

1-24-2018

# Nunez v. Johnson Appellant's Reply Brief Dckt. 45136

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/  
idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Nunez v. Johnson Appellant's Reply Brief Dckt. 45136" (2018). *Idaho Supreme Court Records & Briefs, All*. 6887.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/6887](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6887)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

IN THE SUPREME COURT OF THE STATE OF IDAHO

LYDIA NUNEZ,

Plaintiff/Appellant,

vs.

CARL JOHNSON,

Defendant/Respondent.

**Supreme Court Docket No. 45136**

(Bonneville County District Court Case  
No. CV-2016—482)

**APPELLANT'S REPLY BRIEF**

Appeal from the District Court of the Seventh Judicial District of Idaho  
In and for the County of Bonneville

HONORABLE DANE H. WATKINS, JR., DISTRICT JUDGE, PRESIDING

Don Gamble, ISB #8732  
**GORDON LAW FIRM, INC.**  
477 Shoup Ave, Suite 101  
Idaho Falls, ID 83402  
Telephone: (208) 552-0467  
Facsimile: (866) 886-3419  
[don@brentgordonlaw.com](mailto:don@brentgordonlaw.com)

Attorney for Plaintiff/Appellant  
Lydia Nunez

Don Carey, ISB #4392  
Lindsey R. Romankiw, ISB #8438  
**CAREY ROMANKIW, PLLC**  
980 Pier View Drive, Suite B  
Idaho Falls, Idaho 83402-2913  
[dfc@careyromankiw.com](mailto:dfc@careyromankiw.com)  
[lrr@careyromankiw.com](mailto:lrr@careyromankiw.com)

Attorney for Defendant/Respondent  
Carl Johnson

## TABLE OF CONTENTS

ARGUMENT .....	1
I.    Factual Matters .....	1
II.   The standard under rule 60(b)(4) is not discretionary .....	2
III.  Rule 11.3 must be strictly followed.....	5
CONCLUSION .....	8

## **TABLE OF CASES AND AUTHORITIES**

### **Cases**

<i>Chacon v. Sperry Corp.</i> , 723 P.2d 814, 819 (Idaho 1986) .....	3
<i>Dragotoiu v. Dragotoiu</i> , 991 P.2d 369, 372 n.2 (Idaho App. 1998) .....	4
<i>Jim and Maryann Plane Family Trust v. Skinner</i> , 342 P.3d 639, 643 n. 2 (Idaho 2015).2, 4	
<i>McClure Engineering, Inc. v. Channel 5 KIDA</i> , 155 P.3d 1189 (Idaho Ct. App. 2006) 5, 6	
<i>Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica</i> , 614 F.2d 1247, 1256 (9 <sup>th</sup> Cir. 1980) .....	4
<i>Wright v. Wright</i> , 950 P.2d 1257 (Idaho 1998) .....	3-7

### **Other Authorities**

WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2862, at 197 .....	4
---	---

## ARGUMENT

Johnson opposes Nunez' appeal by taking issue with two factual matters, argues that the court has discretion to deny a motion to set aside a void judgment, and argues that strict compliance with rule 11(b)(3) is not necessary. Nunez addresses these three issues below.

### I. Factual Matters.

There are two factual matters that are disputed.

First, Johnson correctly points out that Nunez picked up her file from her prior attorney but fails to inform the court that Nunez picked up her file *after Johnson filed a motion to dismiss*, which was many months after Nunez' counsel was supposed to serve the order of withdrawal on Nunez. Prior to receiving the motion to dismiss, Nunez' withdrawing counsel had called Nunez to ask her to come in to pick up her file but it was not until after Nunez received the copy of the motion to dismiss that she went to her former attorney's office to retrieve her file. Nunez immediately hired new counsel upon receipt of the motion to dismiss but the trial court granted the motion to dismiss just four days after the motion was filed and before Nunez' new counsel could file an opposition to the motion. *See* R. 16.

In addition, Johnson argues that the court served a copy of the order granting withdrawal on Nunez but that is not true. The record shows that the order was delivered to an individual at zip code **83402**, *see* R. 25, but Nunez lives at an address with a zip code **83401**. *See* Aug. R. 13. The District Court is located in zip code area 83402. The USPS tracking document clearly shows that the letter was unclaimed and that the maximum hold time had expired. *See* R. 25. The delivery of the unclaimed letter was made to an individual at an address in the 83402 zip code area, not to Nunez who lives in the 83401 zip code area. Whoever received it was at an address that was not Nunez' and since the court clerk sent the letter and the court's address is in 83402 it is safe to assume the letter was sent back to the clerk.

