This was balanced against the practical obstacles facing the notice giver such as cost and time involved. Id. at 1273.

In Carlson the plaintiff only needed to locate one person. The court conceded that some money and time may be lost in

locating the person, but concluded that this would not devalue the claim. (Cf. Mullane where personally locating every beneficiary of the trust would cause great hardship on the trust.)

The Carlson court imposed two diligence requirements on the plaintiff with respect to service of process. First, the court stated that before resorting to service by mail, the plaintiff must establish that after diligent effort he or she has determined that the defendant is not resident in the State of Utah. Id. at 1276-77. Second, in order to satisfy constitutional due process requirements, the plaintiff must make a diligent attempt to obtain the defendant's current address. "If a current address is discovered, that address is the one to which the mailed notice should be sent." Id. at 1277.

An analysis of the facts of the present case shows that the plaintiffs have not satisfied the requirements of either Mullane or Carlson. Plaintiffs had ready access to defendant's correct current address. They had previously corresponded with defendant at that address, and they arranged for the deputy to attempt personal service at that address. By attempting to have defendant personally served, defendants satisfied the first diligence requirement imposed by Carlson: they showed that an alternative form of service was appropriate. They completely failed, however, to satisfy the second diligence requirement imposed by Carlson. Instead of using the correct address for the alternative service, they used an address which was easily

identifiable as the main post office for Salt Lake City. In doing so, they selected a method of notice which was much less likely to apprise defendant of this lawsuit than other means which were readily available.

The District Court considered the mailing, publication, and personal service attempts together, and concluded that the plaintiffs had made a diligent effort. But this analysis ignores the fact that Carlson requires two diligent efforts. After using diligence to show that alternative service is appropriate, a plaintiff must then use diligence in implementing the alternative service so that the notice is reasonably calculated to reach the defendant.

This default judgment must be set aside based on similar facts in other cases. In the case of Guenther v. Guenther, 749 P.2d 628 (Utah 1988), the sheriff tried to personally serve the defendant but was unsuccessful. However, the plaintiff knew the defendant's last known address and mailed a notice to that address. The defendant received that notice and service was held to be adequate.

If, as in Guenther, Plaintiffs had sent the notice to 6270 Margray Dr. which was Mr. Romero's correct last known address, then he would have received it and a default judgment would not have been entered.

In Heath v. Mower, 597 P.2d 855 (Utah 1979), plaintiff's counsel mailed a withdrawal of counsel notice to defendant's last known address, to defendant's wife's last known address, and upon

learning of defendant's current address, sent an amended withdrawal of counsel notice there. The court determined that notice had been properly given. It is unknown, in the present case, whether Plaintiffs made the attempt to ascertain the correct address or even to look in their files where the correct address was recorded. In any event, they had Defendant's actual last known address and they did not send a notice to Defendant at that address which resulted in a default judgment against him.

In Weber v. Snyderville West, 800 P.2d 316 (Utah App. 1990), plaintiff's attorney searched for a correct address in telephone directories, motor vehicle files, corporate filings in Utah and California, the County Recorders files in Summit and Salt Lake Counties, and in postal records (the correct address was on the Summit County tax records pertaining to the property in issue which the plaintiff had access to). Even having searched all those records, this Court held that the plaintiff had access to the correct address and never attempted service there. "Had it been done, Weber(plaintiff) would readily have been able to personally serve defendant" Id. at 319.

This case has a more egregious error in service than the error in Weber v. Snyderville West. Plaintiffs knew of Mr. Romero's correct last known address, yet did not mail a copy of the notice there. If such a mailing had occurred, Mr. Romero would have received the notice and a default judgment would not have been entered against him.

If, as Defendant maintains, there was inadequate service of process, the default judgment entered by the District Court is void.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT'S URCP MOTIONS FOR RELIEF.

A District Court is afforded broad discretion in ruling on a motion for relief from judgment under URCP 60(b)and its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989); Larsen v. Collina, 684 P.2d 52 (Utah 1984). However, the District Court "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." Mayhew v. Standard Gilsonite Co., 376 P.2d 951, 952 (Utah 1962). "Courts generally tend to favor granting relief from default judgments where there is any reasonable excuse . . . ." Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, 544 P.2d 876, 879 (Utah 1975). In fact, "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 defendants failure to appear and timely made application is made to set it aside." Mayhew, at 952, Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986).

Defendant realizes that the burden of showing that the District Court abused its discretion lies with him. The Utah Supreme Court laid out three criteria that a movant must meet to overcome the abuse of discretion standard and have a default

judgment set aside. The movant must set forth a URCP 60(b) action for relief, show that his motion to set aside the judgment was timely, and show that he has a meritorious defense to the action. State By & Through Dept. of Soc. Services v. Musselman, 667 P.2d 1053, 1056 (Utah 1983).

A. **Defendant has set forth a URCP 60(b) action for relief.**

1. URCP 60(b)(1)

Rule 60(b)(1) of the URCP states that relief from a default judgment may be granted for mistake, inadvertence, surprise, or excusable neglect. Defendant claims that he was surprised by the default judgment.

In May 1993, Mr. Romero filed the quitclaim deed he received as security from the Plaintiffs. In November of that same year, he received a letter from Plaintiffs' attorney stating that he had been retained to clear up the dispute between Mr. Romero and the Plaintiffs. Mr. Romero responded by a letter and gave the attorney information he thought would help settle the matter. Mr. Romero stated in the letter (which is in Addendum 2) that he felt the Plaintiffs were misleading their attorney and now that the attorney would have all the pertinent information, he could tell his clients that they were in error and still owed money on the promissory note. If a dispute still existed after the attorney spoke with his clients, Mr. Romero expected to hear from someone.

Mr. Romero did not hear anything further either from Plaintiffs or from their attorney. In July 1994, Mr. Romero went

to the Davis County Courthouse to determine what, if any further action he needed to take in regards to the previously recorded quitclaim deed. He was surprised to learn of a default judgment entered against him.

Mr. Romero, by his return letter, had put the onus on Plaintiffs' attorney to contact him again concerning this matter and Mr. Romero fully expected that he would be contacted as evidenced by his letter stating that he desired to settle this case with the Plaintiffs for what they owed.

From November to July, Mr. Romero was not contacted and notice was not given to him about the pending matter. Thus he was justifiably surprised to discover the default judgment. It should, therefore, be set aside according to URCP 60(b)(1)

2. URCP 60(b)(3)

Defendants second URCP 60(b) action for relief is governed by URCP 60(b)(3) which states that relief can be granted for fraud, misrepresentation, or misconduct by the adverse party.

Mr. Romero states that Plaintiffs' attorney misrepresented to the court his last known address.

Mr. Fadel knew that Mr. Romero could be reached at 6270 Margray Dr. He had previously corresponded with Mr. Romero at that address and had instructed the deputy to serve Mr. Romero at that address. Yet he represented to the District Court, in his motion asking it to grant service by publication and mail, that Mr. Romero's last known address was General Delivery, 1760 West 2100 South, Salt Lake City, UT 84111. (See paragraph 10 of the

District Court's Ruling in Appendix 3.) Through minimum diligence Mr. Fadel would have realized that Mr. Romero's correct last known address was 6270 Margray Dr.

Because Mr. Romero's correct last known address was misrepresented to the District Court, Mr. Romero did not receive notice of the pending action. The default judgment should therefore be set aside under URCP 60(b)(3).

3. URCP 60(b)(4)

Defendant also has a valid claim for relief under URCP 60(b)(4). This provision allows relief from judgment "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..."

URCP 60(b)(4) continues a long standing policy under Utah law, that defendants who have not been served personally should have a limited period of time during which, as a matter of right, they can have a default judgment set aside and respond to the complaint on its merits.[5] Section 104-14-4 of Utah Code Annotated (1943) provided, in part, as follows:

> When, from any cause, the summons in an action has not been personally served on the defendant or his legal representative, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within ninety days after the entry of any judgment in such action, to answer to the merits of the original action....

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[5] Section 1293, Compiled Laws of Utah of 1876, allowed a defendant who had not been personally served a period of six months after the judgment to have the judgment set aside and answer the merits of the complaint.

Naisbitt v. Herrick, 290 P. 950 (Utah 1930) is a case decided under section 104-14-4 which is quite similar to the present case. Naisbitt was a quiet title action. The defendant was served only by publication. Within a year after the final decree was entered, the defendant, who had not received actual notice of the lawsuit until after the decree, moved to have the judgment set aside. His motion was denied by the District Court. The Supreme Court reversed, stating as follows:

> In proceedings to open default judgments, the courts quite generally distinguish between those judgments where personal service of summons has been had or personal appearance has been made before judgment and those judgments where there has been merely constructive service of process....
>
> The law applicable to... [judgments founded upon constructive service of process] is stated in 1 Freeman on Judgments (5th Ed.) p. 451, §229. It is there said, in referring to statutes allowing judgments based on constructive service of process to be vacated, that "on complying with the conditions of the statute, the moving party acquires an absolute right to have the judgment opened, which the court has no discretion to deny." Numerous cases cited in support of the text will be found collected in a footnote. The rule of law deducible from the adjudicated cases there cited is this: If a moving party shows (1) that he has not been personally served with process, (2) that he had had no actual notice of the pendency of the action in time to appear and make his defense, (3) that he is injuriously affected by the judgment, and (4) that he has tendered an issue to the merits of the claim of his adversary, then and in such case he has an absolute right to have the judgment opened. 290 P. at 953.

Defendant acknowledges that section 104-14-4 has been superseded by Rule 60(b). The wording of the Rule is so close to the wording of the former statute, however, that Naisbitt remains good precedent.

4. URCP 60(b)(7)

Defendant's last URCP 60(b) action for relief is governed by URCP 60(b)(7) which states that for any other reason justifying relief, the default judgment can be set aside.

The other reason for justifying relief is stated by the District Court in its own ruling. Paragraph 10 of that ruling states "That Plaintiffs either through mistake or inadvertence represented to the Court that Defendant's last known address was 1760 W 2100 S." It was this mistake that prevented Mr. Romero from appearing and defending on the action.

The Utah Supreme Court in Airkem Intermountain Inc. v. Parker, 513 P.2d 429, 431 (Utah 1973) stated that to overturn an abuse of discretion "the movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control."

Mr. Romero returned the initiative for settlement talks to Plaintiffs and, in fact, thought that because he had heard nothing further from them or their attorney that Mr. Fadel had been successful in convincing his clients that they still owed on the promissory note. This was due diligence on the part of Mr. Romero. The circumstance which Defendant could not control was Plaintiff's mistake or inadvertence in telling the District Court that his last known address was different than it really was. If process had been sent to his actual address, which was his residence, he would have been able to appear and a default judgment would not have been entered against him.

Defendant has shown a reason justifying relief according to URCP 60(b)(7) and the default judgment should be set aside.

B. Defendant's motion to set aside the default judgment must be timely made.

According to Rule 60(b), a motion is timely under subparts (b)(1), (b)(3) and (b)(4) when it is filed within three (3) months of receiving notice of the default judgment. However, the time period for 60 (b)(7) is a reasonable time after receiving notice. Defendant has clearly filed both within the three month period and within a reasonable time after receiving notice of the default judgment. The default judgment was entered on June 16, 1994. Mr. Romero learned of it on July 20, 1994. On September 7, 1994, Mr. Romero filed his motion to set aside the default judgment.

C. Defendant has a meritorious defense.

The Utah Supreme Court, in State By & Through Dept. of Soc. Services v. Musselman, 667 P.2d 1053 (Utah 1983), defined what it meant by a meritorious defense. The Court stated that it was "one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgement different from the one entered." Id. at 1057.

