IN THE SUPREME COURT OF GUAM

MICHAEL B. BROWN
Plaintiff-Appellee

vs.

EASTMAN KODAK COMPANY and MICHELLE NIGHTINGALE
Defendants-Appellants

OPINION

Filed: November 27, 2000

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Supreme Court Case No. CVA99-010
Superior Court Case No. CV1890-92

Interlocutory review from the Superior Court of Guam
Argued and submitted on November 4, 1999
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice (Acting)[1], JOHN A. MANGLONA[2], and FRANCES TYDINGCO-GATEWOOD[3], Designated Justices.

SIGUENZA, J.:

[1] Defendants-Appellants seek interlocutory review of the lower court's set-aside of judgment pursuant to Rule 60(b)(6) of the Guam Rules of Civil Procedure. We have chosen to exercise our discretion[4] and have granted interlocutory review pursuant to Title 7 GCA section 3108(b) to clarify issues of general importance in the administration of justice.[5] For the reasons below, we affirm the set-aside.

I.

[2] Plaintiff-Appellee Michael B. Brown ("Brown") was employed by Eastman Kodak Company ("Kodak") from 1988 until his termination in 1992. After his termination, Brown obtained the services of an attorney and filed suit against Kodak and certain of its employees, including Robert Bond, Benigno Bernardo, and Michelle Nightingale (collectively "original defendants"). The

[1]Chief Justice Benjamin J.F. Cruz recused himself from hearing this matter. Associate Justice Peter C. Siguenza, Jr., as the senior member of the panel, presided as the acting Chief Justice.

[2]Justice Manglona was appointed as a Designated Justice pursuant to 7 GCA 3103(b);

[3]Judge Tydingco-Gatewood was appointed as a Designated Justice pursuant to 7 GCA 3103(f);

[4]*See Brown v. Kodak*, CV99-010 (Order May 13, 1999).

[5]**Appealable judgments and orders. (b) Interlocutory review.** Orders other than final judgments shall be available to immediate appellate review as provided by law and in other cases only at the discretion of the Supreme Court where it determines that resolution of the questions of law on which the order is based will: (1) Materially advance the termination of the litigation or clarify further proceedings therein; (2) Protect a party from substantial and irreparable injury; or (3) Clarify issues of general importance in the administration of justice. Title 7 GCA § 3108 (b), (1994).

complaint alleged breach of express and implied contract, breach of the covenant of good faith and fair dealing, negligence, wrongful inducement, interference with contractual relationship, and constructive breach of contract.

[3] By the summer of 1993 Brown, no longer represented by his original attorney, obtained the services of a second attorney, Michael F. Perez, then a partner in a local firm. Brown alleges that Perez did little work on the case while his firm handled it. Instead, other attorneys in the firm did the bulk of the work. Brown believed that Perez's involvement would increase as the case neared trial.

[4] On June 13, 1995, the original defendants moved for summary judgment, and on July 12, 1995, Perez's partner argued in opposition of the motion. Apparently, sometime in late 1995 or early 1996 Perez and his partner parted ways. Brown alleges that he learned of the dissolution of the firm during the early part of 1996. Brown was informed that Perez was the attorney who retained custody of his file and would continue as attorney for the case. After learning of the breakup, Brown attempted several times to contact Perez but was unsuccessful. The two finally met in March of 1996. At this meeting, Brown expressed concern with the difficulty he had contacting Perez and further stated that he was prepared to obtain other counsel. Brown alleges that Perez reassured him that he would continue prosecution of the case.

[5] On March 20, 1996, the trial court denied the first motion for summary judgment. On or about May 21, 1997, the original defendants made three additional motions: a Guam Rule of Civil Procedure ("GRCP") Rule 12(b) Motion to Dismiss for Lack of Personal Jurisdiction; a GRCP Rule 26(e) Motion to Compel Discovery; and a second GRCP Rule 56(b) Motion for Summary Judgment.

[6] Opposition to the motions was due May 28, 1997, and a hearing on the motions was scheduled for June 11, 1997. Perez failed to file a written response to any of the May 1997 motions. However, at the hearing Perez argued against the Rule 12 motion based on memoranda his partner had submitted in opposition to the first summary judgment motion and further agreed to provide discovery pursuant to the Rule 26 motion. When the summary judgment motion came on to be argued, Perez, having not filed a written opposition, asked the court for additional time to file a response. Defendants-Appellants opposed and moved the court to grant judgment, arguing that Brown must show excusable neglect under the standards of GRCP 60 for leave to file a written opposition. The court, without reaching the merits, granted judgment based on Brown's non-opposition. The court also stated for the record that Brown may seek set-aside by filing an appropriate motion.