## **II. The standard under rule 60(b)(4) is not discretionary.**

Johnson argues that this Court has not addressed whether to apply a nondiscretionary standard when a party moves to set aside a judgment under rule 60(b)(4) because the judgment is void. *See Jim and Maryann Plane Family Trust v. Skinner*, 342 P.3d 639, 643 n. 2 (Idaho 2015).

While the statement in *Skinner* may be true regarding the general application of rule 60(b)(4), it is not true when specifically addressing judgments that are void for failure to comply with rule 11.3. This Court has already adopted the Court of Appeals'

nondiscretionary standard under rule 60(b)(4) when applied to judgments that are void for failure to comply with rule 11.3. See *Wright v. Wright*, 950 P.2d 1257 (Idaho 1998).

In *Wright*, this Court noted that the Idaho Court of Appeals has required strict compliance with rule 11.3 before sustaining a default judgment obtained after a party's attorney has withdrawn and, if not, *“the judgment must be set aside as a matter of law, rather than a matter of discretion. This Court agrees that there must be strict compliance with rule 11(b)(3).”* *Id.* (citations omitted).

Johnson fails to cite to *Wright* or provide any discussion about the holding in *Wright* that this Court agreed with the Idaho Court of Appeals that there must be strict compliance with rule 11.3 when deciding whether a district must set aside a judgment as a matter of law.

But even if the issue is unresolved as to judgments that are void for failure to comply with rule 11.3, this Court should follow federal interpretations of rule 60(b)(4) that hold that the standard is nondiscretionary.

This Court held that it adopted federal rules “with the interpretation placed upon that language by the federal courts.” *Chacon v. Sperry Corp.*, 723 P.2d 814, 819 (Idaho 1986). This Court explained,

The reason for adopting the Federal Rules of Civil Procedure in Idaho, and interpreting our own rules adopted from the federal courts as uniformly as possible with the federal cases, was to establish a uniform practice and procedure in both the federal and state courts in the State of Idaho.

*Id.*

This Court noted that the Idaho Court of Appeals' holding that the decision to set aside a void judgment under rule 60(b)(4) is "grounded in the federal courts' interpretation of F.R.C.P. 60(b)(4)" and is supported by the policy that a court should not enforce a void judgment. *See Skinner*, n. 2 (quoting *Dragotoiu v. Dragotoiu*, 991 P.2d 369, 372 n.2 (Idaho App. 1998)).

The Ninth Circuit Court of Appeals held that the district court had a nondiscretionary duty to grant relief from a default judgment under rule 60(b)(4) when a judgment was void. *See Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9<sup>th</sup> Cir. 1980).

"Either a judgment is void or it is valid. . . . [W]hen that question is resolved, the court must act accordingly." *Id.* (quoting WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2862, at 197).

In sum, this Court has already adopted a position that rule 11.3 must be strictly complied with before sustaining a default judgment following the withdrawal of a party's attorney but if there is any question of this Court's holding in *Wright*, this Court should follow the federal interpretations to rule 60(b)(4) that adopt a nondiscretionary standard.



### **III. RULE 11.3 MUST BE STRICTLY FOLLOWED**

Johnson argues that rule 11.3 does not need to be strictly followed and instead argues that this Court should evaluate whether the failure to comply was harmless error. *See* Respondent's Brief 11.

Johnson's position is contradicted by this Court's holding in *Wright*. In *Wright*, this Court noted that the Idaho Court of Appeals has required strict compliance with rule 11.3 before sustaining a default judgment obtained after a party's attorney has withdrawn and, if not, "*the judgment must be set aside as a matter of law, rather than a matter of discretion. This Court agrees that there must be strict compliance with rule 11(b)(3).*" *See Wright v. Wright*, 950 P.2d 1257 (Idaho 1998). (citations omitted). Johnson fails to even cite *Wright*, let alone distinguish it in any way from this case.

Rule 11.3 was not strictly complied with in this case for two separate reasons.