In Mr. Romero's memorandum in support of the motion to set aside the default judgment, he refers to the accompanying affidavit which states specific and sufficiently detailed facts that would result in a different judgment if they are proven.

Mr. Romero states on page two of his affidavit that he constantly worked with Plaintiffs to get them to pay him what they owed because they never paid him on time. He states that sums are still owed to him. He states that throughout the 33 years he tried to receive full payments, he never let more than three years elapse without collecting at least one payment. He also states that he recorded the quitclaim deed which he held as security pursuant to an agreement he had with the Plaintiffs that he could record it if they failed to make all their payments.

If these facts are proven, it would change the judgment from one quieting title to the property in Plaintiffs to one requiring them to complete their obligations pursuant to the promissory note. Thus Defendant has set forth a meritorious defense fulfilling the third criteria as stated by the Utah Supreme Court in Musselman.

Because Defendant has met all three requirements of Musselman, he is entitled to have the default judgment set aside so that the case may proceed on its merits.

D. **Alternative grounds for setting aside the default judgment.**

In the alternative, Defendant requests that this case be remanded to the District Court for further findings of fact and conclusions of law because the District Court in its ruling did not address Mr. Romero's URCP 60(b) grounds for relief.

A review of the District Court's ruling (Addendum 3) shows that the court addressed the sufficiency of service of process,

but failed to recognize that even if service of process is legally sufficient there may be equitable grounds to set aside the default judgment and address the case on its merits. Rule 60(b) is intended to be used "in the furtherance of justice" to relieve a party from a final judgment in the circumstances described in the Rule. There is no discussion in the District Court's ruling of whether or not this case meets the criteria for relief under Rule 60(b). In fact, there is no mention whatever of Rule 60(b) in the court's ruling.

CONCLUSION

Through no fault of his own Mr. Romero never received service of process. Service was not adequate under URCP 4(g) nor under Mullane and Carlson. The District Court abused its discretion when it found service to be "reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action." Even if the service was adequate, it was not personal service and Mr. Romero should be relieved from the effects of the default judgment under Rule 60(b). For these reasons Defendant requests this court to set aside the default judgment.

DATED this 20th day of March, 1995.

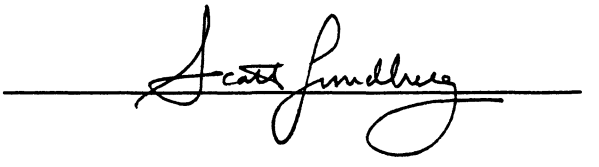
LUNDBERG & MEADERS

By _____
Scott Lundberg
Attorneys for Defendant/
Appellant

CERTIFICATE OF MAILING

I certify that on the 20th day of March, 1995, I caused two copies of the foregoing pleading to be mailed, postage prepaid, to the following:

George K. Fadel
170 West 400 South
Bountiful, UT 84010



ADDENDUM 1: RULES

Rule 60(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 judgement 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.

4(e) Personal service. Personal service shall be made as follows:

1. Upon any individual other than one covered by subparagraphs (2), (3) or (4) below, by delivering a copy of the summons and/or the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and/or the complaint to an agent authorized by appointment or by law to receive service of process.

4(g) Other service.

Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause or believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties. If the motion is granted, the court shall order service of process by publication by mail from the clerk of the court, by other means, or by some combination of the above, provided that the means of notice employed shall be reasonably calculated under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. A copy of the court's order shall be served upon the defendant with the process specified by the court.

ADDENDUM 2: PLEADINGS

GEORGE K. FADEL #1027
ATTORNEY FOR Plaintiffs
170 WEST FOURTH SOUTH
BOUNTIFUL, UTAH 84010
TELEPHONE 295-2421

IN THE SECOND DISTRICT COURT IN AND FOR DAVIS COUNTY,

STATE OF UTAH

GLEN D. WARDLE and THORA WARDLE, Plaintiffs, vs. LESTER ROMERO, Defendant.	**MOTION FOR SERVICE OF PROCESS BY PUBLICATION AND ORDER** Civil No. 940700002 Judge Rodney S. Page

On January 3, 1994, George K. Fadel, attorney for plaintiffs, deposited a Summons and Complaint with the Civil Process Division of the Salt Lake County Sheriff's Office to be served upon Lester Romero, defendant. Having expended significant effort, the Salt Lake County Sheriff has been unable to serve process upon Romero. Since January 13, 1994, Officer Jack Hill of the Salt Lake County Sheriff's Department has attempted to serve Romero at his residence twenty-three times. Officer Hill has had prior dealings with Romero and believes that Romero recognizes Officer Hill and is intentionally avoiding service of process. Officer Hill believes that Romero has been home but has refused to answer his door. Additionally, Officer Hill has sent Officer Ron Jensen to attempt service of process.

Officer Jensen's efforts were equally unproductive.

Having exhausted other service of process methods, plaintiffs pray for an order authorizing service of process upon defendant, Romero, by publication in the Davis County Clipper, a newspaper of general circulation in Davis County, Utah.

George K. Fadel
Attorney for Plaintiffs

Sworn to and subscribed before me this 12 day of April, 1994.

Notary Public
Residing at Bountiful, Utah

My Commission expires:

_____

ORDER

Upon reading the foregoing motion and good cause appearing therefore,

IT IS HEREBY ORDERED that service of process upon Lester Romero be made by publication of summons in the Davis County Clipper, Bountiful, Utah, at least once a week for four successive weeks, and by mailing to the defendant a copy of Summons and Complaint at his last known address: 1760 West 2100 South, Salt Lake City, Utah 84111.

Dated this 12th day of April, 1994.

By the Court:

Rodney S. Page
District Judge

J. Scott Lundberg (U.S.B. No. 2020)
LUNDBERG & ASSOCIATES
Attorneys for Defendant
P.O. Box 1290
Salt Lake City, UT 84110-1290
Telephone: (801) 363-2262

L&A Case No. X0045

SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

GLEN D. WARDLE and THORA WARDLE, Plaintiffs, v. LESTER ROMERO, Defendant.	MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND DECREE QUIETING TITLE IN PLAINTIFFS Civil No. 940700002 Judge Rodney S. Page

Defendant, through his counsel, submits the following memorandum in support of his Motion to Set Aside Judgment and Decree Quieting Title in Plaintiffs (the "Motion").

FACTUAL BACKGROUND

1. Plaintiffs commenced this action in January, 1994 and issued a summons for service on January 3, 1994. (Record.)

2. Defendant claims a security interest in the property subject of this action (the "Property"). (Affidavit of Lester Romero (hereinafter the "Affidavit"), ¶¶ 4-11.)

3. Plaintiffs' counsel made application to the Court for an order authorizing alternative service by publication. (Record.)

4. In that application, plaintiffs' counsel represented that 23 unsuccessful attempts had been made to serve defendant. (Record.)

5. From the court's file (specifically language in the order authorizing alternative service which states that the last known address of the defendant is 1760 West 2100 South, Salt Lake City, UT 84111), it appears that plaintiffs' counsel's representations concerning the attempted service were either false or that those attempts were made at the U.S. Post Office which is located at that address. (Record.)

6. Defendant resides at 6270 Margray Drive, West Jordan, UT 84084. (Affidavit, ¶14).

7. Plaintiffs' counsel was aware of the defendant's address at his residence. (Affidavit, ¶¶13-15.)

8. Defendant had no knowledge of this action until July 21, 1994. (Affidavit, ¶19.)

9. Plaintiffs did not make all the payments due on their obligation to defendant, which obligation was secured by a deed of trust on the Property. (Affidavit, ¶¶6-8, 10, 15.)

10. The Court entered a Judgment and Decree Quieting Title in Plaintiffs (the "Judgment") on June 15, 1994, based upon defendant's failure to respond to the plaintiffs' complaint.

ARGUMENT

Rule 60(b), Utah Rules of Civil Procedure, provides for relief from judgment in certain situations, including "mistake, inadvertence, surprise, or excusable neglect" (Rule 60(b)(1), "fraud . . . misrepresentation or other misconduct of an adverse party" (Rule 60(b)(3), "when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e)" (Rule 60(b)(4), or "any other reason justifying relief from the operation of the judgment" (Rule 60(b)(7). A motion for relief under Rule 60(b) must be timely made, no more than three months after entry in the case of Rule 60(b)(1), (3) and (4).

This motion is brought within three months following the entry of the Judgment, and the facts of this case clearly warrant relief from the Judgment. Defendant was not personally served with a summons and complaint and was not aware of this case or the Judgment until July 21, 1994. The facts demonstrate that the Judgment was entered by reason of either mistake or fraud on the part of plaintiffs' counsel.

From the Court's file, it appears that counsel for the plaintiffs, either by design or neglect, sent the summons and complaint for service on the defendant at the address for the U.S. Post Office on 2100 South. It is, frankly, inconceivable that a process server would make 23 attempts to serve the defendant at

that location. However, that is the conclusion that seems most likely from the available facts.

In fact, plaintiffs' counsel knew that defendant had an address of 6270 South Margray Drive, West Jordan, UT 84084 because he sent a letter dated November 18, 1993 to the defendant at that address and received a reply from the defendant. Whether he failed to use it intentionally or by negligence, he nonetheless failed to use it. Had he done so, it is very likely that service would have been promptly accomplished and defendant would have had an opportunity to defend himself against plaintiffs' claims.

Where a reasonable excuse is offered by the defaulting party, the court should favor granting relief from a default judgment, unless to do so would result in substantial injustice to the adverse party. Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, 544 P.2d 876 (Utah 1975). It is usually not appropriate to examine the merits of the claim decided by default on a motion under Rule 60(b). Larsen v. Collins, 684 P.2d 52 (Utah 1984).

Defendant clearly has a reasonable excuse for failing to respond to the complaint in this case. He was not even aware of its existence until after the Judgment was entered. The Court needn't examine the merits of plaintiffs' claims at this time. Even were it to do so, defendant has set forth facts which would

clearly require a trial or evidentiary hearing in order for the Court to render a reasoned decision on plaintiffs' claims.

CONCLUSION

The Court should set aside the Judgment and grant defendant reasonable time to file a responsive pleading to the plaintiffs' complaint.

DATED this 6th day of September, 1994.

LUNDBERG & ASSOCIATES

By J. Scott Lundberg
J. Scott Lundberg
Attorneys for Defendant

CERTIFICATE OF MAILING

I certify that on the 7th day of September, 1994, I caused a copy of the foregoing Memorandum to be mailed, postage prepaid, to the following:

George K. Fadel
170 West 400 South
Bountiful, UT 84010

J. Scott Lundberg

J. Scott Lundberg (U.S.B. No. 2020)
LUNDBERG & ASSOCIATES
Attorneys for Defendant
P.O. Box 1290
Salt Lake City, UT 84110-1290
Telephone: (801) 363-2262

L&A Case No. X0045

SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

GLEN D. WARDLE and THORA WARDLE, Plaintiffs, v. LESTER ROMERO, Defendant.	AFFIDAVIT OF LESTER ROMERO Civil No. 940700002 Judge Rodney S. Page

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Lester Romero, having been duly sworn, states and represents as follows:

1. I am a resident of Salt Lake County, Utah, over the age of 21 years.

2. I am the defendant in this action.

3. I make this affidavit based upon my personal knowledge, unless noted otherwise, and would so testify in court if called as a witness in this case.

4. In 1960, I was the owner of the property subject of this action (the "Property").

5. At that time, my former wife's parents, the plaintiffs in this action, were having a difficult time financially and I agreed to sell them the Property for $6,000.00.

6. The purchase price for the Property was paid in the form of a promissory note in the amount of $6,000.00, secured by a deed of trust in my favor. In addition, the plaintiffs executed a quit claim deed on the Property which I held as additional security.

