

9-14-2017

Nunez v. Johnson Clerk's Record Dckt. 45136

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IN THE SUPREME COURT OF THE STATE OF IDAHO

LYDIA NUNEZ,

Plaintiff/Appellant,

V.

CARL JOHNSON,

Defendant/Respondent.

Case No. CV-2016-482

Docket No. 45136

* * * * *

CLERK'S RECORD ON APPEAL

* * * * *

Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE DANE H. WATKINS, District Judge.

* * * * *

Don Gamble
477 Shoup Ave, Suite 101
Idaho Falls ID 83402
Attorney for Appellant

Donald F Carey
980 Pier View Drive, Ste B
Idaho Falls ID 83402-2913
Attorney for Respondent

Lydia Nunez vs. Carl Johnson, Does 1-10

Date	Code	User		Judge
1/29/2016	SMIS	TCORONA	Summons Issued	Dane H Watkins Jr
	NCOC	TCORONA	New Case Filed-Other Claims	Dane H Watkins Jr
	NOAP	TCORONA	Plaintiff: Nunez, Lydia Notice Of Appearance Allen H. Browning	Dane H Watkins Jr
		TCORONA	Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Browning, Allen H. (attorney for Nunez, Lydia) Receipt number: 0004177 Dated: 2/1/2016 Amount: \$221.00 (Check) For: Nunez, Lydia (plaintiff)	Dane H Watkins Jr
	COMP	TCORONA	Complaint For Damages And Demand For Jury Trial Filed	Dane H Watkins Jr
5/5/2016		CPETERSON	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Copies Receipt number: 0019235 Dated: 5/5/2016 Amount: \$6.00 (Cash)	Dane H Watkins Jr
6/28/2016	ASRV	TCORONA	Affidavit of Service - 06/22/16 Carl Johnson By Serving Laree Johnson(Wife)	Dane H Watkins Jr
6/29/2016		CPETERSON	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Carey Perkins LLP Receipt number: 0027746 Dated: 6/29/2016 Amount: \$136.00 (Check) For: Johnson, Carl (defendant)	Dane H Watkins Jr
	NOAP	CPETERSON	Defendant: Johnson, Carl Notice Of Appearance Donald F Carey	Dane H Watkins Jr
	ANSW	CPETERSON	Defendant's (Carl Johnson) Answer and Demand for Jury Trial	Dane H Watkins Jr
7/8/2016	NTOS	CPETERSON	Notice Of Service - Defendant's First Set of interrogatories and Defendant's First Set of Requests for Production of Documents	Dane H Watkins Jr
7/26/2016	HRSC	CARTER	Hearing Scheduled (Motion 08/31/2016 09:30 AM) P - Withdraw of Attorney	Dane H Watkins Jr
	MOTN	CPETERSON	Plaintiff's Motion for Order Allowing Withdrawal of Attorney	Dane H Watkins Jr
7/27/2016	NOTC	BJENNINGS	Defendant's Notice of Non-Opposition to Motion for Allowing Withdrawal of Attorney	Dane H Watkins Jr
8/31/2016	MINE	CARTER	Minute Entry Hearing type: Motion Hearing date: 8/31/2016 Time: 9:42 am Courtroom: Court reporter: Minutes Clerk: Cassie Carter Tape Number: Party: Carl Johnson, Attorney: Donald Carey Party: Lydia Nunez, Attorney: Allen Browning	Dane H Watkins Jr
9/1/2016	ORDR	CARTER	Order Allowing Withdrawal of Attorney	Dane H Watkins Jr