[7] Brown himself was not at the June 11, 1997 hearing and was unaware that a second motion for summary judgment went unopposed. He only learned of the dismissal of his case at a meeting with Perez on July 10, 1997. At this meeting, Brown alleges that Perez promised to file a motion for set-aside. However, no such motion was ever filed.

[8] Brown thereafter engaged the services of present counsel, who brought the set-aside motion below. Supporting documentation included, *inter alia*, a Declaration from Brown and copies of a Complaint and Order in an unrelated disciplinary proceeding against Perez. The Order was based on the default by Perez because of his failure to answer the Complaint. The Order provided that Perez was suspended indefinitely from the practice of law for unprofessional conduct in matters with the complainants. In addition, he was ordered to undergo psychiatric counseling and treatment for

substance abuse and was also ordered to make restitution. There was no factual recitation whatsoever of Perez's psychological or medical condition, other than the oblique reference to his rehabilitation. *In re Michael F. Perez*, ADC 98-002, Order (Supreme Ct. Guam Sep. 28, 1998).

[9] At the set-aside hearing, present counsel broached the subject of Perez's conduct by first referring to his divorce. Then, present counsel discussed Perez's personal problems:

> "[I]t was not immediately apparent that [the divorce] was going to have a devastating impact on [Perez]. Certainly the Court was practicing back during that time period, and I would only ask the court to call on its own recollection of just general bar comments during this time period and afterwards, that there was some scuttlebutt within the bar that [Perez] was having some kind of problems."

Transcript at p.7 (Motion for Relief, Jan. 21, 1999). A ground that present counsel argued for Rule 60(b) relief was extraordinary circumstances in Perez's alleged personal problems. However, Defendants-Appellants objected to comments regarding Perez because Brown had no direct evidence of Perez's mental condition. Present counsel responded that the court was "always free to simply be aware of whatever experiences the Court has had . . . I think it would be impossible for the Court not to have some cognizance of [Perez] during this time period." Transcript at p.7 (Motion for Relief, Jan. 21, 1999). Defendants-Appellants again objected, asserting that such facts were not judicially noticeable. Transcript at p. 8. When Defendants-Appellants inquired whether the court would take judicial notice of Perez's mental condition, the court stated, "[t]he Court has knowledge of Mr. Perez's problems, because the Court has dealt with Mr. Perez as a practicing attorney, and getting him just to sign a stipulation that has been agreed to, and in other matters." Transcript at p. 39.

[10] On February 26, 1999, the trial court issued its Decision and Order setting aside the judgment, pursuant to GRCP 60(b)(6). We now take interlocutory review of the trial court's decision to grant relief.

II.

[11] We review a trial court's set-aside under GRCP 60(b) for an abuse of discretion. *Parkland Dev., Inc. v. Anderson*, 2000 Guam 8, ¶ 5; *Midsea Industrial, Inc. v. HK Engineering, Ltd.*, 1998 Guam 12, ¶ 4. A trial court abuses its discretion when its "decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Midsea* at ¶ 4 (citation omitted).

[12] Defendants-Appellees assert error in the trial court's application of law to review the standard of party culpability *vis a vis* attorney conduct in this case in addition to error in its grant of the set-aside. We review a trial court's application of law *de novo*. *Hemlani v. Nelson*, 2000 Guam 20, ¶ 8.

A.

[13] The trial court set aside the June 11, 1997 judgment pursuant to GRCP 60(b), which provides, in relevant part:

> **Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore

> denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or if it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3) not more than one year after the judgment, order, or proceeding was entered or taken. …

Guam R. Civ. P. 60 (b) (1996).

[14] Guam's Rule 60(b) was adopted from Rule 60(b) of the Federal Rules of Civil Procedure. *Cf*. Guam Civ. Proc. Code § 60(b) *with* Fed. R. Civ. P. 60(b). The subsections of the rule are mutually exclusive. *See Klapprott v. United States*, 335 U.S. 601, 613-16, 69 S.Ct. 384, 389-90 (1948). Thus, if the circumstances alleged fall into any of the other subsections allowing set aside, then relief under subsection (6) can not be had. *See id*. at 613-14.