7. The plaintiffs did not make all the payments required by the promissory note in a timely fashion and I had to constantly work with them to get the required payments.

8. At no time did I allow more than three (3) years to go by without receiving a payment from the plaintiffs.

9. The plaintiffs paid the real property taxes on the Property as required by the deed of trust.

10. There have been disagreements between me and the plaintiffs on the amount still due on the promissory note for several years.

11. Not being able to convince the plaintiffs to make the payments still due, I recorded the quit claim deed on May 24, 1993.

12. Thereafter, I received a letter from plaintiff's attorney, George Fadel, dated November 18, 1993. A copy is attached as Exhibit "A."

13. The November 18, 1993 letter was addressed to me at two (2) addresses: (a) 6270 Margray Drive, West Jordan, UT 84084; and

(b) General Delivery, 1760 West 2100 South, Salt Lake City, UT 84111.

14. I received the November 18, 1993 letter at my home at 6270 Margray Drive, West Jordan, UT 84084.

15. In response to Mr. Fadel's letter, I sent a lengthy reply indicating that the plaintiffs had not paid the promissory note off and that I recorded the quit claim deed pursuant to the agreement I had with the plaintiffs that I would do so if they did not pay. A copy of my letter is attached as Exhibit "B."

16. I heard nothing further from Mr. Fadel or the plaintiffs.

17. On July 20, 1994, I visited the clerk of the Court in Davis County to determine what additional action, if any, I needed to take after recording the quit claim deed.

18. At that time, personnel in the clerk's office indicated that a case had been filed which involved the Property. I left a written request that the clerk's office send me a copy of the docket sheet.

19. On July 21, 1994, I received a copy of the docket sheet in this case and learned, for the first time, of the existence of this case.

20. I have reviewed the pleadings filed by Mr. Fadel, particularly those filed in support of his motion or application for an order authorizing service of process by publication.

21. I have never lived at the address of 1760 West 2100 South. In fact, it is common knowledge that that is the address for the post office.

22. Mr. Fadel's motion states that 23 attempts were made to serve the summons and complaint on me, yet he apparently neglected or failed to file any affidavit or return of service from the Sheriff's office supporting that contention.

23. Mr. Fadel fails to state in his motion what address was used in an attempt to serve me with the summons and complaint. Yet the order for publication, prepared by him, states that the last known address for me was the 1760 West 2100 South address, the address of the post office.

24. I don't know officer Jack Hill or officer Ron Jensen of the Salt Lake County Sheriff's office.

25. I had no knowledge of any attempt to serve me with the summons and complaint, and I made no effort to evade any such attempt.

DATED this 6 day of September, 1994.

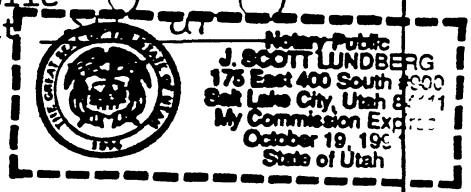
Lester Romero

Subscribed and sworn to before me by Lester Romero this 6th day of September, 1994.

J. Scott Lundberg

My Commission Expires
10/19/94

Notary Public
Residing at UT



CERTIFICATE OF MAILING

I certify that on the 7th day of September, 1994, I caused a copy of the foregoing Affidavit to be mailed, postage prepaid, to the following:

George K. Fadel
170 West 400 South
Bountiful, UT 84010

J. Scott Lundberg

GEORGE K. FADEL
ATTORNEY AT LAW
ROCK-MANOR
170 WEST 400 SOUTH BOUNTIFUL, UTAH 84010

November 18, 1993

Mr. Lester Romero
6270 Margray Drive
West Jordan, Utah 84084

General Delivery
1760 West 2100 South
Salt Lake City, Utah 84111

Dear Mr. Romero:

I have been consulted and retained by Glen D. Wardle and Thora Wardle concerning the Trust Deed and Quitclaim Deed you recorded May 24, 1993, against their home at 320 East Center Street, North Salt Lake, Utah.

If you have any claim to the property at all at this date, your proper remedy would be to pursue a foreclosure of the Trust Deed but not to record the Quitclaim Deed. Presumably the Quitclaim Deed made on the same date as the Trust Deed, March 1, 1960, was only intended as a mortgage.

You are requested to quitclaim the property back to the Wardles. If you desire to discuss the possibility of a settlement of any claim you may have, please call me at 295-2421.

If we have not resolved this matter in the next few weeks, we shall be required to commence appropriate proceedings to remove the deed cloud by a quiet title action, and request punitive damages.

Very truly yours,

George Fadel

EXHIBIT A

Dear Mr. George Fadel,

Received your letter where you try to threaten me but I do not take the threat lightly.
You need to know more about the problem than just to hear the Wardles side of the story. I will not discuss all of my case now, but when we go to court we will lay out our case. If you think I am going to quickclaim the property back to the Wardles you need to gather more information as the Wardles have not payed or agreed and owe more money to me than they say they owe. I let them move into the home I built with out making $1.00 or them paying a down payment just there honor they would pay me back and if they didn't the home would return back to me. I even had to pay the attorneys fees, recording fees etc, that the Wardles agreed to pay back and never did. Attorneys Browning & Knowlton have directed this realestate transaction from the beginning as the Wardles did not even have enough money to pay there rent on the home they rented on 10th West, I married there daughter and I told my wife I would help them out and when Mr. Browning made out the papers on the property he was protecting me as there was a large concern that they would not pay as agreed, so he had

EXHIBIT B

them sign a Trust Deed, Quickclaim, Confession of Judgment, so if they did not pay or agree we could take back the property without a long and costly legal battle. I tryed to be reasonable with the Wardles and they tryed to tell me how they were going to sue and make me pay attorney fees etc, and it is the other way around.
When I was up at there home I took two hours to explain the transaction, they would not listen to me, all they could conceive is of my religious learning. (as they have hated me for that since I learned there doctrin), in en conclusion of that meeting they were to send me a copy of there payments, as it did not agree with mine and to this day they have not sent them to me, just a letter stating I must sign a quickclaim deed, even if I did not agree with what they thought that was what was owed. I am enclosing just some of the paper work that might enlighten your knowledge of this case. You notice a confession of judgement note, that some time ago was recorded as a judgment. We tryed to mail the default and other necessary papers to the Wardles but as you can see from the letter she wrote there was no way she was going to receive anything from me and I have the return mail that she refused, we also have the necessary papers that

the constable failed when the Wardles could not be served so they were served by publication. The attorney Mr. Knowlton also put a Lis Pendens on the property, I am sure you saw that when you checked the record. The reason he filed the quickclaim deed is the Wardles were trying to cloud the title by turning their interest to a Trust, so they did not have to pay me what I have coming to me.

Where you state you are going to charge me punitive damages, I think you need to get all the paper work and re-evaluate your position, as my attorneys have directed this case from the beginning, and the Wardles are not going to get away without paying me what they agreed to pay.

I typed another time to solve this problem (as a copy enclosed) and a harsh letter was sent to me that they thought first because they sent me a check that I did not agree with, that they were not going to pay as agreed, and if I sent them any paper work they would not accept it.

You presuming that the quickclaim deed was only intended as a mortgage is not true, as they signed that if they did not pay as agreed.

that if they did not pay as agreed my interest would not be jeopardized. You state that you think I do not have any claim on the property, you are wrong again.

I suggest that you have another meeting with the Wardles and explain you did not know the particulars of this case and tell them they need to settle with me as it is not fact as they stated to you.

Yours truly

Leslie Romero

X0048

George K. Fadel #1027
Attorney for Plaintiffs
170 West 400 South
Bountiful, Utah 84010
295-2421

IN THE SECOND DISTRICT COURT IN AND FOR DAVIS COUNTY,

STATE OF UTAH

GLEN D. WARDLE and THORA WARDLE, Plaintiffs, vs. LESTER ROMERO, Defendant.	**MEMORANDUM OPPOSING MOTION TO SET ASIDE JUDGMENT AND DECREE QUIETING TITLE IN PLAINTIFF** Civil No. 940700002 Judge Rodney S. Page

The plaintiff submits this memorandum in opposition to defendant's motion to set aside the judgment.

Attached hereto is a copy of the Quit Claim Deed recorded by the defendant which shows an address of 1760 West 2100 South, Salt Lake City, Utah 84111. Also attached is a copy of the envelope postmarked December 13, 1993 which contained correspondence from the defendant with a return address of "Airport Motel, 6270 S. 2005 W., West Jordan, Utah 84084.

An affidavit will be forthcoming from Jack Hill, Deputy Sheriff of Salt Lake County, Utah whose return shows 23 attempts to serve the defendant and the address given at which to serve was 6270 Margray. Officer Hill previously advised that he had known the defendant and that the defendant was deliberately avoiding service by failing to answer the door.

No payment or acknowledgement of the debt was made after

1980, and the applicable statute of limitations is six years. The applicable statutory provision for tolling the statute is Utah Code Ann. section 78-12-44:

> In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

Utah Code Ann. § 78-12-44.

Contrary to the affidavit of Romero which implies that payment of taxes may toll the statute, the Utah Supreme Court in Upton v. Heiselt Const. Co, 208 P.2d 945 (Utah 1949) held that:

> The payment of taxes is an obligation of property ownership, and is an act necessary in order to preserve and protect one's property. It is an equivocal act so far as recognition of any contract obligation is concerned, in that it is an act which would be performed by the property owner without regard to the existence or non-existence of an obligation on a note and mortgage. His payment of taxes does not of itself indicate that he had in mind that there was an outstanding contractual obligation requiring him to make that payment. He could well make such a payment and have in mind that he was under no contractual obligation to do so. It is reasonable to say, then, that the mere payment of taxes by the property owner is not os sufficient probative value to indicate the existence of a contractual obligation to do so, and, therefore, does not constitute a payment . . . which will toll the statute of limitations.

Id. at 948.

The defendant cites Rule 60 (b)(4) as a basis for setting aside a judgment "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." Rule 4 (e) relates to personal service. Rule 4 (g) relates to other service where personal service cannot be made and service is made by publication for a judgment in rem and not a judgment in personam. The judgment rendered in the above entitled action was solely in rem. The Court specifically stated from the bench that no other relief requiring personal service would be granted.

The Sheriff's affidavit is expected to follow.

The defendant motion should be denied.

DATED this 9th day of September, 1994.

George K. Fadel
Attorney for Plaintiffs

I certify that I mailed a copy of the foregoing MEMORANDUM OPPOSING MOTION TO SET ASIDE JUDGMENT AND DECREE QUIETING TITLE IN PLAINTIFFS to J. Scott Lundberg, P.O. Box 1290, Salt Lake City, Utah 84110-1290, this 9th day of September, 1994.

J. Scott Lundberg (U.S.B. No. 2020)
LUNDBERG & ASSOCIATES
Attorneys for Defendant
P.O. Box 1290
Salt Lake City, UT 84110-1290
Telephone: (801) 363-2262

L&A Case No. X0045

SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

GLEN D. WARDLE and THORA WARDLE, Plaintiffs, v. LESTER ROMERO, Defendant.	REPLY TO MEMORANDUM OPPOSING MOTION TO SET ASIDE JUDGMENT AND DECREE QUIETING TITLE IN PLAINTIFFS Civil No. 940700002 Judge Rodney S. Page

Defendant, through his counsel, submits the following reply to the Memorandum Opposing Motion to Set Aside Judgment and Decree Quieting Title in Plaintiffs filed by the plaintiffs (the "Plaintiff's Memorandum").

POINT I

The Court Should Not Examine the Merits of Plaintiffs' Case in Ruling on a Motion under Rule 60(b).