Lydia Nunez vs. Carl Johnson, Does 1-10

Date	Code	User	Judge
9/1/2016	DCHH	CARTER	Hearing result for Motion scheduled on 08/31/2016 09:30 AM: District Court Hearing Held Court Reporter: Number of Transcript Pages for this hearing estimated: P - Withdraw of Attorney
2/6/2017	MOTN	JNICHOLS	Defendant's Motion To Dismiss
2/10/2017	ORDR	CARTER	Order for Dismissal with Prejudice
	JDMT	CARTER	Judgment of Dismissal with Prejudice
	STATUS	CARTER	Case Status Changed: Closed
	CDIS	CARTER	Civil Disposition entered for: Johnson, Carl, Defendant; Nunez, Lydia, Plaintiff. Filing date: 2/10/2017
2/13/2017	NOAP	JNICHOLS	Plaintiff: Nunez, Lydia Notice Of Appearance Don Gamble
2/15/2017	MOTN	JNICHOLS	Plaintiff's Motion to Set Aside Order of Dismissal
2/16/2017	NOAP	TCORONA	Plaintiff: Nunez, Lydia Notice Of Appearance Don Gamble
2/22/2017	HRSC	CARTER	Hearing Scheduled (Motion 03/09/2017 08:30 AM) D - Mtn to Set Aside Judgment
	STATUS	CARTER	Case Status Changed: Closed pending clerk action
2/27/2017	NOTH	BJENNINGS	Notice Of Hearing - Plaintiff's Motion to Set Aside Order of Dismissal - 03/09/2017 at 8:30 AM
3/2/2017		BJENNINGS	Objection to Motion to Set Aside Order of Dismissal
3/9/2017	MINE	CARTER	Minute Entry Hearing type: Motion Hearing date: 3/9/2017 Time: 8:30 am Courtroom: Court reporter: Minutes Clerk: Cassie Carter Tape Number: Party: Carl Johnson, Attorney: Donald Carey Party: Lydia Nunez, Attorney: Don Gamble
	DCHH	CARTER	Hearing result for Motion scheduled on 03/09/2017 08:30 AM: District Court Hearing Held Court Reporter: Amy Bland Number of Transcript Pages for this hearing estimated: D - Mtn to Set Aside Judgment
3/30/2017	ORDR	CEARLY	Order Denying Motion To Set Aside Order Of Dismissal
4/20/2017		CPETERSON	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Gondon Law Firm, Inc Receipt number: 0019111 Dated: 4/20/2017 Amount: \$129.00 (Check) For: Nunez, Lydia (plaintiff)

Lydia Nunez vs. Carl Johnson, Does 1-10

Date	Code	User		Judge
4/20/2017	NOTC	CPETERSON	Notice of Appeal	Dane H Watkins Jr
	BNDC	CPETERSON	Bond Posted - Cash (Receipt 19113 Dated 4/20/2017 for 100.00)	Dane H Watkins Jr
8/21/2017	NOTC	TCORONA	Notice Of Firm Change Carey Romankiw	Dane H Watkins Jr
9/6/2017	BNDC	CPETERSON	Bond Posted - Cash (Receipt 40390 Dated 9/6/2017 for 22.75)	Dane H Watkins Jr

Allen H. Browning, ISB#3007
BROWNING LAW
482 Constitution Way, Suite 111
Idaho Falls, ID 83402
Telephone: (208) 542-2700
Facsimile: (208) 542-2711

BONNEVILLE COUNTY
IDAHO

2016 JAN 29 PM 3:39

Attorney for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

LYDIA NUNEZ,

Plaintiff,

vs.

CARL JOHNSON, and DOES 1 through 10,
Inclusive,

Defendants.

Case No.: CV-16- 482

COMPLAINT FOR DAMAGES AND
DEMAND FOR JURY TRIAL

COMES NOW, the above-named Plaintiff, LYDIA NUNEZ, by and through her attorney of counsel, Allen Browning, of Browning Law, complains and alleges against the Defendants as follows:

1. At all times relevant hereto the Plaintiff LYDIA NUNEZ was a resident of the County of Bonneville, Idaho.
2. At all times relevant hereto, Defendant CAROL JOHNSON was a resident of the County of Bonneville, Idaho. Plaintiff does not know the true identities of DOES 1 through 10 inclusive, but contends and alleges that each was in some way liable for the Plaintiffs injuries herein.



3. That on or about January 31, 2014 Plaintiff, LYDIA NUNEZ was stopped facing south at a red light on 17th Street at the intersection of 17th Street and Woodruff Avenue in Idaho Falls, Idaho. The Defendant, CARL JOHNSON, was traveling eastbound on 17th Street when he failed to yield to another vehicle while attempting to make a left turn onto Woodruff Avenue and struck said other vehicle. The force of the collision caused the Defendant CARL JOHNSON to collide with the Plaintiff LYDIA NUNEZ.

4. At the time and place of the accident, Defendant, CARL JOHNSON, failed to exercise due care by failing to yield to right away on a left turn.

5. Defendant, CARL JOHNSON, was cited and found guilty for violating Idaho Code § 49-640 for failure to yield right away on a left turn.

