IN THE UTAH COURT OF APPEALS

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Gary L. Welborn, Plaintiff and Appellant, v. Jon Huntsman, Mark Shurtleff, Speaker of the House, and Senate Majority Leader, Defendants and Appellees.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20090795-CA F I L E D (February 4, 2010) 2010 UT App 28

Third District, Salt Lake Department, 090904057
The Honorable Robert P. Faust

Attorneys: Gary L. Welborn, Gunnison, Appellant Pro Se
Mark L. Shurtleff and Brent A. Burnett, Salt Lake City, for Appellees

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Before Judges McHugh, Orme, and Bench.[1]

PER CURIAM:

Gary L. Welborn appeals the district court's September 2, 2009 judgment, which granted a motion to dismiss his complaint filed against former Governor Jon Huntsman, Attorney General Mark Shurtleff, and various members of the Utah Legislature (the State Defendants). This case is before the court on a sua sponte motion for summary disposition.

On September 15, 2009, Welborn filed a motion to set aside the district court's dismissal because it had been issued prior to the time allowed for him to respond to the State Defendants' motion to dismiss. The State Defendants responded to the motion to set aside the judgment and conceded that the district court acted on their motion to dismiss prior to the expiration of Welborn's time to respond to that motion. Accordingly, the State Defendants asked the district court to vacate its September 2,

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[1]The Honorable Russell W. Bench, Senior Judge, sat by special assignment pursuant to Utah Code section 78A-3-102 (2008) and rule 11-201(6) of the Utah Rules of Judicial Administration.

2009 judgment, allow Welborn to respond, and allow the State to reply before submitting the motion to dismiss for a decision. On September 23, 2009, before the district court had ruled on the motion to set aside the judgment, Welborn filed a notice of appeal from the September 2, 2009 judgment. The State Defendants correctly stated that the district court could consider a motion under rule 60(b) of the Utah Rules of Civil Procedure while an appeal was pending. On November 2, 2009, the district court granted Welborn's motion to set aside the September 2, 2009 judgment. The court set a new response time for Welborn to respond to the State Defendants' motion to dismiss. The district court ordered the parties to notify the Utah Court of Appeals of its decision but did not request a remand from this court prior to entering the order granting the motion to set aside the judgment.

On December 16, 2009, Welborn informed this court that the motion to set aside the judgment had been granted and that he would seek a stay of this appeal. On the same date, the State Defendants filed a response to the sua sponte motion seeking dismissal of this appeal for lack of jurisdiction pending the entry of a final judgment.

In National Advertising v. Murray City Corp., 2006 UT App 75, 131 P.3d 872, we described the procedure for considering a motion to set aside a judgment while an appeal from that judgment is pending, stating,

> [T]he proper procedure for considering a rule 60(b) motion during the pendency of an appeal is threefold. First, as long as the trial court's adjudication of the rule 60(b) motion does not impact the legal issues raised on appeal, the trial court should consider the motion and, if appropriate, "deny it without interference from [the appellate courts]." Second, if the trial court does grant such a motion, "the trial court . . . need only advise this court that the judgment has been modified. [And t]he district court action granting or denying the motion . . . should be included in the record when it is prepared for review by [the appellate court]." Third, if the rule 60(b) motion does in fact impact the legal issues being considered on appeal, and the trial court is inclined to grant the motion, "counsel should obtain a brief memorandum to that effect from the trial court, and request an order of remand from

> the appellate court so that the trial court can enter the order."

Id. ¶ 22 (citations omitted).

Welborn's rule 60(b) motion falls within the third category, yet the district court vacated the September 2, 2009 judgment without seeking an order of remand from this court. Accordingly, the district court lacked jurisdiction to grant Welborn's motion to set aside its September 2, 2009 order granting the State Defendants' motion to dismiss. We construe the State Defendants' response to the sua sponte motion as requesting "an order of remand from the appellate court so that the trial court can enter the order" granting the motion to set aside its September 2, 2009 order of dismissal, and we remand the case to the district court for that purpose. See id. We request counsel for the State Defendants to notify this court when a valid order is entered in the district court vacating the September 2, 2009 order of dismissal, after which this appeal will be dismissed, without prejudice to a timely notice of appeal filed after the entry of a final, appealable judgment.

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Carolyn B. McHugh,
Associate Presiding Judge

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Gregory K. Orme, Judge

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Russell W. Bench, Senior Judge