Plaintiffs attempt to confuse the issue before the Court by arguing [apparently] that the statute of limitations expired on the debt to defendant which was secured by both a deed of trust and a quit claim deed. They also cite, erroneously, to a case dealing

with the payment of taxes and the question of whether the payment tolls the statute of limitations.

First, plaintiffs' attempts to argue the merits of their case an inappropriate here. As indicated in the Memorandum filed in support of defendant's motion, the Court need not evaluate the merits of the underlying case in deciding a motion to set aside a default judgment.

Second, even if it were appropriate to argue the merits of the underlying case, plaintiffs' attempts to do so are unpersuasive. Without any basis in fact, plaintiffs' counsel states that "no payment or acknowledgement of the debt was made after 1980." That statement is directly contradicted by the Affidavit of Lester Romero filed in support of defendant's motion. Mr. Romero, under oath, stated that "[a]t no time did I allow more than three (3) years to go by without receiving a payment from the plaintiffs."

Plaintiffs' citation to Upton v. Heiselt Const. Co., 208 P.2d 945 (Utah 1949) is apparently based upon plaintiffs' erroneous assumption that defendant argues that plaintiffs' continued payment of taxes evidences the existence of the obligation. In fact, the mention in the Affidavit of Lester Romero of payment of taxes was intended to counter the arguments originally made by plaintiffs in their complaint and motion for entry of default judgment (and reflected in the findings of fact and conclusions of law prepared by plaintiffs' counsel) that their payment of the taxes bolstered

their claim to ownership of the property (apparently an attempt to invoke the doctrine of adverse possession). Mr. Romero's reference to the payment of taxes was intended only to rebut that reliance on an adverse possession theory. Adverse possession based upon payment of taxes is inappropriate in a situation where the occupant of the property is under contractual obligation to the other party to pay those taxes.

POINT II

Adequate Cause Exists for the Court to Grant Relief under Rule 60(b).

Plaintiffs argue that Rule 60(b)(4) doesn't support defendant's motion because the case was *in rem* and personal service isn't required. Even if the Court is persuaded by plaintiffs' position on that point, plaintiffs failed to address the other three (3) bases for relief relied upon by the defendant.

Rule 60(b)1) provides for relief from a default judgment in cases involving "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(3) provides for relief in situations involving "fraud . . . misrepresentation or other misconduct of an adverse party." Finally, Rule 60(b)(7) provides for relief for "any other reason justifying relief from the operation of the judgment."

One or more of those provisions applies to the situation presented by the facts of this case. As clearly evidenced by the Affidavit of Lester Romero, defendant was completely surprised by

the judgment entered. He had no notice whatsoever of the proceeding or the judgment until after it had been entered.

Plaintiffs attempt to explain their use of the address for the General Office of the United States Postal Service by attaching a copy of a quit claim deed. Careful examination of the deed indicates that it was originally prepared in 1960, long before Mr. Fadel's letter to defendant (dated November 18, 1993) at the correct address of 6270 Margray, West Jordan, Utah. The 1760 West 2100 South address clearly was that for Mr. Horace Knowlton, the attorney for defendant at the time the document was prepared in 1960. Even if that address were supplied by the defendant, it was before plaintiffs' counsel successfully contacted defendant at the West Jordan address. It is inexcusable for plaintiffs' counsel to even refer to that address in his attempts to serve the defendant.

With little effort, plaintiffs' counsel could have ascertained that the address of 6270 South 2005 West ("Airport Motel") is the same as 6270 Margray. There is obviously no motel there. By the attachment of the envelope from the defendant, plaintiffs' counsel concedes the fact that he contacted defendant using the 6270 Margray address, further confirming the fact that he was negligent, if not fraudulent, in suggesting to the Court anything about the defendant's address being 1760 West 2100 South. [Note that the order authorizing publication of summons, prepared by plaintiffs'

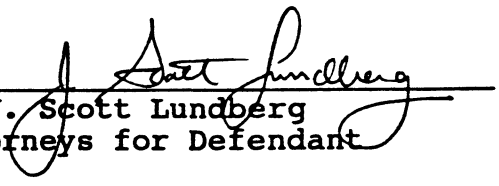
counsel, states specifically that the last known address for the defendant is 1760 West 2100 South.]

CONCLUSION

Nowhere in Plaintiffs' Memorandum is there any showing that defendant received actual notice of the pendency of this action, despite the fact that plaintiffs' attorney knew that defendant lived at 6270 Margray in West Jordan. Defendant's motion was timely filed. Plaintiffs' Memorandum reflects no facts that support an argument that any prejudice will result to the plaintiffs by granting the motion. Defendant should be entitled to present his case to the Court. In view of the inconsistencies in the actions and representations of plaintiffs' counsel, relief from the default judgment is appropriate in this case. Defendant's motion should be granted.

DATED this 12th day of September, 1994.

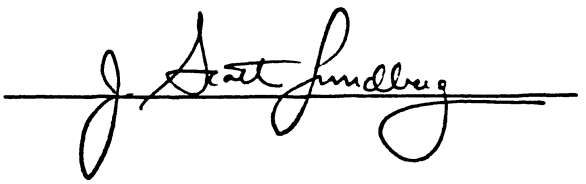
LUNDBERG & ASSOCIATES

By 
J. Scott Lundberg
Attorneys for Defendant

CERTIFICATE OF MAILING

I certify that on the 12th day of September, 1994, I caused a copy of the foregoing Reply to be mailed, postage prepaid, to the following:

George K. Fadel
170 West 400 South
Bountiful, UT 84010



George K. Fadel #1027
Attorney for Plaintiffs
170 West 400 South
Bountiful, Utah 84010
295-2421

IN THE SECOND DISTRICT COURT IN AND FOR DAVIS COUNTY,

STATE OF UTAH

GLEN D. WARDLE and THORA WARDLE, Plaintiffs, vs. LESTER ROMERO, Defendant.	AFFIDAVIT SUPPORTING MEMORANDUM OPPOSING MOTION TO SET ASIDE JUDGMENT AND DECREE QUIETING TITLE IN PLAINTIFF Civil No. 940700002 Judge Rodney S. Page

Attached hereto is the affidavit of the Sheriff of Salt Lake County as to attemped service of summons upon the defendant.

Dated this 15th day of September, 1994.

GEORGE K. FADEL
Attorney for Plaintiffs

I mailed a copy hereof to Mr. J. Scott Lundberg, attorney for defendant, P.O. Box 1290, Salt Lake City, Utah 84110 this 15th day of September, 1994.

STATE OF UTAH)
) ss. SHERIFF'S OFFICE
COUNTY OF SALT LAKE)

I, Deputy Jack Hill, being first duly sworn, on oath deposes and says:

That I am a citizen of the United States over the age of twenty-one years at the time of service herein, and not a party to this action.

That I received the hereto annexed summons, complaint on the 5th day of January, 1994. Between the dates of January 13, 1994 and March 11, 1994, I attempted service of said paper a total of 23 times (dates listed below).

That the address I attempted service is 6270 S. Margray Dr.

Aaron D. Kennard, Sheriff of Salt Lake County, State of Utah

Dated at Salt Lake City, Utah this 8th day of September, 1994.
Subscribed and sworn to before me this 8th day of September, 1994.

By _____
Deputy

Docket # 941658

By _____
Notary Public residing in Salt Lake City, Utah
My commission expires: 1/20/95

1/13/94	1/31/94	2/23/94
1/14/94	2/2/94	2/27/94
1/18/94	2/3/94	2/28/94
1/19/94	2/9/94	3/2/94
1/25/94	2/10/94	3/3/94
1/26/94	2/14/94	3/10/94
1/27/94	2/15/94	3/11/94
1/28/94	2/16/94	

NOTARY PUBLIC
MARILYN ROBINSON
437 South 200 East
Salt Lake City, UT 84111
My Commission Expires
January 20, 1995
STATE OF UTAH

ADDENDUM 3: RULING AND ORDER OF DISTRICT COURT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
DAVIS COUNTY, STATE OF UTAH

GLEN D. WARDLE and THORA WARDLE, Plaintiffs, v. LESTER ROMERO, Defendant.	RULING ON DEFENDANT'S MOTION TO SET ASIDE JUDGMENT AND DECREE QUIETING TITLE IN PLAINTIFFS Case No. 940700002

Comes now the Court and having reviewed the memoranda filed by Plaintiffs and Defendant on Defendant's Motion to Set Aside Judgement and Decree Quieting Title in Plaintiffs, the other documents on file with the Court, and being fully advised in the premises, the Court hereby enters the following findings and ruling:

1. The Court hereby finds that the instant case was commenced on January 3, 1994.

2. That on or about January 3, 1994, Plaintiffs supplied an original Summons and a copy of said Summons and Complaint with the Civil Process Division of the Salt Lake County Sheriff's Office.

3. That the address indicated for Defendant was "6270 So. Margray Dr., West Jordan."

4. That at the time of the events in question, Defendant in fact resided at the 6270 So. Margray Dr., West Jordan.

5. That Deputy Hill received Plaintiffs' Summons and Complaint on January 5, 1994, and unsuccessfully attempted to serve said summons and complaint on Defendant twenty-three (23) times between the dates of January 13, 1994 and March 11, 1994.

Additionally, the Court further finds that Deputy Hill attempted the foregoing service at 6270 S. Margray Dr.

6. That by attempting to serve Defendant twenty-three (23) times at his correct address, i.e., 6270 S. Margray Dr., Plaintiffs in good faith exercised reasonable diligence in attempting to search for or ascertain the whereabouts of Defendant. See Downey State Bank v. Major-Blackeney Corp., 545 P.2d 507 (Utah 1976); see also Carlson v. Boss, 740 P.2d 1269, 1276-1278. (Utah 1987).

7. That the property that is the subject of the underlying action is located in Davis County.

8. That Plaintiffs filed a Motion for Service of Process by Publication and Order, dated April 12, 1994, which the Court granted authorizing service of process upon Defendant by publication and by mail at Defendant's last known address.

9. That Plaintiffs' Summons was first published in the Davis County Clipper on April 15, 1994, and was published in each issue of said newspaper for three (3) weeks, the last publication being in the issue dated May 6, 1994.

10. That Plaintiffs either through mistake or inadvertence represented to the Court that Defendant's last known address was 1760 West 2100 South.

11. That the 1760 West 2100 South address is the general delivery address for the United States Post Office.

12. That service by mail was subsequently unsuccessfully attempted twice at the 1760 West 2100 South address.

13. That, notwithstanding said mistake, based on Deputy Hill's attempt to serve said summons and complaint on Defendant twenty-three (23) times between the dates of

January 13, 1994 and March 11, 1994, and the fact that Plaintiffs' Summons was published in the Davis County Clipper on April 15, 1994, and was published in each issue of said newspaper for three (3) weeks, the last publication being in the issue dated May 6, 1994, service of process under all the circumstances was reasonably calculated to apprise Defendant of the pendency of the action to the extent reasonable or practicable as required under Rules 4(e) and 4(g) of the Utah Rules of Civil Procedure.

14. Indeed, the Court finds that, in total, service was attempted over a period of approximately three (3) months, i.e., January 13, 1994 to March 13, 1994, (personal), and April 15, 1994 to May 6, 1994, (publication). Thus,

15. Finally, the Court finds pursuant to Rule 12 of the Utah Rules of Civil Procedure that Defendant failed to respond to Plaintiffs' Summons and Complaint within the statutorily prescribed twenty (20) day period.

Therefore, the Court denies Defendant's Motion to Set Aside Judgement and Decree Quieting Title in Plaintiffs. Counsel for Plaintiffs is instructed to prepare an order consistent with this ruling and submit the same to opposing counsel prior to the time it is submitted to the Court for signature.