[15] The motion for Rule 60(b)(6) relief must be brought within a reasonable time. GRCP 60(b)(6); *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977). Judgment went unopposed at the June 11, 1997 hearing. Brown became informed of the default on July 20, 1997 and moved for set-aside on or about September 22, 1997. We find the motion timely.

[16] The extraordinary circumstances found in this case fall into patterns similar to those found in other Rule 60(b)(6) cases. For instance, in *In re Cremidas*, the trial court vacated an order setting aside an order of the probate court declaring a minor sole heir because the attorney was so drunk that he was incapable of presenting evidence that the minor was entitled to a share of the estate. *In re Cremidas*, 14 F.R.D. 15 (D. Alaska 1953). *Lucas v. City of Juneau* provides an example wherein a plaintiff's attorney abandoned the case without informing him, and summary judgment based on failure to prosecute was set aside. *Lucas v. City of Juneau*, 20 F.R.D. 407 (D. Alaska 1957). In

United States v. Cirami, a taxpayer took summary judgment by default when his attorney failed to oppose the motion. *Cirami*, 563 F.2d at 29. Judgment was set aside under circumstances consisting of gross negligence on the part of the attorney coupled with lack of neglect on the part of the taxpayer. The taxpayer alleged that mental illness caused the attorney to neglect opposition to the motion, to remain inaccessible in the time prior to taking of the judgment, and to induce reliance on the part of his clients. *Id.* at 34-35. Likewise in *Fuller v. Quire*, the attorney filed suit, and a discovery schedule was set. *Fuller v. Quire*, 916 F.2d 358 (6th Cir. 1990). The attorney never proceeded through discovery but suggested to the plaintiff that a settlement was pending then ceased all contact with him. When the plaintiff failed to appear at docket call, his suit was dismissed for lack of prosecution. *Fuller*, 563 F.2d at 359. The district court set aside the judgment because it reasoned that equities warranted the set-aside in the interests of justice. The plaintiff lived some distance from the jurisdiction and displayed reasonable diligence in attempting to discover the status of his case, and there was no showing of undue prejudice to the defendant. Grant of the set-aside was found to be within the trial court's discretion. *Id.* at 361.

[17] Here, we see allegations similar to that found in *Cirami* and *Fuller*. Perez, allegedly suffering from substance abuse and marital problems, fostered Brown's reliance but took no action to prosecute the case. Perez evidently avoided Brown, who was diligent himself in attempts to contact his attorney. The result was summary judgment taken on default, and Brown acted quickly to set aside the default.

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[18] Rule 60 is remedial in nature and is to be liberally construed. *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (citation omitted); *Midsea*, ¶ 6 (citation omitted); *see also Cremidas*, 14 F.R.D. at 17. The power vested in the courts under Rule 60(b)(6) is sufficient to enable them to vacate judgments whenever such action is appropriate to accomplish justice. *Klapprott*, 335 U.S. at 614-15. Judgment by default is a drastic step, appropriate only in extreme circumstances, and a case should, whenever possible, be decided on the merits. *Falk*, 739 F.2d at 463; *Midsea*, 1998 Guam 14, ¶ 6. In this case, we do find extraordinary circumstances sufficient to warrant relief from operation of the judgment.

[19] Defendants-Appellants' several arguments that the trial court erred in its linkage of the disciplinary Order and Complaint to its finding of extraordinary circumstances in Perez's conduct go to whether Brown's allegations in the aggregate support set aside by reason of such circumstances. Defendants-Appellants various grounds can be summarized as complaining of the lack of a nexus between the facts averred and the disciplinary Complaint and Order and lack of corroboration between such, Brown's allegations, and the remaining record.

[20] We do not find Defendant-Appellants' arguments convincing. Defendants-Appellants single out but one document in Brown's moving papers, suggesting that it provides the only basis for the trial court's finding extraordinary circumstances. For this opinion, we take the facts to be as Plaintiff-Appellee alleges because we must determine whether the allegations, if proved, would justify relief. *See Cirami*, 563 F.2d at 28; *United States v. Karahalias*, 205 F.2d 331, 333 (2d Cir. 1953).

