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Procedure–Imputability of Attorney's Negligence to Client Under West Virginia Rules of Civil Procedure

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Rev. Rul. 62-92. However, the number of appeals pending indicates that the law on this point is not settled. Merritt, *op. cit. supra*. Congressional enactment of the Int. Rev. Code of 1962, §§ 1245, 1250, has limited the problem considerably. These sections require the taxpayer to apply the high ordinary tax rate to certain gains to the extent depreciation recapture is involved. These sections look to the much broader problem of the interaction caused by any deduction for depreciation without regard for the year in which it was taken. However, they fail to completely dispose of the issue in the year of sale because (1) they concern only certain property and (2) section 1250 operates only as to a part of the recapture. Therefore, the need for dispositive legislation or a Supreme Court pronouncement remains.

Robert Willis Walker

**Procedure—Imputability of Attorney's Negligence to Client Under
West Virginia Rules of Civil Procedure**

Appellee was injured by a car driven by an employee of appellant. Two days before the statute of limitations would have barred his claim, appellee filed suit. About nine months later the complaint was dismissed, after notice to his then counsel, for failure to prosecute. Two years later the appellee, by new counsel, moved to reinstate the suit on the ground that his former counsel had been beset with personal problems which involved the serious illness of his wife and the recent death of his parents. Appellee was assured from time to time by his former counsel that the case was proceeding and that settlement would be made soon. Appellee learned that his case had been dismissed for failure to prosecute only by checking personally with the court clerk. The trial court granted the motion to reinstate the suit and appellant appealed. *Held*, affirmed. The trial court did not abuse its discretion in reinstating the action under Rule 60(b)(6) of the Federal Rules of Civil Procedure which allows the court to vacate judgments for reasons justifying relief from the operation of such judgments. The motion was made within a reasonable time and the appellee, a person unfamiliar with court procedures, should not be penalized by the inexcusable neglect of his counsel. A dissenting judge reasoned that the motion for reinstatement had not been made within a reasonable time and

that a client is bound by the acts and omissions of his employed attorney. *L. P. Stewart, Inc. v. Matthews*, 329 F.2d 234 (D.C. Cir. 1964).

Courts continuously have struggled to reconcile the need for correction of unjust judgments with the aims of finality in litigation. Rule 60(b) of the Federal Rules of Civil Procedure provides that, on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for "(1) mistake, inadvertence, surprise or excusable neglect" or "(6) any other reason justifying relief from the operation of the judgment." The motion must be made within a reasonable time, and for reason (1), not more than one year after the judgment, order or proceeding was entered or taken.

In the principal case the majority agreed with the trial court's holding that the attorney's conduct did not represent excusable neglect, thus by-passing the one-year limitation in item (1). Instead, the action was reinstated under item (6), the residual clause, in which the only time limitation is one of "reasonable time." Because of the language "any other reason," items (1) - (5) and item (6) are mutually exclusive; thus, relief granted under item (6) may not be for excusable neglect. Otherwise, the word "other" is rendered meaningless. The majority characterized the attorney's conduct as gross neglect, thus inexcusable. However, this gross neglect on the attorney's part was not imputed to his client and the action was reinstated in order "to accomplish justice." Such a holding of non-imputability, as the vigorous dissent pointed out, is contrary to the general rule.

The relationship between client and attorney is one of agency. Thus, the general rules of law which apply to agencies usually apply to the relationship of client and attorney. The client is generally bound by the acts of the attorney within the scope of the latter's authority. The omissions, as well as the commissions, of an attorney are to be regarded as the acts of the client whom he represents; his neglect is equivalent to the neglect of his client. *Anzalone v. Johnson*, 345 Ill. App. 410, 103 N.E.2d 383 (1952); *Kuhn v. Indiana Ice & Fuel Co.*, 104 Ind. App. 387, 11 N.E.2d 508 (1937); *Longyear v. Edwards*, 217 Ore. 314, 342 P.2d 762 (1959).

However, there is authority for the view that the negligence of the attorney is not always to be imputed to the client. In *Lucas v. City of Juneau*, 20 F.R.D. 407 (D.C. Alaska 1957), where the attorneys permitted an order dismissing the case without the knowledge or consent of a client who was under medical care outside the jurisdiction, the conduct of the attorneys was not imputed to the client and the order of dismissal was vacated under Rule 60(b)(6). A court also refused to bind the client by the negligent conduct of his attorney in *In Re Estate of Cremidas*, 14 F.R.D. 15 (D.C. Alaska 1953), where the attorney was so drunk throughout the hearing as to be incapable of presenting his client's case on its merits. In *Sayre v. Lee*, 40 S.D. 170, 166 N.W. 635 (1918), the imputability rule was not applied where the attorney intentionally neglected his client's business.