Dated this 23rd day of December, 1994.

BY THE COURT:

Rodney S. Page
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing ruling was mailed to the following parties this 23rd day of December, 1994:

George K. Fadel
170 West 400 South
Bountiful, Utah 84010

J. Scott Lundberg
LUNDBERG & ASSOCIATES
P.O. Box 1290
Salt Lake City, Utah 84110-1290

Michael D. Di Reda
Law Clerk to the Honorable Rodney S. Page

George K. Fadel #1027
Attorney for Plaintiffs
170 West 400 South
Bountiful, Utah 84010
295-2421

IN THE SECOND DISTRICT COURT IN AND FOR DAVIS COUNTY,

STATE OF UTAH

GLEN D. WARDLE and THORA WARDLE, Plaintiffs, vs. LESTER ROMERO, Defendant.	**ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE JUDGMENT AND DECREE QUIETING TITLE IN PLAINTIFFS** Civil No. 940700002 QT Judge Rodney S. Page

The Court rendered a Judgment and Decree Quieting Titled in Plaintiffs to property situated at 320 East Center Street, North Salt Lake, Davis County, State of Utah, on June 15, 1994, upon application of the plaintiffs for entry of default of the defendant and for judgment by default. Defendant filed a motion to set aside the judgment and decree dated September 6, 1994, asserting lack of personal service. The court has reviewed the memoranda of both parties and the file and has issued its Ruling on Defendant's Motion to Set Aside Judgment and Decree Quieting Title for Plaintiffs wherein the Court has made its findings of fact and conclusions of law that service of process in this in rem action was proper, the plaintiffs having exercised reasonable diligence to serve the defendant personally.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the defendant's Motion to Set Aside Judgment and Decree Quieting Titled in Plaintiffs be, and the same is hereby denied.

2. That the Judgment and Decree Quieting Title in Plaintiffs dated June 15, 1994, entered June 16, 1994, is in no manner affected by the defendant's motion to set aside the same.

DATED this 11th day of January, 1995.

BY THE COURT

Rodney S. Page
District Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the proposed order denying the defendant's motion to set aside the judgment herein to Mr. J. Scott Lundberg, attorney for defendant, P.O. Box 1290, Salt Lake City, Utah 84110 this 28 day of December, 1994.

UTAH COURT OF APPEALS

REVA BRUNSON,	*	
Petitioner,	*	
vs.	*	
	*	**Appeal No. 950198-CA**
INDUSTRIAL COMMISSION OF UTAH, STOUFFER FOODS CORP. and/or TRAVELERS INSURANCE,	*	**Priority No. 7**
Respondent.	*	

BRIEF OF PETITIONER/APPELLANT REVA BRUNSON FOR PETITON FOR REVIEW

Attorney for RESPONDENT/APPELLEE

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79 South Main
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Salt Lake City, Utah 84145-0385

Attorney for PETITIONER/APPELLANT

Wayne A. Freestone
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ANGERHOFER & HARDING
50 West 300 South, #900
Salt Lake City, Utah 84101

UTAH COURT OF APPEALS

REVA BRUNSON, Petitioner, vs. INDUSTRIAL COMMISSION OF UTAH, STOUFFER FOODS CORP. and/or TRAVELERS INSURANCE, Respondent.	*	Appeal No. 950198-CA Priority No. 7

BRIEF OF PETITIONER/APPELLANT REVA BRUNSON FOR PETITON FOR REVIEW

Attorney for
RESPONDENT/APPELLEE

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79 South Main
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Salt Lake City, Utah 84101

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JURISDICTION

The Court of Appeals has jurisdiction to review an order of the Utah Industrial Commission pursuant to §35-1-86 Utah Code Ann.

NATURE OF PROCEEDINGS AND OF AGENCY

This is a Petition For Review of an Order of the Utah Industrial Commission.

STATEMENT OF ISSUES

The issues presented for review on appeal are as follows:

1. **Whether or not the Industrial Commission erred by ignoring competent, reliable and credible evidence of the industrial cause of Applicant's accident and by finding no industrial accident occurred.**

The standard of review is the "substantial evidence" standard. (See Willardson vs. Industrial Commission, 856 P.2d 371, 374 (Utah App. 1993); King vs. Industrial Commission, 850 P.2d 1281, 1285 (Utah App. 1993)).

DETERMINATIVE PROVISIONS

Utah Code Ann. §35-1-86 states as follows:

> "The Court of Appeals has jurisdiction to review, reverse, or annul any order of the commission, or to suspend or delay the operation or execution of any order."

STATEMENT OF CASE

On February 3, 1994, Petitioner filed an Industrial Disease and Accident Claim with the Industrial Commission. The Petitioner was claiming that her on-the-job activities, which included

standing to watch a moving conveyor belt for approximately 11 hours caused her to faint and sustain a concussion and head injury.

Defendants claim that Petitioner's recent bout with bronchitis and inner ear infection caused her to faint and hit her head on the floor and thus, denied her claim.

The medical records indicate that Petitioner had been awake for approximately 20 hours at the time of the industrial accident. The Petitioner's treating physician, Dr. Colver reported that the Petitioner's fainting was probably due to a generalized weakness and working too hard on her feet after getting over a bout of bronchitis. Dr. Colver goes on to indicate that the Petitioner's fainting may also have had some labyrinthitis with some vertigo which could have been exacerbated by the motion of the conveyor belt.

On or about October 12, 1994, the Administrative Law Judge found that Petitioner's industrial accident was not a result of her work activities. However, in so doing, he ignored competent, credible evidence that Petitioner's work activities and conditions aggravated her internal infirmities, causing an accident. On or about February 17, 1995, the Industrial Commission affirmed the Administrative Law Judge's decision, failing to give adequate weight to a clarifying letter from Dr. Colver dated March 21, 1994, wherein, he stated that Petitioner's physical condition was

aggravated by working too hard and being on her feet which could have been exacerbated by the motion of the conveyor belt. However, the Industrial Commission referred to his opinion as "conjecture".

The Industrial Commission also failed to give adequate consideration to the Petitioner's emergency room physician, Dr. Egbert, who's report indicates that considering the nature of the Petitioner's work he believed that the most likely the cause of her passing out was motion sickness due to the watching of the conveyor belt going past her. However, the Industrial Commission referred to his opinion as "conjecture".

The Industrial Commission also failed to give adequate consideration to the Summary of Medical Records submitted by Dr. Clark. Dr. Clark specifically states that there is a medically demonstrative causal relationship between the industrial accident and the problems for which Petitioner was treated.

STATEMENT OF RELEVANT FACTS

At the time of the accident, the Applicant was 75 years old and had been working for Stouffer Foods for only 3 days. The shift that she had been working, and was working at the time of the accident, began at 3:00 p.m. and was to end at 11:00 p.m. At the time of Applicant's injury she had been getting less sleep than normal because her sleep pattern had been disturbed by the new job. She had recently suffered a cough without fever, chills, sweats and

a sore throat, from which she was recovering. At the time of the accident, Applicant had completed her shift and was working overtime.

The Applicant's duties consisted of standing next to a conveyor belt which transported frozen food and watching the boxes as they came down the conveyor belt. If any of the boxes needed to be readjusted, Applicant would do so. On the night of the industrial accident, Applicant had a meal break from 7:30 p.m. to 8:30 p.m. in the cafeteria. Through-out her 8 hour shift and the overtime, the Applicant had been standing. Sometime shortly after 12:13 a.m., during the overtime shift, the Applicant looked up at the ceiling lights and then at the boxes as they moved along the conveyor belt and began to feel light headed. Applicant testified that she did not feel ill or faint. From that point on, the Applicant had no recollection of what happened. Sometime soon thereafter, Applicant fell backwards hitting her head on the tile floor. The Applicant was placed in a stretcher and transported to Mountain View Hospital in Payson, Utah, where she was hospitalized for 3 days. Prior to working at Stouffer Foods, the Applicant had been out of the work force for a considerable period of time. On the day of the accident, the Applicant had been up since 6:00 a.m. that morning. The doctor's notes indicated that the Applicant had been awake for 20 hours at the time of the industrial accident.

In the hearing, Victoria Nelson, a Registered Nurse, employed by Stouffer Foods for 7 years, testified that she knew of other employees on another conveyor line who had become nauseous or light headed. Ms. Nelson testified that on the other conveyor line the movement of the belt would make people light headed. She stated that many of the people who became light headed had been pregnant. Ms. Nelson also testified that to her knowledge, no one had fainted or had light headiness problems on the conveyor line in which the Applicant had been working.

Subsequent to the fall, Dr. David T. Roberts found the Applicant had an abnormal EEG. However, it is not clear from the medical records whether the abnormal EEG occurred as a result of the fall or was present prior to the fall.

The Administrative Law Judge states that, "On December 7, 1993, Dr. Colver reported that he suspected that the fall was due to a syncope based upon a generalized weakness due to resolving bronchitis and possibly due to mild labyrinthitis exacerbated by working on her feet at a moving conveyor belt all day." (See Page 3 of Order) The Industrial Commission also stated that Dr. Colver's opinion of the cause of the fall was conjecture (See Addendum E page 3). However, what Dr. Colver stated was:

> Syncope. This is probably due to a generalized weakness and **working too hard on her feet** after getting over a bout of bronchitis. She may have also had some

> labyrinthitis with some vertigo which could have been exacerbated by the motion of the conveyor belt. (Emphasis added) (See Addendum A).

The Administrative Law Judge also failed to mention, and the Industrial Commission ignored a letter from Dr. Colver, dated March 21, 1994, which was submitted by the Applicant. Said letter stated:

> In response to your questions in the letter dated March 12, 1994, you asked if my report states that you had a inflammation of the inner ear prior to the accident. The letter from Mr. Keith F. Walquist, dated March 8, 1994, states: "also he reported that you had a inflammation of the inner ear which could cause vertigo".
>
> Mr. Walquist is misquoting me. My note dated 7-7-93, says that she may have also had some labyrinthitis with some vertigo. Thus, I did not say that you had an inflammation of the inner ear, I merely hypothesized that it was possible.
>
> There is no way of knowing from my reports or examination if you had a inflammation of the inner ear prior to the accident.
>
> I did feel the most likely cause of your fainting was, "due to a generalized weakness and working too hard on your feet after getting over a bout of bronchitis". My records indicate that you had a cough from which you were recovering when you went back to work and had the accident...(Emphasis added).
> (See Addendum B)

The Administrative Law Judge and the Industrial Commission also failed to give adequate consideration to a letter of December

14, 1993, from the Applicant's emergency room physician, Dr. L. Dean Egbert. Dr. Egbert states the following:

> Mrs. Brunson is a 74 year old women that I saw in the emergency department on 12-7-93, after falling while working at a conveyor belt while working at Stouffers. She had been working there for only 2 days, she did not feel any spinning sensation, simply became light headed, passed out, hit her head on the floor sustaining a contusion of her brain. She was admitted to the hospital. As far as I know, no other specific cause of the blacking-out episode was found. **Considering the nature of this work I think that the most likely cause of her passing out was motion sickness due to watching the conveyor belt go passed (sic) her.** (Emphasis added)
> (See Addendum C)

The Administrative Law Judge and the Industrial Commission also failed to give proper weight to the Summary of Medical Record which was signed by Dr. John R. Clark, the Applicant's neurosurgeon. In said Summary of Medical Records, it is specifically stated that there is a medically demonstrative causal relationship between the industrial accident and the problems for which she was treated. (See Addendum D)

SUMMARY OF ARGUMENT

The Commission ignored and disregarded competent, reliable and credible evidence from the petitioner's treating physicians when it found that the petitioner's industrial injury was caused by a pre-existing condition rather than as a result of her fainting while watching the conveyor belt.