[21] On the whole, the record reveals a pattern of inexcusable neglect of Brown's case. First, as alleged in Brown's Declaration, we see that Perez did not defend against the first motion for summary judgment even though he was the attorney Brown had hired. Perez also repeatedly reassured Brown that his case was proceeding forward when in fact it was not. Perez even claimed additional preparation time was needed by Defendants-Appellants, as a matter of professional courtesy, when another attorney undertook Defendant-Appellant's case. Against this backdrop, Brown experienced difficulty trying to contact Perez, and that the periods out of communication were not insubstantial. *See* Brown Decl. at ¶¶ 9-12.

[22] Second, it is apparent that Perez's conduct was peculiar during the relevant period in this case. Counsel for Defendants-Appellants told the court at the second summary judgment hearing that she had encountered extreme difficulty in her attempts to contact Perez. When describing the progression of the case in the weeks immediately preceding the hearing, counsel stated:

> Our messenger was unable to serve [Perez] because his office was closed. And, Your Honor, we had attempted to serve some other discovery matters on [Perez] prior to this date, even by certified mail, and when it was returned unsigned, we attempted to leave it at the office and put notice in the Court mailbox. On the 21st, because we couldn't serve in person because the office was closed, I mailed the pleadings to [Perez's] office and the Declaration of my mailing was filed with this Court on May 23rd. On May 22nd, I left a telephone message at [Perez's] phone number to let him know. And this is not a voice mail message, Your Honor.

Brown v. Kodak, et al, CV1890-92, Transcript Mot. to Dismiss and Mot. for Summ. J. at p. 11 (June 11 1997). Ironically, Defendants-Appellants' statements at the June 11, 1997 hearing corroborate Brown's allegations that Perez could not easily be found prior to the June 11, 1997 hearing date.

[23] Third, it is an inescapable conclusion that prosecution of the case proceeded forth until Perez undertook direct participation. Brown's first counsel filed the original complaint, other attorneys in Perez's former firm handled matters, and Perez's partner defended against the first motion for summary judgment.

[24] Fourth, there are sufficient facts to warrant the conclusion that Perez's conduct went beyond mere professional negligence. In *Benhil Shirt Shops, Inc. v. Lynns*, 87 B.R. 275, 278 (S.D.N.Y. 1988), an attorney experienced extraordinary personal problems which caused him to neglect his client's case, and the trial court there stated:

> Although we have been presented with no medical evidence or documentation that Rodgers was or is suffering from a psychological impairment or a physical illness, the lack of such information is not fatal to the present motion. Rodgers, an attorney with over thirty years experience, was with the Firm for six years. During those six years there was no indication that he was anything other than a competent attorney. It does not require medical expertise to know that when a competent veteran attorney fails to perform, and covers up his non-performance by lying to his clients and his colleagues, something is obviously wrong with him. There is no reason to demand medical proof when the facts speak for themselves.

Id., at 278. Defendants-Appellants argue the distinction that, in *Benhil*, the attorney's affidavit corroborated allegations of extraordinary circumstances. Although there is no similar affidavit here, we agree with Brown and the lower court that it was difficult not to notice a fairly seasoned member of this modestly-sized bar conducting himself in a manner which affected his professional performance. There was no reason to demand medical proof when the facts speak for themselves.

[25] Under Rule 60(b)(6), in addition to showing an extraordinary set of facts, the movant must satisfy the court that it has a meritorious case, that substantial injustice to the movant would otherwise result, and that it would be appropriate to set aside default so that the case can proceed

to the merits. *See Cirami*, 563 F.2d at 35; *Benhil*, 87 B.R. at 278 (citation omitted). It is not possible for this court to determine whether Brown may have had a meritorious case because judgment arose by default. Nevertheless, we find the other two factors present. First, Brown has been pursuing his claim for eight years; it would work substantial injustice to extinguish his claim by default. Second, it is appropriate to allow Brown's case to proceed because this jurisdiction favors adjudication on the merits. *Midsea*, 1998 Guam 12, ¶ 6 (citation omitted); *Adams*, 1998 Guam 15, ¶ 5.

[26] Our conclusion that there was sufficient reason for the trial court to exercise its discretion to set aside the judgment is further supported by cases where that extraordinary circumstances exist when counsel inexcusably neglects prosecution or defense of a case and the client's conduct does not constitute neglect within rule 60(b). *Accord Fuller*, 916 F.2d 358; *L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234 (D.C. Cir. 1964); *King v. Mordowanec*; *Lucas*, 20 F.R.D. 407; *Benhil* 87 B.R. 275; *see also Pioneer Inv. Serv., Inc. v. Brunswick Assoc.*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1497-98 (1993) ("[A] party's failure to file on time for reasons beyond his or her control is not considered to constitute 'neglect'" within rule 60(b)). We likewise find gross negligence on the part of Perez and diligence on the part of Brown.