**A. Rule 11.3 was not strictly followed when the motion to withdraw and notice of hearing were not served on Nunez.**

The withdrawing attorney in this case failed to serve a copy of the motion to withdraw or the notice of hearing on Nunez. Johnson cites the case of *McClure Engineering, Inc. v. Channel 5 KIDA*, 155 P.3d 1189 (Idaho Ct. App. 2006) to support his

argument that the default judgment of dismissal entered against Nunez was not void even though Nunez' counsel failed to serve a copy of the motion to withdraw or the notice of hearing on Nunez.

But *McClure Engineering, Inc.* does not help Johnson since the Idaho Court of Appeals found in that case that the withdrawing attorney strictly complied with rule 11.3. The Idaho Court of Appeals distinguished the case from *Wright* because the attorney in *Wright* admitted that he sent the motion and notice to the wrong address but the attorney in *McClure Engineering, Inc.* sent the motion to the correct address. "The evidence shows that [the withdrawing attorney] sent his motion to withdraw and the withdrawal order by certified mail to the correct business address. . . . The district court correctly found that . . . there was no violation of rule 11(b)(3)." *Id.* at 1194.

In this case, the withdrawing attorney failed to serve the motion to withdraw or the notice of hearing on Nunez and so, as Johnson's counsel admitted during oral argument, the **"motion to withdraw was defective in that [withdrawing counsel] didn't appear to serve it on Ms. Nunez."** See Tr. page 7, line 1 (emphasis added).

In this case, the efforts to comply with rule 11.3 were even less than those found, as a matter of law, insufficient in *Wright* because the attorney in *Wright* made an attempt, albeit a poor one, to send the motion and notice to his client but in this case no attempt at all was made to send Nunez a copy of the motion to withdraw or notice of hearing.

**B. Rule 11.3 was not strictly followed when the order to withdraw contained the wrong deadline.**

Johnson argues that the inclusion of the wrong deadline to enter an appearance is harmless error. Johnson fails to cite to or discuss *Wright's* holding that requires strict compliance with rule 11.3.

Johnson's counsel acknowledged that **"there is a technical defect in that order in that it says '20 days' instead of '21 days.'"** See Tr. page 7, lines 14-17 (emphasis added).

Johnson argues that the inclusion of the wrong deadline does not affect Nunez' substantive rights but provides no reasoning to support a position that the reduction in time to comply with an order does not affect Nunez' substantive rights. Regardless, the assessment for the court is not whether the defect was harmless. Instead, this Court held in *Wright* that there must be strict compliance with rule 11.3. An order that contains the wrong deadline that shortens the time for compliance does not strictly comply with rule 11.3.

**C. Johnson inappropriately filed a motion to dismiss while the case was stayed.**

The order granting Nunez' counsel to withdraw stayed the case until Nunez' counsel served a copy of the order on Nunez. Nunez' counsel never served the order on Nunez. The order did not contain any language that the stay would be lifted if the clerk served the order. So whether the court clerk served a copy of the order on Nunez is not relevant to determine whether the case was stayed when Johnson filed his motion to dismiss. It is undisputed that at that time Johnson filed his motion to dismiss Nunez' counsel had not served the order on Nunez as required by the order and that the case was stayed.

**CONCLUSION**

This Court has already held that there must be strict compliance with rule 11.3 and that trial courts must, as a matter of law, set aside default judgment when there is a failure to strictly comply with rule 11.3. Johnson's counsel acknowledged that rule 11.3 was not strictly complied with when Nunez' counsel failed to serve the motion to withdraw and notice of hearing on Nunez and when the court order contained the wrong deadline to comply. Accordingly, this Court should reverse the trial court's denial of Nunez' motion to set aside and remand for further proceedings.

DATED January 23, 2018.

  
Don Gamble

**CERTIFICATE OF SERVICE**

I hereby certify that on January 23, I faxed, emailed, and caused two true and correct copies of the foregoing instrument to be delivered to the following via U.S. Mail, postage prepaid:

Don Carey, ISB #4392  
Lindsey R. Romankiw, ISB #8438  
**CAREY ROMANKIW, PLLC**  
980 Pier View Drive, Suite B  
Idaho Falls, Idaho 83402-2913  
Fax: (208) 525-2604  
[dfc@careyromankiw.com](mailto:dfc@careyromankiw.com)  
[lrr@careyromankiw.com](mailto:lrr@careyromankiw.com)

  
Don Gamble