6. As a direct and proximate result of the aforementioned negligence, Plaintiff, LYDIA NUNEZ, was caused to suffer serious, painful, and debilitating injuries which some are permanent, including, but not limited to headaches, neck pain, shoulder pain, lower back pain, popping in neck and numbness in right hand fingers. She has also incurred past medical bills in an amount not less than \$9,182.25.

7. As a direct and proximate result of the aforementioned negligence, Plaintiff was caused to suffer serious, painful, and debilitating injuries, and incur medical bills, and property damage, the full extent of which will be proved at trial.

8. As a direct and proximate result of the aforementioned negligence, the Plaintiff has been required to retain the services of BROWNING LAW and is entitled to reasonable attorney's fees and costs herein.

WHEREFORE, Plaintiff, LYDIA NUNEZ, prays for judgment against the

Defendants as follows:

1. For past and future medical expenses for LYDIA NUNEZ in an amount to be no less than \$9,182.25.
2. For general damages in excess of \$10,000.00.
3. For other losses, including potential losses of earnings in an amount to be determined at trial;
4. For reasonable attorney's fees and costs as the Court may deem just and proper.
5. For such other and further relief as the Court deems just, equitable, and proper.

Dated this 29 day of January, 2016.




Allen Browning
Attorney for the Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby makes demand for jury trial of the issues in the above-entitled matter pursuant to Rule 38 of the Idaho Rules of Civil Procedure.

DATED this 31 day of January, 2016.

BROWNING LAW



Allen Browning

Donald F. Carey, ISB No. 4392
CAREY PERKINS LLP
980 Pier View Drive, Suite B
P. O. Box 51388
Idaho Falls, Idaho 83402-4918
Telephone: (208) 529-0000
Facsimile: (208) 529-0005

BONNEVILLE COUNTY, IDAHO

2016 JUN 29 PM 3:10

Attorneys for Carl Johnson

IN THE DISTRICT COURT OF
THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF BONNEVILLE

LYDIA NUNEZ,

Plaintiff,

vs.

CARL JOHNSON, and DOES 1 through 10,
inclusive,

Defendants.

Case No. CV-16-482

ANSWER AND DEMAND FOR JURY
TRIAL

Defendant, Carl Johnson, by and through his attorneys of record, Carey Perkins LLP,
answer Plaintiff's Complaint and alleges as follows:

1. Defendant denies each and every allegation of the Complaint not herein
expressly admitted.

2. Defendant hereby admits the allegation set forth in paragraph 2 of the
complaint alleging that at all times material Carl Johnson lived in Bonneville County. Answering
Defendant is unaware of the "Doe Defendants" and cannot respond to the balance of the allegations
set forth in paragraph 2.

ORIGINAL

3. With respect to the allegations contained in paragraph 3 of Plaintiff's complaint, answering Defendant admits that he was traveling east on 17th Street, Idaho Falls, Idaho and was making a left hand turn onto north bound Woodruff at the time of the collision. The balance of the allegations contained in paragraph 3 are denied and denied without knowledge.

4. Defendant is without sufficient knowledge as to Paragraph(s) 1 and 4 of Plaintiff's Complaint and therefore denies the same.

5. Answering Defendant admits paragraph 5 of the Complaint.

6. Defendant specifically denies Paragraphs 6, 7 and 8 of Plaintiff's Complaint.

7. Plaintiff has failed to mitigate her damages, if any.

8. Plaintiff was comparatively negligent, and her negligence was greater than or equal to the negligence, if any, of Defendant. Any damages are subject to reduction pursuant to Idaho Code § 6-801, et seq.

9. Plaintiff's damages, if any, were caused by the actions or omissions of persons or parties other than Defendant, which actions or omissions were the proximate and primary causes of the damages, if any, suffered by Plaintiff.

10. Plaintiff is not the real party in interest as it respects to some or all of her claims, contrary to Rule 17 of the Idaho Rules of Civil Procedure.

11. If Defendant has any liability to Plaintiff, which liability Defendant denies, any award made to Plaintiff in this action must be reduced by the Court, pursuant to I.C. § 6-1606, in the event that any such award includes compensation for damages for which Plaintiff has been compensated independently from collateral sources.

12. If Defendant has any liability to Plaintiff, which liability Defendant denies, any recovery by Plaintiff would be subject to the limitations on non-economic damages established by I.C. § 6-1603.