[27] The lower court further found that, since Defendants-Appellants were on notice that set-aside would be forthcoming, they would suffer no prejudice if it were granted. We agree. Equitable considerations may warrant set aside in the interests of justice. *Fuller*, 916 F.2d at 361. Weighing the injustice to Brown and the lack of prejudice to Defendants-Appellants, we can not say that the lower court abused its discretion in granting set aside of the default taken on June 11, 1997.

B.

[28] The second ground Defendants-Appellants cite as error is the trial court's application of the incorrect standards of culpability to judge attorney conduct. Defendants-Appellants complain that *Midsea,* 1998 Guam 14, and *Adams,* 1998 Guam 15, were wrongly decided insofar as those cases incorporate standards of culpability not in conformity with *Link v. Wabash*, 370 U.S. 626, 82 S.Ct. 1386 (1962) and *Pioneer Investment Services, Inc.*, 507 U.S. 380, 113 S.Ct. 1489. These cases stand for the proposition that a client may not seek to avoid acts and omissions of freely-chosen counsel. Defendants-Appellants urge us to overrule *Midsea* and *Adams*, arguing that under the holdings of *Link* and *Pioneer*, Perez's conduct cannot be divorced from Brown's and that Perez's various failures associated with missing deadlines must be equated with Brown's failure to oppose summary judgment. We note this serious challenge to established Rule 60(b) precedents in this jurisdiction and dispose of it accordingly for clarification of issues of importance in the administration of justice.

[29] Preliminarily, we note that neither *Link* nor *Pioneer* deal with directly with Rule 60(b)(6), and, therefore, neither are dispositive of the question of law before us. Nevertheless, we will address Defendants-Appellants' reliance on these cases as support for their contention. In *Link*, the trial court *sua sponte* dismissed a case for want of prosecution when counsel failed to attend a pretrial conference and was historically dilatory. The client there had claimed that dismissal worked an unjust penalty on him. *Link* at 633, 82 S.Ct. at 1390. In response, the Court stated:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney."

Id. at 633-34, 82 S.Ct. at 1390 (citation omitted). However the Court, in considering the fact that the trial court had not given notice of possible *sua sponte* dismissal to the aggrieved party, further stated that given the history of counsel's dilatory conduct, due process arguments were unconvincing, especially when the client did not first seek remedy available under Rule 60(b) for setting aside final orders inadvisedly entered. *Id.*, 370 U.S. at 632, 82 S.Ct. at 1389-90. Apparently, even the *Link* Court believed that rule 60(b) may have been available as relief from the judgment, notwithstanding conduct of counsel, at least upon the inadvised grant of judgment.[6] Likewise, it seems logical that the *Link* Court would approve of the use of GRCP 60(b) in this case, where trial court discretion was exercised to grant judgment on mere non-opposition and inexcusable conduct on the part of the attorney.

[30] By comparison, we see that in *Midsea*, the party seeking Rule 60(b) relief took default after failing to answer a complaint. *Midsea*, 1998 Guam 14 at ¶ 2. We determined that it was within the trial court's discretion to grant relief when failure to meet a deadline could be attributed to the party's attorney. *Id*. at ¶¶ 7, 9. We disposed of the very same argument that Defendants-Appellants here pose by opining that default judgments are not to be used to discipline attorneys whose conduct was inexcusable "neglect and inattention." *Id*. at ¶ 8. Our stated policy was a preference for deciding cases on their merits instead of allowing a case to fail by way of default. *Id*. at ¶ 11.

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[6] *See also King v. Mordowanec*, 46 F.R.D. 474, 478 (D.R.I. 1969) (holding that *Link* expressly left open the question whether the facts of that case left open rule 60(b) as relief); *Cirami*, 563 F.2d at 34 (recognizing that attorney misconduct which is deliberate or the product of inexcusable neglect falls within subsection (6) of the rule).

[31] In *Pioneer Investment Services*, a creditor failed to file its claim by the bar date set by the bankruptcy court. Defendants-Appellants submit that this case is an example of culpability requisite for GRCP 60(b)(6). There, the U.S. Supreme Court in evaluating standards of party culpability wrote,

> [a]t one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other, a party simply may choose to flout a deadline. In between lie cases where a party may choose to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence.