DETAIL OF ARGUMENT

I

THE INDUSTRIAL COMMISSION IGNORED COMPETENT, RELIABLE AND CREDIBLE EVIDENCE WHEN IT FOUND THAT THERE WAS NO EVIDENCE WHICH MEETS THE STANDARD OF REASONABLE MEDICAL PROBABILITY AS TO AN INDUSTRIAL CAUSE OF THE APPLICANT'S ACCIDENT.

The Court of Appeals has authority to reverse the Industrial Commission's Order. (See U.C.A. §35-1-86). The standard applied by the Court of Appeals in reviewing the Industrial Commission's Order is "substantial evidence". (See Willardson vs. Industrial Commission, 856 P.2d 371, 374 (Utah App. 1993); King vs. Industrial Commission, 850 P.2d 1281, 1285 (Utah App. 1993)). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (See Willardson vs. Industrial Commission, 856 P.2d 371, 374 (Utah App. 1993).

The Industrial Commission adopted the Administrative Law Judge's Findings of Fact (See Addendum F page 1). Thus, this appeal includes issues covered in the Administrative Law Judge's Findings of Fact and Conclusions of Law and Order.

The Industrial Commission arbitrarily disregarded competent evidence when it affirmed the Administrative Law Judge and found that the applicant had failed to establish medical causation. In Nicholson vs. Industrial Commission of Utah, 389 P.2d 730 (Utah 1964), the Supreme Court recognized the fact that it would not

disturb the findings or the order of the Commission if they were supported by "substantial evidence". However, at the same time they recognized that the Supreme Court has a duty, particularly with reference to the denial of compensation, to determine whether the Commission has arbitrarily disregarded competent evidence in making its decision.

In the Administrative Law Judge's Findings, the last paragraph on page three, it states:

> A preponderance of evidence shows that Mrs. Brunson's injury coincidentally occurred at work because of her idiopathic condition without any enhancement from the work place. Although, there has been speculation about why she had the fainting episode there is no evidence which can be set-forth which meets the standard of a reasonable medical probability. (See Addendum E)

"Medical causation demands that petitioner 'prove (his) disability is medically the result of a exertion or injury that occurred during a work-related activity.'" Allen vs. Industrial Commission, 729 P.2d 15, 27 (Utah 1986). "'The key question in determining causation is whether given this body and this exertion, the exertion in fact contributed to the injury.'" Stouffer Foods Corp. vs. Industrial Comm'n, 801 P.2d 179, 182 (Utah App. 1990) (quoting Allen, 729 P.2d at 24). In order to answer this question, we must focus on what exertions by Petitioner are involved. See id.; Nyrehn vs. Industrial Comm'n, 800 P.2d 330, 334 (Utah App.

1990), cert. denied, 815 P.2d 241 (Utah 1991).

As mentioned in the Statement of Facts, Dr. Colver stated on two occasions, that although, petitioner's physical condition was weaker than usual, it was aggravated by, "...working too hard on her feet..." and "...could have been exacerbated by the motion of the conveyor belt". In his clarifying letter of March 21, 1994, Dr. Colver goes on to state in more definitive terms, "I do feel the **most likely cause** of your fainting was, 'due to a generalized weakness and working too hard on your feet after getting over a bout a bronchitis'". (emphasis added).

As also pointed out in the Statement of Facts herein, the December 14, 1993, letter of L. Dean Egbert, M.D., the emergency room physician, stated, also in definitive terms, his opinion of the cause of the Applicant's injury. He stated:

> Considering the nature of this work, I think the **mostly likely cause** of her passing out was motion sickness due to watching the conveyor belt go passed her. (emphasis added).

The Administrative Law Judge states in his Findings that there was no evidence that had been set-forth which meets the standard of a reasonable medical probability. The definition of medical probability, according to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, page 318, is as follows:

> ***Possibility, Probability***: These are terms that refer to the likelihood or chance that an injury or illness was caused or aggravated by

> a particular factor. "Possibility" sometimes is used to imply a likelihood of less than 50%; "probability" sometimes is used to imply likelihood of greater than 50%. (See Addendum G).

The opinions of Dr. Colver and Dr. Egbert both state, "the most likely cause" of the Applicant's injury was due to working too hard, being on her feet for extended period of time, and motion sickness from watching the conveyor belt. The words, "most likely cause" certainly indicate that, in their medical opinion, there is more than a 50% likelihood that the of the cause of the accident was the Applicant being on her feet for an extended period of time, working too hard, and motion sickness from watching the conveyor belt. Thus, both treating physicians opined that it was medically probable that the cause of the accident was industrially related. Consequently, the Administrative Law Judge ignored opinions of reasonable medical probability from the two treating physicians that the injury was in fact caused by conditions of the Applicant's employment. Dr. Clark's opinion that petitioner's injury was directly related to an industrial accident compounds further the evidence in favor of petitioner.

It is well established that if a pre-existing condition is aggravated by working conditions, resulting in an injury, as long as the activity which caused the injury was extraordinary in nature, causation is established and workers compensation benefits

should be ordered. (See Allen vs. Industrial Commission, 729 P.2d 15 (Utah 1986)). Certainly, standing on one's feet for nine or more hours watching a conveyor belt would be considered an extraordinary activity. An ordinary 20th century person would not usually engage in a similar exertion in everyday, nonindustrial life. (See Allen vs. Industrial Commission, 729 P.2d 15 (Utah 1986)). As is set-forth herein, the Applicant did not suffer from an idiopathic fall. The Applicant was recovering from some pre-existing conditions, and consequently, may have been in a weakened state. However, as stated by the opinions of Dr. Colver and Dr. Egbert, **it is more than likely** that the cause of the accident was the aggravation of those pre-existing conditions by the long hours the Applicant was working, standing on her feet the entire time and the motion sickness that she incurred by watching the conveyor belt. This is also supported by the testimony of Victoria Nelson, the Registered Nurse employed by Stouffer Foods, who testified that other employees at Stouffer Foods had become nauseous and light headed by watching the conveyor belt.

CONCLUSION

Petitioner requests that this Court find that the Commission, in denying petitioner's application for benefits, arbitrarily disregarded competent evidence in when it determined that the petitioner's job-related-activities did not cause the industrial

accident. There simply is no evidence to indicate otherwise. Thus, Petitioner respectfully requests that this Court enter an Order reversing the Industrial Commission's Order in this matter.

DATED this 19 day of July, 1995.

WAYNE A. FREESTONE
Attorney for Applicant

ADDENDUM

ADDENDUM A

Ccu

MOUNTAIN VIEW HOSPITAL
1000 East, U.S. Highway 6
Payson, Utah 84651

A

INTERNAL MEDICINE CONSULTATION REPORT

Name: Brunson, Reba
Hosp. #: 01 36 75
Date: 12-7-93

Consulting Physician: Kevin J. Colver, M.D.
Referring Physician: John R. Clark, M.D.

CHIEF COMPLAINT:

This is a 75-year-old white female patient admitted by Dr. Clark because of syncope and cerebral contusion.

HISTORY OF PRESENT ILLNESS:

The patient recently had a cough without fevers, chills, sweats, or sore throat from which she was recovering. She returned to her new job working at a conveyer belt at Stouffer's yesterday evening and after standing for almost her complete 8 hour shift she felt dizzy and then fell backwards with apparent loss of consciousness and struck the back of her head. She sustained a laceration and a cerebral contusion. Apparently she had no chest pain, palpitations, or shortness of breath. It is unclear whether her dizziness was vertigo or light headedness.

PAST MEDICAL HISTORY:

1. Partial thyroidectomy in 1973, now on chronic Synthroid therapy.
2. Appendectomy in 1967.
3. Spinal meningitis without sequelae in 1958.
4. Brief syncopal episode many years ago while in a shower after getting over a cold.

MEDICATIONS: Synthroid, one pink pill per day.

ALLERGIES: None known.

HABITS: None.

SOCIAL HISTORY:

The patient is married and has a new job at Stouffer's.

REVIEW OF SYSTEMS:

Otherwise negative except for significant hearing loss.

PHYSICAL EXAMINATION:

General: This is a sleepy white female with a left hearing aid.

HEENT:
- Head: She has a laceration on the back of her head.
- Eyes: The pupils are equal and round and respond to light.
- Ears: The tympanic membranes were difficult to visualize due to narrow canals.
- Throat: Clear.

Lungs: Clear.

Cardiac: Normal S1 and S2, 2/6 systolic murmur at the upper left sternal border.

Abdomen: Bowel sounds present. The abdomen is soft and non-tender.

Extremities: Without cyanosis, clubbing or edema.

Neural: Mental status is alert and oriented. Cranial nerves II through XII show decreased hearing, otherwise intact. Motor strength is 4 to 5/5 in all extremities. Sensory: She has light touch sensation in all extremities. Deep tendon reflexes: There is a +2 left prepatellar and a trace right prepatellar reflex. Babinski's are absent.

Laboratory: EKG shows possible left anterior fascicular block, otherwise normal. Chemistries include a glucose of 137, LDH 200. CBC: WBC 6.2, hematocrit 39.4. CBC unremarkable.

IMPRESSION AND PLAN:

1. Syncope. This is probably due to a generalized weakness and working too hard on her feet after getting over a bout of bronchitis. She may have also had some labyrinthitis with some vertigo which could have been exacerbated by the motion of the conveyer belt. There has been no arrhythmias and no indication of other cause of syncope. The preliminary report on the carotid ultrasound shows very trace left plaque and none on the right. I would like to check some cardiac enzymes and also check the urinalysis. If these are negative, I do

not feel strongly that any further for the workup for the cause of syncope is indicated. I do agree with the EEG as already ordered by Dr. Clark.

2. History of thyroidectomy. Will resume her Synthroid 0.2 mg QD.

KEVIN J. COLVER, M.D.
Verified By Electronic Signature

KJC/cm
D/ 12-7-93 13:41
T/ 12-7-93 15:36

ADDENDUM B

Kevin J. Colver, M.D.
1120 East Highway 6, Suite 1
Payson, Utah 84651

March 21, 1994

Reva Brunson
91 South 200 East #4
Provo, Utah 84606

Dear Mrs. Brunson:

In response to your questions in the letter dated 12 March 1994, you asked if my report states that you had inflammation of the inner ear prior to the accident. The letter from Mr. Keith F. Wahlquist dated 8 March 1994 states, "also he reported that you had an inflammation of the inner ear which could cause vertigo."

Mr. Wahlquist is misquoting me. My note dated 7-7-93 says that, "she may have also have some labyrinthitis with some vertigo." Thus I did not say that you had an inflammation of the inner ear, I merely hypothesized that this was possible.

There is no way of knowing from my reports or examination if you did have inflammation of the inner ear prior to the accident.

I did feel the most likely cause of your fainting was, "due to a generalized weakness and working too hard on her feet after getting over a bout of bronchitis." My records indicate that you had a cough from which you were recovering when you went back to work and had the accident. The sentence in Mr. Wahlquists letter which states, "Dr. Kevin Colver reported that your fainting was probably due to your getting over a bout with bronchitis" is accurate.

Sincerely,

K. Colver MD

Kevin J. Colver, M.D.

KJC/pj

EXHIBIT "B"

ADDENDUM C

MOUNTAIN VIEW HOSPITAL
1000 East, U.S. Highway 6
Payson, Utah 84651

December 14, 1993

To Whom It May Concern:

Re: Reva Brunson

Attending Physicians: John R. Clark, M.D.
Kevin J. Colver, M.D.