13. Plaintiff may have failed to join, as parties to this action, one or more persons or entities necessary for a just adjudication. If so, said persons or entities would be indispensable, and this action should be dismissed pursuant to I.R.C.P. 12(b)(7) and 19(a) due to their absence.


WHEREFORE, Defendant prays the Court enter judgment against Plaintiff as follows:

1. Dismissing Plaintiff's Complaint with Plaintiff taking nothing thereby;
2. Awarding Defendant costs and fees, pursuant to Idaho Code § 12-120 and 12-121; and
3. For such other and further relief as this Court deems just.

DEFENDANT DEMANDS TRIAL BY JURY.

DATED this 29th day of June, 2016.

CAREY PERKINS LLP


By 
Donald F. Carey, Of the Firm
Attorneys for Carl Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2016, I served a true and correct copy of the foregoing ANSWER AND DEMAND FOR JURY TRIAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

Allen H. Browning
BROWNING LAW
482 Constitution Way, Suite 111
Idaho Falls, Idaho 83402
Telephone (208) 542-2700
Attorneys for Plaintiff

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile (208) 542-2711



Donald F. Carey

BONNEVILLE COUNTY
IDAHO FALLS, IDAHO

2017 FEB 10 PM 4:01

IN THE DISTRICT COURT OF
THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF BONNEVILLE

LYDIA NUNEZ,

Plaintiff,

vs.

CARL JOHNSON, and DOES 1 through 10,
inclusive,

Defendants.

Case No. CV-16-482

JUDGMENT OF DISMISSAL
WITH PREJUDICE

JUDGMENT IS ENTERED AS FOLLOWS: This matter is hereby dismissed with
prejudice.

DATED 9 - Feb, 2017.

By 

Honorable Dane H. Watkins, Jr.

RECEIVED

FEB 06 2017

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of _____, 2017, I served a true and correct copy of the foregoing JUDGMENT OF DISMISSAL WITH PREJUDICE by delivering the same to each of the following, by the method indicated below, addressed as follows:

Lydia Nunez
3787 Copper Lane
Idaho Falls, Idaho 83401

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile

Donald F. Carey, ISB No. 4392
CAREY PERKINS LLP
980 Pier View Drive, Suite B
P. O. Box 51388
Idaho Falls, Idaho 83402-4918
Telephone: (208) 529-0000
Attorneys for Defendants

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 529-0005

Clerk of the Court

2017 FEB 15 PM 3:19

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

Don Gamble (ID# 8732)
GORDON LAW FIRM, INC.
 477 Shoup Ave, Suite 101
 Idaho Falls, ID 83402
 Telephone: (208) 552-0467
 Facsimile: (866) 886-3419

Attorney for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

LYDIA NUNEZ,

Plaintiff,

vs.

CARL JOHNSON,

Defendant.

Case No. CV-16-482

**MOTION TO SET ASIDE ORDER OF
 DISMISSAL**

Plaintiff, by and through her undersigned counsel, hereby files the following Motion to Set Aside Order of Dismissal.

BACKGROUND

Plaintiff was represented by Allen Browning for injuries she sustained in a car accident. Mr. Browning filed a motion to withdraw as attorney of record due to an alleged issue raised by Mr. Browning that he was unable to "remain in contact" with Plaintiff. *See* Motion to Withdraw,

MOTION TO SET ASIDE ORDER OF DISMISSAL - 1

attached as Exhibit A.

The motion did not comply with rule 11.3's requirement that the attorney seeking to withdraw "provide notice to all parties, *including the party the withdrawing attorney represents.*" Idaho R. Civ. P. 11.3(b)(1) (emphasis added). The certificates of service for the motion and notice of hearing state that they were only faxed to defense counsel—neither were served on Plaintiff as required by rule 11.3.

This Court granted Mr. Browning's motion to withdraw as counsel and signed an order prepared by Mr. Browning, which ordered Mr. Browning to serve the order on Plaintiff by personal service or by certified mail. The order states that this action will be stayed for a period of **twenty days** after service of the order and notifying the Plaintiff that she has **twenty** days to appear.

Rule 11.3(c)(1) provides that an order must notify that party whose attorney is withdrawing that the case may be dismissed if the party does not appear not appear "within **21 days** after service of the order." Idaho R. Civ. P. 11.3(c)(1). Rule 11.3(c)(2) states that the action is stayed for "**21 days** after service" of the order. Idaho R. Civ. P. 11.3(c)(2).

Mr. Browning did not serve the order on Plaintiff as ordered.