Pioneer Investment Serv., Inc. at 387-88, 113 S.Ct. at 1494. The Court held that it was proper to make an equitable inquiry into circumstances of neglect to determine whether it was excusable. *Id.*, at 389-92, 395, 113 S.Ct. 1495-96. The Court then found excusable neglect when failure to meet a deadline was due to the court's providing deficient notice of a deadline. *Id.*, at 395, 113 S.Ct. at 1498. In *Adams*, we granted set-aside when the party seeking Rule 60(b) relief failed deadlines and took default because of excusable neglect. *Adams*, 1998 Guam 15 at ¶¶ 7, 9. To this extent, we therefore find *Adams* analogous and find no appealing reason to overturn our decision.

[32] Turning specifically to the standard of law at issue here, as it had done in *Link*, the U.S. Supreme Court in *Pioneer* provided an explanation of how subsection (6) is to be treated in the context of a party's culpability. To justify relief under subsection (6), a party "must show extraordinary circumstances suggesting that a party is faultless in the delay." *Pioneer Investment Serv., Inc* at 393, 113 S.Ct. at 1497 (citations omitted). If the party is partly to blame for the delay, relief must be sought within one year and the party's neglect must be excusable. *Id.* If the inability

to comply with a deadline is due to reasons beyond a party's control, party culpability is not considered to constitute neglect, and the case falls without subsection (1) of the rule. *Id.* 507 U.S. 394, 113 S.Ct. at 1497-98. In other words, a court making inquiry into the culpability of a party seeking relief under subsection (6) should ask whether the circumstances alleged suggest that a party is faultless in her failure to comply with a deadline. If the answer to that question is affirmative, then relief may be had under subsection (6). If the party is completely at fault, no relief may be had under subsection (6), but if the party is only partly at fault, its culpability or neglect must be excusable, and the motion must be made within a year of the judgment; or relief comes under subsection (1). However, if the failure to comply with a deadline is due to reasons beyond a party's control, such is not neglect within GRCP 60(b)(1), and therefore subsection (6) would be the appropriate mechanism for relief.

[33] For Brown, one inquiry is dispositive as to whether he may have relief under subsection (6): whether he has alleged extraordinary circumstances suggesting no fault in his failure to timely file a written opposition to summary judgment. After comparison with the cases cited in *Pioneer*, specifically, *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209 (1950) and *Klapprott*, 335 U.S. 601, 69 S.Ct. 384, we find circumstances suggesting no culpability attributable to Brown for the failure to timely file a written opposition.

[34] In *Klapprott*, the circumstances suggesting no fault on the party seeking relief was that the party was deprived of a reasonable opportunity to defend against charges when he was ill, incarcerated, and without funds to hire counsel. *Klapprott*, 335 U.S. 604, 69 S.Ct. at 385. Here, Brown was likewise deprived of a reasonable opportunity to defend against summary judgment.

Perez gave assurances that the case was proceeding in a normal fashion when, in fact, summary judgment was proceeding unopposed. Perez also did not inform Brown of the June 11, 1997 hearing. Perez's conduct was ostensibly a product of his personal problems. If counsel's personal problems caused him to misrepresent the status of the case to the client; to neglect to inform his client of upcoming motion hearings which may dispose of the case; and to neglect to file a written opposition to said motions, then the client is deprived of any reasonable opportunity to defend against proceedings brought to dispose of the case. Therefore, we find that the facts that Brown alleges suggest no fault for his failure to timely oppose summary judgment and that such circumstances would pass muster under *Pioneer*.

[35] *Ackerman*, by comparison, provides an example of circumstances insufficient to suggest no fault on a party in his failure to meet a deadline. *Ackerman*, at 197-200, 71 S.Ct. at 211-12. In *Ackerman*, the party seeking relief made a bald unproven assertion that judgment after trial on the merits was in error. *Id*. at 202, 71 S.Ct. at 213. Here, the trial court granted judgment not because of any decision on the merits but because local rules allow it when a party fails to file a written opposition. In *Ackerman*, the party seeking relief had allegedly forgone appeal because of financial inability. *Id*. at 197, 71 S.Ct. 212. In this case, Perez's alleged substance abuse problems suggest that Brown's failure to meet the opposition deadlines arose out of counsel's neglect. In *Ackerman*, instead of relying on advice from counsel on whether to pursue appeal, the party relied on advice from an alien control officer, who was a layperson and a stranger. *Id*. at 197-98, 71 S.Ct. at 211. In this case, the allegations concerning Perez's substance abuse-related conduct and circumstances suggesting that Plaintiff-Appellee had no input whatsoever in the decision to allow summary

judgment to go unopposed militate against any conclusion that Brown was at fault. Thus, unlike the insufficient circumstances found in *Ackerman*, here the circumstances suggest no fault on the part of Brown for the failure to comply with the opposition deadline.

