IN THE UTAH COURT OF APPEALS

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Bolinder Company, Inc., a Utah corporation, Plaintiff, v. Steven K. Walker, Defendant, Third-party Plaintiff, and Appellant, v. Russell Christensen dba Fineline Development, Third-party Defendant and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20091076-CA F I L E D (December 16, 2010) 2010 UT App 363

Third District, Tooele Department, 070301570
The Honorable Stephen L. Henriod

Attorneys: Sean N. Egan, Salt Lake City, for Appellant
Jaime D. Topham, Grantsville, for Appellee

Before Judges McHugh, Thorne, and Voros.

VOROS, Judge:

The trial court granted plaintiff Bolinder Company, Inc. summary judgment against defendant Steven K. Walker. It also granted third-party defendant Russell Christensen summary judgment against third-party plaintiff Walker. Walker sought relief from the latter judgment under rule 60(b) of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 60(b). The trial court denied Walker's rule 60(b) motion, and Walker appeals. We affirm.[1]

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[1]We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the

(continued...)

The portion of rule 60(b) relied upon by Walker authorizes the trial court, "in the furtherance of justice," to relieve a party from a final judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect." Utah R. Civ. P. 60(b)(1). We note at the outset that dispositions of "rule 60(b) motions are rarely vulnerable to attack. We grant broad discretion to trial courts' rule 60(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review." Fisher v. Bybee, 2004 UT 92, ¶ 7, 104 P.3d 1198.

Walker advances four separate arguments on appeal. First, he contends that the trial court erred in denying rule 60(b) relief because the trial court granted Christensen's motion for summary judgment notwithstanding the fact that Christensen had never formally submitted the motion for decision. Rule 7(d) of the Utah Rules of Civil Procedure does state that if no party files a request to submit a motion for decision, "the motion will not be submitted for decision." Utah R. Civ. P. 7(d). This rule, in substance, was formerly located in the Utah Code of Judicial Administration, see Utah Code of Jud. Admin. 4-501(1)(D) (repealed 2003) (stating, in pertinent part, "If neither party files a notice [to submit for decision], the motion will not be submitted for decision"). In interpreting that materially identical rule, this court squarely held in Scott v. Majors, 1999 UT App 139, 980 P.2d 214, that "nothing in this rule or any other rule bars a court from deciding [a matter that is not submitted for decision] sua sponte." Id. ¶ 11. The object of rule 7(d) is thus not to prevent the court from disposing of a fully briefed motion, but to alert the parties that they "may not assume that a matter will be presented to the judge for decision by the clerks' office unless a party notifies the clerk of the court that the matter is fully briefed . . . and ready for decision." Id. The trial court's actions here complied with applicable law as expressed in Scott and did not require rule 60(b) relief.

Next, Walker argues that the trial court erred in denying rule 60(b) relief because Christensen's summary judgment motion was never noticed for hearing by the court. However, Walker's rule 60(b) motion filed in the trial court did not cite this as a ground for relief. This claim of error is thus not preserved for appellate review. See Pratt v. Nelson, 2007 UT 41, ¶ 15, 164

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[1](...continued)
decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3).

P.3d 366 ("In order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue" (internal quotation marks omitted)). Nor does Walker offer any "grounds for seeking review of an issue not preserved in the trial court." Utah R. App. P. 24(a)(5)(b). Accordingly, we do not consider it further.

Next, Walker contends that the trial court erred in denying rule 60(b) relief because neither counsel for Walker nor counsel for Christensen attended the hearing on Christensen's motion for summary judgment.[2] As noted above, "We grant broad discretion to trial courts' rule 60(b) rulings." Fisher, 2004 UT 92, ¶ 7. We acknowledge that when counsel for Walker and Christensen failed to appear, the trial court might have taken a more measured approach, continuing the summary judgment hearing and perhaps assessing attorney fees against counsel. See Paulos v. All My Sons Moving & Storage, 2008 UT App 462U, para. 7 (mem.) ("When a party fails to appear, the trial court may award attorney fees under its authority to control proceedings before it."); see also Jones v. Layton/Okland, 2009 UT 39, ¶ 22 n.15, 214 P.3d 859. Instead, the trial court followed a more rigorous course. Having done so, Walker contends, the court erred in later denying relief from the judgment ordered at that hearing.

Essentially, Walker is claiming excusable neglect. The trial court has wide latitude in determining whether a party's neglect was excusable:

> [I]n deciding whether a party is entitled to relief under rule 60(b) on the ground of excusable neglect, a district court must determine whether the moving party has exercised sufficient diligence that it would be equitable to grant him relief from the judgment entered as a result of his neglect. In making this determination, the district court is free to consider all relevant factors and give each factor the weight that it determines it deserves.

Jones, 2009 UT 39, ¶ 25. In denying the rule 60(b) motion, the trial court here explained in detail the basis for its finding

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[2]Because we decline to reach the merits of Walker's claim that the summary judgment motion was not properly noticed, we assume for purposes of this appeal that it was.

that Walker's counsel had not exercised "due diligence" in attempting to continue or attend the hearing. Those facts are set out in the court's lengthy minute entry and we do not repeat them here.[3] We conclude on this record that the court acted within its broad discretion in denying Walker's rule 60(b) motion despite counsel's nonappearance at the summary judgment motion hearing.

Finally, Walker argues that the trial court erred in denying rule 60(b) relief because genuine issues of material fact precluded summary judgment. However, Walker is appealing the court's denial of his rule 60(b) motion. Accordingly, we are reviewing the order denying the rule 60(b) motion, not the underlying order granting summary judgment:

> "An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. The appeal does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought. Appellate review of Rule 60(b) orders must be narrowed in this manner lest Rule 60(b) become a substitute for timely appeals. An inquiry into the merits of the underlying judgment or order must be the subject of a direct appeal from that judgment or order."

Franklin Covey Client Sales, Inc. v. Melvin, 2000 UT App 110, ¶ 19, 2 P.3d 451 (emphasis omitted) (quoting 12 James Wm. Moore et al., Moore's Federal Practice § 60.68[3] (3d ed. 1999)).

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[3]We recognize that the trial court addressed this issue in the context of the motion for summary judgment filed by Bolinder, heard at the same hearing as the summary judgment motion filed by Christensen. In so doing, the court followed Walker's lead. Walker's rule 60(b) motion did not argue that his failure to appear and argue the Christensen motion was more excusable than his failure to appear and argue the Bolinder motion in the same hearing. He did argue that the absence of Christensen's counsel was a reason to grant Walker relief from the summary judgment in Christensen's favor. We find this argument unpersuasive.

Accordingly, Walker's challenge to "the underlying judgment from which relief was sought," id., is not well taken.

Affirmed.

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J. Frederic Voros Jr., Judge

WE CONCUR:

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Carolyn B. McHugh,
Associate Presiding Judge

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William A. Thorne Jr., Judge