Plaintiff contacted her current attorney on Friday, February 10, 2017 and counsel filed a notice of appearance immediately after meeting with Plaintiff.

Defendant filed a motion to dismiss on February 6, 2017. This Court granted the motion

MOTION TO SET ASIDE ORDER OF DISMISSAL - 2

on February 10, 2017 and before Plaintiff could respond to the motion.

Defendant's motion made a conclusory and unsupported assertion that "the time within which the Plaintiff was required to appoint another attorney or to appear on her own behalf has passed." Defendant's Motion to Dismiss, 1. Defendant's motion does not state when Mr. Browning completed service of the order or when Plaintiff was required to appear.

LEGAL ARGUMENT

This Court should set aside the order of dismissal of the case under rules 55 and 60 of the Idaho Rules of Civil Procedure and reinstate the case because the Mr. Browning's motion to withdraw was defective because he failed to serve a copy of it on Plaintiff as required by rule 11.3. Further, this Court should set aside the order of dismissal because this Court prohibited any activity in the case until Plaintiff was served by Mr. Browning with a copy of the order but Mr. Browning has not served the order on Plaintiff. Since the order was never served or mailed by Mr. Browning on Plaintiff, the case is still be inactive per the order and Defendant's Motion to Dismiss was filed in violation of the order.

Idaho appellate courts have addressed defective motions to withdraw and have held that orders of dismissals or default judgments are void if they are entered following the failure to comply with rule 11.3. "We have held that noncompliance with Rule 11(b)(3) creates an entitlement to relief from a default judgment." *Knight Ins. v. Knight*, 109 Idaho 56, 704 P.2d 960

MOTION TO SET ASIDE ORDER OF DISMISSAL - 3

(Idaho Ct. App. 1985). In this case, it is undisputed that Mr. Browning failed to comply with rule 11.3(b)'s requirement to provide notice to "the party the withdrawing attorney represents" of both the motion to withdraw and the hearing. Idaho R. Civ. P. 11.3(b)(1).

The Idaho Court of Appeals noted that rule 55 provides that a court may set aside a default judgment under rule 60(b) for various reasons, one of which is not discretionary – when the judgment is voidable.

Rule 55(c) provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b)." In turn, Rule 60(b) enunciates a variety of grounds upon which relief from a judgment may be obtained. Some grounds -- such as mistake, inadvertence, surprise or excusable neglect under subsection (b)(1) -- allow discretionary relief. Others, such as the voidness of a judgment under subsection (b)(4), create a nondiscretionary entitlement to relief. This distinction is critical for appellate review. Where discretionary grounds are invoked, the standard of review is abuse of discretion. Where nondiscretionary grounds are asserted, the question presented is one of law upon which the appellate court exercises free review.

Knight Ins. v. Knight, 109 Idaho 56, 704 P.2d 960 (Idaho Ct. App. 1985).

In *Knight*, the order served on the party whose attorney withdrew did not provide a statement required by rule 11.3 and the court held that the failure to include the statement rendered the default judgment voidable under rule 60(b)(4) and the refusal to set aside the default judgment was error since the decision was not discretionary.

Here, the motion to withdraw and notice of hearing were defective and the order to withdraw was defective. The motion to withdraw and notice of hearing were defective because

MOTION TO SET ASIDE ORDER OF DISMISSAL - 4

they were not served on Plaintiff as required under rule 11.3. Further, the order is defective because it misstates the time that Plaintiff is allowed to file an appearance and misstates the period of time that the action is stayed under rule 11.3. For these reasons, this Court should set aside the order of dismissal and reinstate the case under rule 60(b)(4) since the dismissal is voidable because the motion to withdraw and notice of hearing were not served on Plaintiff and the order misstates the time period to file an appearance and stay the action.

Finally, this Court should set aside the order of dismissal under rule 60(b)(1) or 60(b)(6) because Mr. Browning did not notify Plaintiff of the order of withdrawal by personal service of certified mail as ordered. Instead, one of Mr. Browning's assistants called Plaintiff to pick up her file from his office. Rule 60(b)(1) and 60(b)(6) set forth discretionary reasons to set aside an order of dismissal for mistake, inadvertence, surprise, excusable neglect, or any other reason that justifies relief.