[36] After oral argument in this case, this court decided *Parkland***,** 2000 Guam 8. *Parkland* did not involve a default. Instead, the party seeking relief argued that failure to raise an affirmative defense was included as "any other reason justifying relief from operation of the judgment" within subsection (6) of the Rule. *Id.* at ¶ 7. We disagreed and held that the failure to raise an affirmative defense did not constitute gross negligence or exceptional circumstances within the meaning of subsection (6). *Id*. at ¶ 16. Moreover, because the matter was fully adjudicated we opined that, in accordance with *Link*, it was dangerous policy to allow a party to distance himself from the acts and omissions of his freely-chosen counsel. *Id.* at ¶ 15.

[37] In this case, the trial court found Perez's conduct to constitute extraordinary circumstances. Such extraordinary circumstances justify the court's exercise of discretion to set aside a judgment, especially in instances of default. Unlike *Parkland* there are extraordinary circumstances in counsel's conduct. This case is also unlike *Adams* because Perez's conduct is inexcusable neglect. Thus, we see no reason to overrule those holdings. On the other hand, this case is like *Midsea* because attorney culpability led to the party's default. Applying *Pioneer*, we see that in both this case and in *Midsea* the party alleged extraordinary circumstances suggesting that the party is faultless for the delay. While it was a closer call in *Midsea*, this jurisdiction shall favor adjudication on the merits when the party opposing set-aside can show no prejudice. *Cf*. *Midsea*, 1998 Guam 14, ¶ 9 (holding that it was not an abuse of discretion to grant set-aside when no prejudice to the

opposing party can be shown). Accordingly, we see no reason to overrule *Midsea*.

[38] Thus, our review of the standards of culpability with respect to party conduct as it relates to GRCP 60(b) leads us to conclude that the circumstances here are appropriate for providing relief from operation of the judgment. We therefore find that the trial court committed no reversible error in its application of *Midsea* to set aside the default here.

III.

[39] There is no disguising that we decide between two extremes in this case. Should this court circumvent the trial court's discretion and not allow set-aside of a judgment arising from inexcusable attorney conduct as in *Midsea*, or should the court suggest a party seek recourse from the attorney by filing a malpractice action, as indicated in *Parkland*? *See Parkland*, 2000 Guam 8, at n. 5. Application of U.S. Supreme Court case law concerning standards of party culpability indicates that the question of whether Rule 60(b)(6) relief is appropriate when attorney conduct is alleged to result in default may be answered by examining whether a party seeking relief alleges circumstances suggesting that it was faultless in the delay. Having incorporated party culpability standards applicable on Rule 60(b) review, we find no reason to overrule our previous Rule 60(b) opinions.[7] For the reasons stated, the trial court's grant of set-aside is **AFFIRMED** and the case is

[7] In a closer case, the question might turn on facts not so apparent. Nevertheless, we observe that the local bar has no mandatory Practice Liability Fund. The bar must police itself. When counsel notices that opposing party's case is adversely affected by opposing counsel's inexcusable and possibly disciplinable conduct, there may be a reason to act in the utmost professional manner. We do not say that there is a whistle-blowing duty, nor do we say that counsel failed to act. However, if opposing counsel fails in this regard and thereby directly or indirectly benefits, we see no reason to allow stand a judgment that is possibly connected with a failure to protect the integrity of the bar. *Cf. Liljberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 867-69, 108 S.Ct. 2194, 2206-07 (1988) (holding that vacating a judgment due to judge's failure to recuse himself when he should have known of a financial interest in litigation before him encourages a judge or litigant to examine and remediate disciplinable conduct).

REMANDED for proceedings consistent with this opinion.

JOHN A. MANGLONA
Designated Justice

FRANCES TYDINGCO-GATEWOOD
Designated Justice

PETER C. SIGUENZA, JR.
Chief Justice (Acting)