Mrs. Brunson is a 74-year-old woman that I saw in the Emergency Department on 12-7-93 after falling while working at a conveyer belt at Stouffer's. She had been working there for only two days. She did not feel any spinning sensation, simply became light headed, passed out, hit her head on the floor sustaining a contusion to her brain. She was admitted to the hospital. As far as I know, no other specific cause of the blacking out episode was found. Considering the nature of this work, I think that the most likely cause of her passing out was motion sickness due to watching the conveyer belt go past her.

Sincerely,

L. Dean Egbert, M.D.
Emergency Room Physician
Mountain View Hospital

LDE/cm
D/ 12-14-93 9:37
T/ 12-14-93 10:45

EXHIBIT "C"

ADDENDUM D

Revised 7/93

Industrial Commission of Utah-Adjudication Division
160 East 300 South, 3rd Floor, P.O. Box 146615
Salt Lake City, Utah 84114-6615
(801)530-6800

Exhibit "L"

SUMMARY OF MEDICAL RECORD
(to be completed by treating physician)

EVALUATION FOR: Reva Brunson

DATE OF INJURY: 7 Dec 1993 EMPLOYER

1. Has applicant been released for usual work? NO What date?
2. Has applicant been released for light duty? NO What date?
3. Applicant was required to be off work from 7 Dec 93 to Present
4. Has applicant a permanent injury? No
5. In case of permanent injury, on what date did or will the applicant reach a final state of recovery?
6. If there is a permanaent injury, give your estimate of impairment in terms of percentage of loss of function:
7. Is there a medicallly demonstrative casual relationship between the industrial accident and the problems you have been treating? Yes Please explain as necessary: Post-concussion aftermath
8. What future medical treatment will be required as a result of the industrial accident? Observation only
9. What is the percentage of permanent physical impairment attributable to previously existing conditions, whether due to accidental injury, disease of congenital causes? None
10. What is the applicant's total physical impairment, if any, resulting from all causes and conditions, including industrial injury? Temporarily Totally Disabled
11. Did the industrial injury aggravate the applicant's pre-existsing condition? Please explain as necessary: N/A

Dated this 4th day of April 1994

John R. Clark MD
Physician's Name (please print)

Neurosurgery
Physician's Specialty

John R Clark MD
Physician's Signature

1172 Highway 6 #12
Street Address

Payson UT 84651
City/State/Zip

801/465-4866
Physician's Telephone Number

Shall RTW @ no restrictions as of 2 May 1994

ADDENDUM E

INDUSTRIAL COMMISSION OF UTAH

Case No. 94-180

REVA BRUNSON,	*	
	*	
Applicant,	*	**FINDINGS OF FACT,**
	*	
vs.	*	**CONCLUSIONS OF LAW,**
	*	
STOUFFER FOODS CORP. and/or **TRAVELERS INSURANCE,**	*	**AND ORDER**
	*	
	*	
Defendants.	*	
	*	
* * * * * * * * * * * * * * * * *		

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah on August 31, 1994 at 10:00 o'clock a.m. The hearing was pursuant to Order and Notice of the Commission.

BEFORE: Benjamin A. Sims, Administrative Law Judge.

APPEARANCES: The applicant, Reva Brunson, was present and represented herself pro se.

The defendant employer, Stouffer Foods, and its insurer, Travelers Insurance, were represented by Steven Aeschbacher, Attorney at Law.

The applicant, Reva Brunson, claims medical expenses and temporary total disability. The applicant was initially scheduled for a hearing on July 15, 1994. She has a profound hearing loss and wears hearing aids. Because her hearing aids were in for repair, she was unable to hear the proceedings, and elected, after considerable discussion, to delay the hearing until August 31, 1994.

On August 31, 1994, arrangements were made by Travelers Insurance to have a stenographic reporter present who provided a lap top computer by which the applicant could see on a computer screen all of the discussion that transpired in the hearing room. In addition, as back-up, the Industrial Commission provided a 20 inch computer screen by which typed questions could be shown to the applicant. The 20 inch screen was not necessary since the applicant could adequately read on the lap top computer screen what was transpiring during the session.

The defendants submitted an additional document on September 27, 1994, and the applicant submitted her response to it on September 30, 1994. The case was considered ready for an Order on October 3, 1994.

This case involves a fall at work. The 75 year old applicant, who looks younger than her age, had been working for Stouffer Foods (Stouffer) for only three days at the time of her injury. During her work for Stouffer, her shift was from 3:00 o'clock p.m. to 11:00 p.m. She was getting less sleep than she normally got, and although she had rested prior to going to work, her sleep pattern had been disturbed. MR at 16. At the time of her injury, she recently had a cough without fevers, chills, sweats, or sore throat from which she was recovering. She was working overtime. Her job was to stand next to a conveyer which transported frozen food and to readjust boxes as they came down the conveyer belt. On the night of the industrial incident, she had a meal break from 7:30 to 8:00 p.m. in the cafeteria.

At about 12:13 a.m., the applicant recited that she felt fine. She had been standing during her shift, and during her overtime. She looked up at the ceiling lights, and then at the boxes as they moved along the conveyor belt. Sometime thereafter she stated that she began to feel "light headed". She did not feel ill, nor did she feel faint. She has no recollection of what happened, but she fell backwards, hitting her head on the tile floor. She was placed on a stretcher and transported to the Payson Hospital where she was hospitalized for three days.

The applicant had previously worked as a supervising seamstress. She had also worked for Carlisle Foods. After a long period being out of the work force, she went to work for Stouffer. Stouffer instructed all of its employees, including the applicant, that if they were injured they were to go to see a company nurse, and if they were feeling ill they were to tell a supervisor or trainer.

On the day of this incident, the applicant had been up since 6:00 a.m. that morning. The doctor's notes indicate that the applicant had been awake for 20 hours at the time of the industrial incident. Although the applicant denied that she had been up for 20 hours, from 6 a.m. to 12 midnight is 20 hours. The applicant recited that she rested before she went to work. She claims that her problem stemmed from a lack of carbohydrates and attributes her fainting to lack of foods high in carbohydrates in Stouffer's cafeteria, and the movement of the conveyor on which she adjusted the food boxes.

The defendant employer provides free food to its employees, but does not tell them what to eat. The employees may choose such food items as they desire. Offered are entree items, salads, cereals, snacks, breads, peanut butter, and normal food items carried by cafeterias including numerous other carbohydrates. The employer is not responsible for providing its employees food.

The applicant was adamant at the hearing in expressing her physical endurance and ability to work for extended periods of time. In fact, subsequent to her injury, the applicant recited that she had worked from 7 a.m. to 5 p.m. in May 1994 for several days moving heavy boxes from a storage area.

The applicant also asserted that her problem with fainting and falling while at work at Stouffer was due to the fact that she had an extra undershirt on, and that the additional clothing caused her to get too warm.

Victoria Nelson, a registered nurse employed by Stouffer Foods for seven years, testified that she has had other people on another conveyor line who have become nauseous or light headed. On the other conveyor line, the movement of the belt will make people light headed. Many of the people who become light headed have been pregnant. No one has had fainting or light headedness problems on the conveyor line on which the applicant was working to the knowledge of Ms. Nelson. The applicant's conveyor line was designed differently.

The applicant suffers from previously existing long standing Hypacusis, and Hypothyroidism which is under control by replacement medication. Subsequent to the fall, Dr. David T. Roberts found an abnormal EEG. He reported that some of the forms appear "suspiciously epileptiform in character." MR at 49 & 8. It is not clear from the medical records whether this abnormal EEG occurred as a result of the fall, or was present prior to the fall.

On December 7, 1993, Dr. Colver reported that he suspected that the fall was due to a syncope based upon a generalized weakness due to resolving "bronchitis and possibly due to mild labyrinthitis exacerbated by working on her feet at a moving conveyor belt all day." MR at 53.

Dr. Clark gave her work releases through March 17, 1994. At the time he released her to return to work on March 17, 1994, he indicated that she had a post-concussion syndrome which was subsiding, as well a slight left ulnar neuropathy. She told Dr. Clark that she was afraid to return to work because she works swing shift, and at this time of the evening she is most tired and does not feel well. She claimed that if she could return to work during the day shift that she could handle it because during the day she is able to lift items and do her house work. MR at 19.

The preponderance of the evidence shows that Mrs. Brunson's injury coincidentally occurred at work because of her idiopathic condition without any enhancement from the workplace. Although there has been speculation about why she had the fainting episode, there is no evidence which has been set forth which meets the

standard of a reasonable medical probability.

Prior to and at the time of her syncopal episode and fall, Mrs. Brunson was not engaged in any activity which created any strain, exertion, or stress greater than that of her normal nonemployment life or the normal nonemployment life of any other person. Her syncopal episode and injury did not result from any strain, exertion, or stress related to her employment.

CONCLUSIONS OF LAW:

1. Mrs. Brunson was not injured by accident arising out of and in the course of her employment with her employer.

2. Neither Mrs. Brunson's employment nor any activities related thereto were the legal cause or medical cause of her injury.

3. The fall was related to a syncopal episode.

4. Mrs. Brunson is not entitled to workers' compensation benefits as set forth in U.C.A. Sect. 35-1-1 et seq.

DISCUSSION:

The general rule concerning causation is that an employee cannot recover for a physiological malfunction which is not job-induced and which could have happened as easily away from work as at work. Thus, in Sabo's Electronic Service v. Sabo, 642 P.2d 722, 723-24 (Utah 1982), the Utah Supreme Court denied recovery for a herniated disc caused by preexisting back problems from another job, and which manifested itself when the employee engaged in lifting activities which were not strenuous and could have happened anywhere. Accord Billings Computer Corp. v. Tarango, 674 P.2d 104 (Utah 1983); Farmers Grain Co-op. v. Mason, 606 P.2d 237 (Utah 1980); Church of Jesus Christ of Latter-day Saints v. Ind. Comm'n and Thurman, 590 P.2d 328 (Utah 1979); see also Nuzum v. Roosendahl Construction and Mining Corp., 565 P.2d 1144 (Utah 1977); Redman Warehousing Corp. v. Ind. Comm'n, 22 Utah 2d 398, 454 P.2d 283 (Utah 1969).

The Utah Supreme Court has held that a different rule applies, however, where because of some non-occupational internal weakness (such as a fainting spell), an employee falls and sustains an injury from the fall. Kennecott v. Ind. Comm'n and Georgas, 675 P.2d 1187 (Utah 1983). The Court stated, however, that the Georgas case did not present the question, and for that reason the Court did not decide whether an idiopathic fall to level ground and resulting injuries were compensable. Id. at FN 4. Compare, e.g., Williams v. Ind. Comm'n, 38 Ill.2d 593, 232 N.E.2d 744 (1967)

(recovery for fall to level floor denied), with Lovett v. Gore Newspapers Co., Fla., 419 So.2d 306 (1982) (recovery allowed). The instant case presents the instance of a fall to a level tile floor.

It will be helpful to first review the statute germane to this case. The Utah statute in effect at the time of the injury states in pertinent part:

> Each employee ... who is injured ... by accident arising out of and in the course of his employment, wherever such injury occurred,... shall be paid compensation ....

U.C.A. Sect. 35-1-45 (1988).

The statute requires an accident "arising out of and in the course of" employment. Id. (emphasis added). It is not sufficient to have an injury which occurred in the course of employment, but which did not arise out of the employment. There is no question, but that the head injury occurred in the course of her employment. However, the question based upon the facts of this case, is whether the arising out of prong has been met. The arising out of requirement might be met out of the hardness of the tile floor as an added employment hazard. A. Larson, Law of Workmen's Compensation, Sect. 12.14(e)(1994). As Professor Larson discusses, a china dish might survive if dropped on the kitchen linoleum, but would not have a chance on the ceramic tile floor of a factory.