Arguably, the action is still stayed under the order, which stayed the action until 21 days after service of the order on Plaintiff and it was a mistake for Defendant to file a motion to dismiss without any documentation to demonstrate that Mr. Browning had complied with the order to personally serve the notice or to use certified mail to serve the notice nor did Defendant set forth when the 21 days from that service ran.

Plaintiff did receive a copy of Defendant's motion to dismiss and found an attorney who filed a notice of appearance within a week from receiving the motion. Plaintiff is prepared to

MOTION TO SET ASIDE ORDER OF DISMISSAL - 5

move forward with her case. For these reasons, as an alternate to setting aside the order under rule 60(b)(4), Plaintiff asks that the order of dismissal be set aside and the case reinstated under rule 60(b)(1) or 60(b)(6).

DATED February 15, 2017.

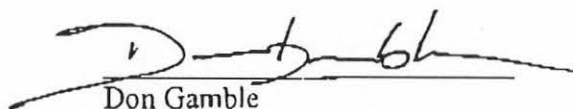

Don Gamble

MOTION TO SET ASIDE ORDER OF DISMISSAL - 6

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2017, I mailed a copy of the foregoing to the following:

Lindsey R. Romankiw
CAREY PERKINS LLP
980 Pier View Drive, Suite B
Idaho Falls, ID 83402



Don Gamble

MOTION TO SET ASIDE ORDER OF DISMISSAL - 7

BONNEVILLE COUNTY
IDAHO

2018 MAR -2 PM 3:01

Donald F. Carey, ISB No. 4392
Lindsey R. Romankiw, ISB No. 8438
CAREY PERKINS LLP
980 Pier View Drive, Suite B
Idaho Falls, Idaho 83402
Telephone: (208) 529-0000
Facsimile: (208) 529-0005

Attorneys for Carl Johnson

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LYDIA NUNEZ,

Plaintiff,

vs.

CARL JOHNSON, and DOES 1 through
10, inclusive,

Defendants.

Case No. CV-16-482

OBJECTION TO MOTION
TO SET ASIDE ORDER OF
DISMISSAL

COMES NOW the Defendant, Carl Johnson, by and through his counsel of record, and hereby objects to the Plaintiff's *Motion to Set Aside Order of Dismissal* (hereinafter the "Motion"), and as grounds therefor states the following:

1. The Court Clerk sent the Court's *Order Allowing Withdrawal of Attorney* to Plaintiff, Lydia Nunez, via certified mail on September 1, 2016, with tracking number 7012 1010 0002 3610 7274.

2. Entry of that tracking number into the USPS website shows that the document was delivered on September 27, 2016. A true and correct copy of the tracking history shown on the website is attached hereto.

3. By the time the *Order of Dismissal* was entered on February 10, 2017, it had been 137 days, or four and a half months, since a copy of the *Order Allowing Withdrawal of Attorney* was served on Ms. Nunez.

4. In *Bull v. Leake*, the Idaho Court of Appeals upheld the dismissal of a case with prejudice after the Plaintiff received the order allowing withdrawal of her attorney, but failed to appear within the time limit. 109 Idaho 1044 (Ct. App. 1986). In so holding, the Court noted that “[t]he decision whether to grant a motion to set aside a dismissal order under Rule 60(b) is committed to the sound discretion of the trial court.”

5. Because the tracking information reflects the fact that Ms. Nunez received the order allowing her attorney to withdraw, and because she took no action in the case for over four months after that, the Court’s *Order of Dismissal* should not be set aside.

DATED this 2nd day of March, 2017.


CAREY PERKINS LLP

By: Lindsey R. Romankiw
Lindsey R. Romankiw, Of the Firm
Attorneys for Carl Johnson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon the person named below, by hand delivery, prepaid first class mail, or facsimile transmission.

DATED this 2nd day of March, 2017.


Lindsey R. Romankiw

Don Gamble, Esq.
GORDON LAW FIRM, INC.
477 Shoup Ave., Suite 101
Idaho Falls, ID 83402
(208) 552-0467
Attorneys for Plaintiff

☐ U.S. Mail
☐ Hand Delivery
☒ Facsimile (866) 886-3419

3/2/2017

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Features:
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LOCATION

September 27, 2016, 2:28
pmDelivered, Left with
Individual

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Your item was delivered to an individual at the address at 2:28 pm on September 27, 2016 in IDAHO FALLS, ID 83402.