The Supreme Court of the United States squarely met this issue of imputability in *Link v. Wabash R.R.*, 370 U. S. 626 (1962). The Court held that dismissal of petitioner's claim because of his counsel's unexcused conduct in failing to prosecute the action did not impose an unjust penalty on the client. Since the petitioner voluntarily chose this attorney as his representative in the action, he could not avoid the consequences of the acts or omissions of this freely selected agent. "Any other notion would be wholly inconsistent with our system of representative litigation. . . ." The Court also pointed out that if the attorney's conduct falls below what is reasonable under the circumstances, the client's remedy is against the attorney in an action for malpractice. Keeping the action alive merely because the plaintiff should not be penalized for the omissions of his own attorney, the Court added, would be "visiting the sins of plaintiff's lawyer upon the defendant."

The dissent in the *Link* case contended, however, that the defendant would incur no punishment if the suit were to be decided on its merits in a recognized court of justice. The dissent deemed the case a good example of the "deplorable kind of injustice that can come from the acceptance of any such mechanical rule."

Under the West Virginia Rules of Civil Procedure a contrary decision would have been reached on the reasoning in the principal case. West Virginia Rule 60(b) is substantially the same as the federal rule but a motion under item (6) must be made within a reasonable time and in any event not more than eight months after

the judgment, order, or proceeding was entered or taken. In the principal case there was a lapse of two years before the motion to reinstate was made within the "reasonable time" limitation of the federal item (6). The maximum period of eight months in West Virginia corresponds with the general time limitation on appeal. LUGAR & SILVERSTEIN, W. VA. RULES 467 (1960). In the West Virginia Rules, as in the Federal Rules, item (6) is a residual item. It may cover relief from final judgments which was formerly available under the abolished common law and equity remedies but which is not available under items (1) - (5) of Rule 60(b). However, this is not to say that no other reason may be sufficient. LUGAR & SILVERSTEIN, *op. cit. supra* at 473, 474.

The Supreme Court of Appeals of West Virginia has not decided any case involving Rule 60(b). Neither has it squarely answered the question of whether an attorney's negligence will be imputed to his client. The only reference to the general weight of authority regarding this imputability is found in *Roller v. McGraw*, 63 W. Va. 462, 60 S.E. 410 (1908), where the court held that the general rule of a client's being bound by the acts of his attorney does not apply where the act is in pursuance of a fraudulent confederation of the attorney with the opposing party.

In *Post v. Carr*, 42 W. Va. 72, 24 S.E. 583 (1896), the court interpreted the then applicable statute, which provided that a default judgment could not be set aside without "good cause shown therefor." The court held that in order to establish "good cause," the party must show fraud, accident, mistake, surprise, or some adventitious circumstance, and he must be free from negligence. The default judgment was not set aside because the defendant personally was negligent in failing to appear in court. The guidelines provided in the *Post* case are substantially preserved under Rule 60(b).

Under West Virginia Rules 12(a) and 55(b), default judgment may ordinarily be entered by the court twenty-one days after service upon the defaulting party unless he obtains an extension of time under Rule 6(b). The latter rule permits an extension of time for "excusable neglect" or "unavoidable cause," which are among the reasons for reinstating an action under Rule 60(b). Thus the issue of imputability may also arise under Rule 6(b). Although no West Virginia cases have arisen under Rule 6(b), the

court early set forth certain circumstances under which an extension of time could be granted. These guidelines remain substantially in effect under the West Virginia rules. The question of whether a continuance should be granted was a matter depending on sound judicial discretion in determining whether "good cause" was shown under the statute. The party must have been prevented from obeying the rule of the court by fraud, mistake, accident, surprise or some adventitious circumstance beyond his control. He must also have been free from neglect. *Bartrug v. Edgell*, 80 W. Va. 220, 92 S.E. 438 (1917). However, the court again has not determined whether a continuance may be granted if the client is free from neglect but his attorney is negligent.

In *Moore v. Moore*, 72 W. Va. 260, 78 S.E. 99 (1913), the client relied on the advice of his counsel that according to local custom and practice the cause would be pressed for hearing only at a subsequent term. The attorney was absent from the state when the cause was unexpectedly pressed for hearing at the present term. The court held that the party was entitled to a continuance since he was not purposely attempting to delay the final determination of the litigation.

Although the West Virginia court has not decided whether the negligence of the attorney will be imputed to his client, the court seems to have deemed the relationship between the attorney and his client as one of agency. By the rules of agency, such negligence generally is imputed to the principal. Since cases decided under the Federal Rules of Civil Procedure may afford some guidance in West Virginia, it is conceivable that the court could hold that the negligence of the attorney is not to be imputed to the client in some situations. Such a holding would not be contrary to any West Virginia case law, but it would appear to run against the tenor of its holdings as well as the rule generally applied in the federal courts.

Lester Clay Hess, Jr.