Of the five cases allowing a level-floor award, one involved a tile floor (General Ins. Corp. V. Wichersham, 235 S.W.2d 215 (Tex. Civ. App. 1951), three involved a concrete floor (Smith v. Container Gen. Corp., 559 So.2d 1019 (Miss. 1990); Employers Mut. Liab. Ins. Co. v. Ind. Acc. Comm'n, 41 Cal.2d 676, 263 P.2d 4 (1953); George v. Great Eastern Food Prod., 44 N.J. 44, 207 A.2d 161 (1965), and one involved a "hard wood" floor (Pollock v. Studebaker Corp., 97 N.E.2d 631 (Ind. App. 1951). These cases indicate that the arising out of prong is satisfied by a physical impact with a floor which was the immediate cause of the injury.

However, the great majority of cases deny recovery where the injury occurred upon a tile or concrete floor because these types of floors are common outside the work environment, and these types of floors present risks which are not unique to work. See e.g., Oldham v. Ind. Comm'n, 139 Ill. App. 3d 594, 93 Ill. Dec. 868, 487 N.E. 693 (1985)(the diagnosis was a transient loss of consciousness of unknown etiology, and the necessity of standing and the presence of a clay tile floor were not risks greater than those outside of the employment).

In the instant case, there is insufficient evidence to show

that the injury arose out of the employment. There was no showing that the applicant's employment posed a risk to her that was greater than that to which she would be exposed as a member of the general public. There are many homes and businesses which have concrete and ceramic tile floors, and had she fainted in any of them, her injury would have been as severe. Under the circumstances, as much as I would like to give her an award, there is unfortunately no legal basis for recovery since the medical evidence does not show by a preponderance that her fainting was caused by her employment.

ORDER:

IT IS HEREBY ORDERED that the claim filed by Reva Brunson for injuries filed as a result of a fall on December 7, 1993 while working on the premises of Stouffer Foods Corporation must be dismissed with prejudice since it did not arise out of her employment for Stouffer Foods Corporation.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal. In the event a Motion for Review is timely filed, the parties shall have 15 days from the date of filing with the Commission, in which to file a written response with the Commission in accordance with U.C.A. Section 63-46b-12(2).

DATED THIS 12 day of October 1994.

INDUSTRIAL COMMISSION OF UTAH

Benjamin A. Sims
Administrative Law Judge

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of October, 1994, the attached ORDER in the case of Reva Brunson was mailed, postage prepaid to the following persons at the following addresses:

Reva Brunson
91 S 200 E #4
Provo UT 84606

Steven Aeschbacher, Atty
PO Box 45385
SLC UT 84145-0385

INDUSTRIAL COMMISSION OF UTAH

June S. Harrison, Paralegal
Adjudication Division

/jsh

ORD\BRUNSON

ADDENDUM F

THE INDUSTRIAL COMMISSION OF UTAH

REVA BRUNSON, Applicant, vs. STOUFFER FOODS CORPORATION and TRAVELERS INSURANCE COMPANY, Defendants.	*	ORDER DENYING MOTION FOR REVIEW Case No. 94-0180

Reva Brunson asks The Industrial Commission of Utah to review the Administrative Law Judge's decision denying her claim for benefits under the Utah Workers' Compensation Act.

The Industrial Commission of Utah exercises jurisdiction over this Motion For Review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53, and Utah Admin. Code R568-1-4.M.

FINDINGS OF FACT

The Commission adopts the findings of fact set forth in the decision of the ALJ, summarized below.

Ms. Brunson had worked at Stouffer Foods for only three days prior to the accident in question. The accident occurred on December 7, 1993 while she was assigned to adjust packages of frozen food that passed by on a conveyor belt. Without warning, she fainted and struck her head on a tile floor. As a result of the fall, Ms. Brunson suffered a concussion and required overnight hospitalization.

Ms. Brunson can only speculate as to the cause of her fainting spell. She has submitted a written statement from Dr. Colver that "the most likely" cause of the incident was "a generalized weakness and working too hard on your feet after getting over a bout of bronchitis." She has also submitted a written statement of Dr. Egbert that "the most likely" cause of her accident was "motion sickness due to watching the conveyor belt go passed (sic) her." Finally, Dr. Clark states "there is a medically demonstrative causal relationship between the industrial accident and the problems for which (Ms. Brunson) was treated." However, Dr. Clark provides no explanation of his conclusion.

Based on the foregoing evidence, the ALJ concluded that Ms. Brunson had failed to establish that her fainting and resulting injury "arose out of and in the course of" her employment at Stouffer Foods. The ALJ therefore held that her injury was not compensable under the Utah Workers' Compensation Act.

DISCUSSION AND CONCLUSIONS OF LAW

The Utah Workers' Compensation Act provides compensation to workers who are injured by accident "arising out of and in the course of" their employment. (Utah Code Ann. §35-1-45.) It is the worker's burden to prove that his or her employment is both the medical and the legal cause of injury. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). The focus of this case is on the requirement of medical causation, which requires Ms. Brunson to prove that her work at Stouffer Foods was the medical cause of her injury.

Ms. Brunson herself cannot explain why she fainted at work. Likewise, her physicians' statements do not reveal any reasonable medical certainty regarding the cause of her fainting. In fact, Dr. Colver and Dr. Egbert arrive at two different conjectures to explain the incident. Under these circumstances, the Commission agrees with the ALJ's conclusion that Ms. Brunson has failed to establish medical causation.

As noted above, it is Ms. Brunson's burden to prove medical causation. Because she has not done so, the Commission must deny her claim for workers' compensation benefits.

ORDER

The Commission affirms the decision of the Administrative Law Judge and dismisses Ms. Brunson's Motion For Review. It is so ordered.

Dated this 17 day of February, 1995.

Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Colleen S. Colton
Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

NOTICE OF APPEAL RIGHTS

Any party may ask the Commission to reconsider this Order by filing a Request for Reconsideration with the Commission within 20 days of the date of this Order. Alternatively, any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.

CERTIFICATION OF MAILING

I certify that a copy of the foregoing ORDER DENYING MOTION FOR REVIEW in the matter of Reva Brunson, Case No. 94-0180, was mailed, first class, postage prepaid this 17 day of February, 1995, to the following:

WAYNE A. FREESTONE
PARKER, FREESTONE, ANGERHOFER & HARDING, P.C.
BANK ONE TOWER
50 WEST 300 SOUTH, SUITE 900
SALT LAKE CITY, UTAH 84101

STEVE J. AESCHBACHER
RAY, QUINNEY & NEBEKER
70 SOUTH MAIN STREET
P O BOX 45385
SALT LAKE CITY, UTAH 84145-0385

REVA BRUNSON
91 SOUTH 200 EAST #4
PROVO, UTAH 84606

Adell Butler-Mitchell
Support Specialist
Industrial Commission of Utah

Orders\94-0180

CERTIFICATE OF MAILING

I hereby certify that on ___ day of July 1995, I caused to be mailed by First-Class Mail, postage pre-paid, a true and correct copy of the foregoing Motion For Review to the following:

Steven Aeschbacher, Esq.
RAY, QUINNEY & NEBEKER
79 South Main
Salt Lake City, Utah 84145-0385

CERTIFICATE OF MAILING

I hereby certify that on ___ day of July 1995, I caused to be mailed by First-Class Mail, postage pre-paid, a true and correct copy of the foregoing Motion For Review to the following:

Steven Aeschbacher, Esq.
RAY, QUINNEY & NEBEKER
79 South Main
Salt Lake City, Utah 84145-0385

ADDENDUM G

5. Illness, Disease: An illness may be considered to be the summation of the physical, mental, and other kinds of factors that are involved in an individual's less than optimal health status. A disease may be considered to be the specific pathophysiologic processes involved, which give rise to the individual's signs and symptoms and their progression.[1]

6. Employability: This is the capacity of an individual to meet the demands of a job and the conditions of employment associated with that job as defined by an employer, with or without accommodation.

7. Employability Determination: This is an assessment by management of the individual's capacity, with or without accommodation, to meet the demands of a job and the conditions of employment. The management carries out an assessment of performance capability to estimate the likelihood of performance failure and the likelihood of incurring liability in case of human failure. If either likelihood is too great, then the employer may not consider the individual employable in the job.

8. Medical Determination Related to Employability: This is the process of evaluating the relationship of an individual's health to the demands of a specific job as described by the employer, such as demands for performance, reliability, integrity, endurance, or prolonged service. The physician must ensure that the medical evaluation is complete and detailed enough to draw valid conclusions with respect to the individual's capability of meeting the job's demands and carrying out essential job functions.

The physician's tasks are to (1) identify impairments that could affect performance and determine whether or not the impairments are permanent; and (2) identify impairments that could lead to sudden or gradual incapacitation, further impairment, injury, transmission of a communicable disease, or other adverse occurrence.

In estimating the risk factors, the physician should indicate whether or not the individual represents a greater risk to the employer than someone without the same medical condition and should indicate the limits of the physician's ability to predict the likelihood of an untoward occurrence.

9. Risk, Hazard: A *risk* represents the probability of an adverse event; a risk must be weighed together with the consequences of the adverse event. An individual's activities or characteristics, and biologic, physical, or chemical factors, may increase the risk of morbidity or mortality.

A *hazard* is a potential source of danger; to a woman contemplating crossing the Atlantic Ocean in a rowboat, the Atlantic presents a serious hazard. Excessive numbers of coliform bacteria or *Shigella dysenteriae* in the public water supply present a hazard to a city.

10. Possibility, Probability: These are terms that refer to the likelihood or chance that an injury or illness was caused or aggravated by a particular factor. "Possibility" sometimes is used to imply a likelihood of less than 50%; "probability" sometimes is used to imply a likelihood of greater than 50%.

Social Security Disability Determinations

Although the Social Security system predated the first *Guides* edition and is not based on the *Guides*, a description of the system is included here to compare and contrast the ways in which medical information is used under each approach. The Social Security Administration (SSA) has national responsibility under Public Law 74-271 for the administration of both the Social Security disability insurance program (title II) and the supplemental security income (SSI) program (title XVI). Every person who pays into Social Security contributes to the Social Security Disability Trust Fund.

The title II program provides cash benefits to disabled workers and their dependents who have contributed to the trust fund through the FICA tax on their earnings. A person qualifies under the title II program because of financial need. The title XVI program provides for a minimum income for the needy, aged, blind, and disabled. Under that program, financial need is indicated by limitation of income and resources to a level that is equal to or less than an amount specified in the law.

Definitions and Terms

Under the title II and title XVI programs, the definitions of disability are essentially the same. The law defines disability as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months (Section 223 [d] [1] [A]). The law may apply to infants and children as well as adults. In terms of the law, a person is either disabled or not disabled.

To meet the definition of disability, an individual's impairment or combination of impairments must be of such severity that he or she not only is unable to do the work previously done, but also cannot perform any other kind of substantial gainful work considering the individual's age, education, and work experience (Section 223 [d] [2] [A]). Substantial gainful work means any work that involves significant and productive physical or mental activities and is

CERTIFICATE OF MAILING

I hereby certify that on 19 day of July 1995, I caused to be mailed by First-Class Mail, postage pre-paid, a true and correct copy of the foregoing Brief of Petitioner/Appellant Reva Brunson to the following:

Steven Aeschbacher, Esq.
RAY, QUINNEY & NEBEKER
79 South Main
Salt Lake City, Utah 84145-0385

Industrial Commission of Utah
Adjudication Division
160 East 300 South, 3rd Floor
P.O. Box 146615
Salt Lake City, Utah 84114-6615

Wayne A. Freeston