September 26, 2016, 11:26
pm

Departed USPS Facility

POCATELLO, ID 83202

September 26, 2016, 10:28
pm

Arrived at USPS Facility

POCATELLO, ID 83202

September 25, 2016, 10:40
am

Departed USPS Facility

SALT LAKE CITY, UT 84199

September 24, 2016, 1:12
pm

Arrived at USPS Facility

SALT LAKE CITY, UT 84199

September 23, 2016, 3:48
pmUnclaimed/Max Hold Time
Expired

IDAHO FALLS, ID 83401

September 8, 2016, 1:03
pmNotice Left (No Authorized
Recipient Available)

IDAHO FALLS, ID 83401

September 6, 2016, 8:10
am

Out for Delivery

IDAHO FALLS, ID 83401

September 6, 2016, 8:08
am

Sorting Complete

IDAHO FALLS, ID 83401

September 6, 2016, 7:48
am

Arrived at Unit

IDAHO FALLS, ID 83401

September 5, 2016, 11:15
pm

Departed USPS Facility

POCATELLO, ID 83202

September 5, 2016, 7:48
pm

In Transit to Destination

September 3, 2016, 5:48
pm

Arrived at USPS Facility

POCATELLO, ID 83202

September 3, 2016, 10:19
am

Departed USPS Facility

SALT LAKE CITY, UT 84199

September 2, 2016, 10:36
pm

Arrived at USPS Facility

SALT LAKE CITY, UT 84199

3/2/2017

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BONNEVILLE COUNTY
IDAHO
2017 MAR 30 AM 9:23

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LYDIA NUNEZ,

Plaintiff,

vs.

CARL JOHNSON, and DOES 1 through
10, inclusive,

Defendants.

Case No. CV-16-482

ORDER DENYING MOTION TO
SET ASIDE ORDER OF DISMISSAL

THIS MATTER having come on regularly for hearing before the Court on Plaintiff's Motion to Set Aside Order of Dismissal on March 9, 2017, at 8:30 a.m., and the Court having heard and considered the arguments of counsel for both parties, and having reviewed the pleadings and papers on file herein, and the Court having made oral findings regarding this matter on the record in open court, and being fully advised in the premises;

NOW THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion to Set Aside Order of Dismissal is hereby DENIED.

DATED 3-27, 2017.



Honorable Dane H. Watkins, Jr.

RECEIVED

MAR 22 2017

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of March, 2017, I served a true and correct copy of the foregoing ORDER DENYING MOTION TO SET ASIDE ORDER OF DISMISSAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

Don Gamble GORDON LAW FIRM, INC. 477 Shoup Ave., Suite 101 Idaho Falls, Idaho 83402 <i>Attorneys for Plaintiff</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Courthouse box
Lindsey R. Romankiw CAREY PERKINS LLP 980 Pier View Drive, Suite B Idaho Falls, Idaho 83402 <i>Attorneys for Defendant</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile (208) 529-0005



Clerk of the Court

BONNEVILLE COUNTY
IDAHO FALLS, IDAHO

2017 APR 20 PM 2:06

Don Gamble (ID# 8732)
GORDON LAW FIRM, INC.
477 Shoup Ave, Suite 101
Idaho Falls, ID 83402
Telephone: (208) 552-0467
Facsimile: (866) 886-3419

Attorney for Plaintiff

**IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR BONNEVILLE COUNTY, STATE OF IDAHO**

LYDIA NUNEZ,

Plaintiff,

vs.

CARL JOHNSON,

Defendant.

Case No. CV-16-482

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, CARL JOHNSON AND THE PARTY'S ATTORNEY, LINDSEY R. ROMANKIW, CAREY PERKINS LLP, 980 PIERVIEW DRIVE STE. B, IDAHO FALLS, ID 83402, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant Lydia Nunez, appeals against the above named respondent in

NOTICE OF HEARING - 1

the Idaho Supreme Court from the final judgment entered in the above entitled action on the thirtieth day of March 2017, Honorable Judge Dane Watkins presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(1)(1), I.A.R.
3. Appellant intends on appealing the issue of whether the district court erred in ruling that Appellant's Motion to set aside Order of Dismissal be denied.
4. No order has been entered sealing any portion of the record.
5.
 - a. A reporter's transcript is requested
 - b. The appellant requests the reporter's transcript in hard copy. Appellant requests a partial transcript consisting of the hearing on Plaintiff's Motion to Set Aside Order of Dismissal held on March 9, 2017.
6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:
 - a. Plaintiff's Motion to Set Aside Order for Dismissal.
 - b. Defendant's Memorandum in Opposition to Plaintiff's Motion to Set Aside Order for Dismissal.
 - c. Order Denying Motion to Set Aside Order of Dismissal.

