IN THE UTAH COURT OF APPEALS

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Mark D. Bergman, Plaintiff and Appellant, v. Debbie A. Burke, Defendant and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080751-CA F I L E D (April 2, 2009) 2009 UT App 88

Second District, Ogden Department, 040902444
The Honorable Parley R. Baldwin

Attorneys: Mark D. Bergman, Ogden, Appellant Pro Se
Michael E. Bostwick, Salt Lake City, for Appellee

Before Judges Thorne, Bench, and McHugh.

PER CURIAM:

Plaintiff Mark D. Bergman appeals the denial of a motion to set aside a judgment under rule 60(b) of the Utah Rules of Civil Procedure. Our review is limited to the narrow issues pertaining to the rule 60(b) motion and does not encompass a challenge to the underlying judgment, which is the subject of the direct appeal in case number 20080323.

Bergman's briefs implicate the principles stated in Peters v. Pine Meadow Ranch, 2007 UT 2, 151 P.3d 962, and rule 24(k) of the Utah Rules of Appellate Procedure by making statements impugning the integrity of the district court. Rule 24(k) provides that "[a]ll briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters." Utah R. App. P. 24(k). Briefs that are not in compliance may be disregarded or stricken. See id. In Peters, the Utah Supreme Court stated that, "to address errors of fact and law is the very purpose of the appellate process. But to argue that a court has committed an error is one thing, to argue that a court has intentionally committed that error due to an improper motive is quite another." 2007 UT 2, ¶ 7. The supreme court further stated that making "bald and unfounded accusations of judicial impropriety in briefs filed in this court" is not an

avenue to address alleged judicial impropriety. Id. ¶ 8. Concluding that the briefs in Peters included "a substantial amount of materials that is offensive, inappropriate, and disrespectful" and therefore violated rule 24(k), the supreme court struck the appellants' briefs and affirmed the judgment. Id. ¶ 12.

Bergman's pro se briefs also contain language directed toward the district court and opposing counsel that is highly inappropriate and disrespectful. The allegations of improper motive on the part of the district court and improper ex parte contact are not based upon any evidence beyond Bergman's own unsupported speculations. Accordingly, we strike and disregard those portions of the briefs that contain Bergman's allegations of improper ex parte contact between the court and opposing counsel and claims that the district court acted out of an improper motive. We consider the appeal only insofar as it challenges the grounds for denying the rule 60(b) motion to set aside the judgment.

Bergman claims that the district court erred by initially staying action on his rule 60(b) motion pending his direct appeal. In its ruling, the district court stated that it had applied the general rule that a trial court is divested of jurisdiction while an appeal is pending. However, upon learning that Utah appellate courts adopted a limited exception to that general rule to allow a trial court to consider a rule 60(b) motion while an appeal is pending, the district court denied the motion on the merits. Bergman asserts that the delay in ruling on his rule 60(b) motion should result in our vacating the underlying judgment and granting him a new trial before a different judge. This argument is frivolous. The court's initial misunderstanding about its jurisdiction to consider the rule 60(b) motion while an appeal was pending was harmless error and does not entitle Bergman to the requested relief.

"An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief." Franklin Covey Client Sales, Inc. v. Melvin, 2000 UT App 110, ¶ 19, 2 P.3d 451. "An inquiry into the merits of the underlying judgment or order must be the subject of a direct appeal from that judgment or order." Id. Bergman's rule 60(b) motion did not cite a specific subsection. The district court construed the motion as one alleging fraud, see Utah R. Civ. P. 60(b)(3), or "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)," id. R. 60(b)(2). The district court noted Bergman's claim that one of Defendant Debbie A. Burke's witnesses lied at trial and his claim of alleged "newly discovered evidence" consisting of a copy of the check. The district court concluded that Bergman failed

to either demonstrate that Burke's witness gave false testimony or that the alleged newly discovered evidence could not have previously been discovered.

Bergman's claims were based upon his assertion that witness Vince Isbell's testimony that Bergman received funds from a check was perjured because the check was made out to "cash." Burke's brief states that Isbell testified that he wrote check 3348 and cashed it to get $500.00 in cash, which he gave to Bergman. Accordingly, Burke states, "The fact that check number 3348 was not included in Exhibit D13 does not change the fact that Mr. Isbell testified to the transaction and the copy of the check would not have changed the fact that Mr. Bergman received $500.00 from Mr. Isbell on June 7, 2003." Burke's contentions have merit, and the district court did not abuse its discretion in denying the rule 60(b) motion based upon alleged fraud. In addition, Bergman did not conduct any pretrial discovery. Therefore, the district court correctly ruled that Bergman did not demonstrate that he could not have discovered the alleged newly discovered evidence prior to trial or within the time to make a motion for a new trial.

Accordingly, we affirm the denial of the motion to set aside the judgment. We also deny Burke's request for attorney fees because it does not comply with rule 24 of the Utah Rules of Appellate Procedure. See Utah R. App. P. 24(a)(9) ("A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.").

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William A. Thorne Jr.,
Associate Presiding Judge

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Russell W. Bench, Judge

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Carolyn B. McHugh, Judge