7. I certify:

- a. That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Amy Bland
605 N. Capital Ave.
Idaho Falls, ID 83402

- b. That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.
- c. That the estimated fee for preparation of the clerk's record has been paid.
- d. That the appellate filing fee has been paid.
- e. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED April 20, 2017.


Don Gamble

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2017, I mailed a copy of the foregoing to the following:

Lindsey R. Romankiw
Carey Perkins LLP
980 Pierview Drive Ste. B
Idaho Falls, ID 83402-2913

Amy Bland
605 N. Capital Ave.
Idaho Falls, ID 83402


Don Gamble

Amy L. Bland, CSR, RPR
Official Court Reporter
Seventh Judicial District
Bonneville County Courthouse
605 N. Capital Ave.
Idaho Falls, Idaho 83402
(208) 529-1350 Ext 1329
E-mail: abland@co.bonneville.id.us

NOTICE OF LODGING

DATE: June 21, 2017

TO: Stephen W. Kenyon, Clerk of the Court
Supreme Court / Court of Appeals
P.O. Box 83720
Boise, ID 83720-0101

SUPREME COURT DOCKET NO: 45136

DISTRICT COURT CASE NO: CV-2016-482

CAPTION OF CASE: Lydia Nunez vs. Carl Johnson, and DOES 1
through 10, inclusive

You are hereby notified that a reporter's appellate transcript in the above-entitled and numbered case has been lodged with the District Court Clerk of the County of Bonneville in the Seventh Judicial District. Said transcript consists of the following proceedings, totaling 16 pages:

1. Motion to Set Aside Dismissal Hearing
(March 9, 2017)

Respectfully,

AMY L. BLAND
Idaho CSR #SRL-1053

cc: District Court Clerk

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

LYDIA NUNEZ,)	
)	
Plaintiff/Appellant,	)	Case No. CV-2016-482
)	
v.	)	Docket No. 45136
)	
CARL JOHNSON,	)	CLERK'S CERTIFICATION
	)	OF EXHIBITS
Defendant/Respondent.)	
)	

STATE OF IDAHO)
)
County of Bonneville)

I, Penny Manning, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination:

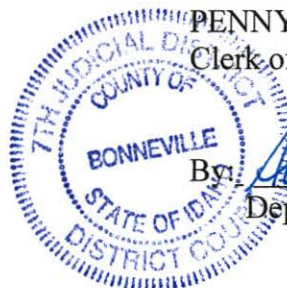
No exhibits were offered

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court this 14 day of September, 2017.

Penny Manning
Clerk of the District Court

By *Amelia A. Birch*
Deputy Clerk



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

LYDIA NUNEZ,)	
)	
Plaintiff/Appellant,	)	Case No. CV-2016-482
)	
v.	)	Docket No. 45136
)	
CARL JOHNSON,	)	CLERK'S CERTIFICATE
)	
Defendant/Respondent.)	
)	

STATE OF IDAHO)
)
County of Bonneville)

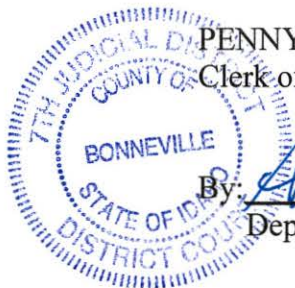
I, Penny Manning, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript (if requested) and the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand affixed the seal of the District Court this 14 day of September, 2017.

PENNY MANNING
Clerk of the District Court

By: *Amanda L. Brink*
Deputy Clerk



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

LYDIA NUNEZ,)	
)	
Plaintiff/Appellant,	)	Case No. CV-2016-482
)	
v.	)	Docket No. 45136
)	
CARL JOHNSON,	)	CERTIFICATE OF SERVICE
)	
Defendant/Respondent.)	
)	

I HEREBY CERTIFY that on the 14 day of September, 2017, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

Don Gamble
477 Shoup Ave, Suite 101
Idaho Falls ID 83402

Donald F Carey
980 Pier View Drive, Ste B
Idaho Falls ID 83402-2913

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

Penny Manning
Clerk of the District Court

By: *[Signature]*
Deputy Clerk

