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George W. Flick v. Glen Van Tassell and Van's Service, Inc : Petition for Rehearing

Utah Supreme Court

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Craig S Cook; Michael R Carlston; Worsley, Snow, and Christensen; Attorneys for Appellants.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GEORGE W. FLICK,

Plaintiff and Respondent,

vs.

GLEN VAN TASSELL and VAN'S SERVICE, INC., a Utah corporation,

Defendants and Appellants.

Case No. 14154

PETITION FOR REHEARING

Appeal from the Judgment of the Second Judicial District Court for Davis County, the Honorable Ronald O. Hyde, Judge.

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IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE W. FLICK,

Plaintiff and Respondent,

vs.

Civil No. 14154

GLEN VAN TASSELL, and VAN'S SERVICE, INC., a Utah corporation,

Defendants and Appellants.

PETITION FOR REHEARING

POINT ONE. A REHEARING SHOULD BE GRANTED TO APPELLANT ON THE GROUNDS THAT THIS COURT MISCONCEIVED THE NATURE OF THE RELIEF BEING SOUGHT AND IN LIGHT OF RECENT OPINIONS OF THIS COURT GRANTING RELIEF FROM DEFAULT JUDGMENTS.

The opinion of this court filed March 5, 1976 succinctly states the facts of this appeal. The dates cited by the court are correct since they give the chronology of the events starting from the Notice of Appeal to the date of Argument. However, if there is any implied impression that a delay occurred in the prosecution of this appeal, it must be remembered that appellant's former

counsel controlled the appeal up until the first of February, 1976 when appellant's present counsel entered its appearance. Thus, any delay in the appellate process was caused by appellant's former counsel just as the failure in the lower court to answer the interrogatories and appear at trial was caused by the advice and conduct of such counsel.

Appellant believes that this court's opinion concerning general rules of law as to matters beyond the record is absolutely correct and should be applied in 99% of any cases where the record is to be supplemented. However, this case is in the 1% exception where the court's equity power must be applied. The reason for this exception is simple: when a fraud or perpetration of a fraud is committed at the lower court level and at the same time the record of the lower court is established by the perpetrators, it is only logical that the record will be devoid of any showing of this wrongful conduct. This, of course, could only occur when the acts or omissions were made by the trial attorneys or the trial court who can effectively prevent the record from revealing the true nature of any malpractice or misfeasance. In this case, for example, the trial court

was perfectly justified in ruling as it did with the record which was presented before it by the perpetrator of the fraud and misrepresentation. It was only after the defendant consulted with new counsel who was not a party to this gross neglect and malpractice that the errors could be raised and supplemented into the record.

This court in its opinion continually states that allowing affidavits of "losers" to supplement the record would destroy the sanctity of a judgment. This too is a correct statement that should be applied in the large majority of cases. So too, this Court states that such affidavits without the benefit of "cross examination" or an "evidentiary hearing" would be a miscarriage of justice and could allow a litigant to complain about his counsel after a bad result was obtained and procure himself a new trial. Appellant has no argument with these statements.

Two things should be considered in this particular case, however. First, the case involved a default judgment where the litigant, John Van Tassell, never once personally appeared before the trial court so that any representations or failures to appear were performed solely by his counsel.

Second, defendant is not appealling from the judgment itself but is appealling from the motion to reconsider the granting of the default. Defendant is not, as the Court's opinion seems to indicate, asking for a new trial but is only asking for a new hearing before the trial court to determine whether the judgment should be set aside.

Such a hearing would allow sufficient cross examination and evidence to be made part of the record so that the trial court can adequately evaluate the correct grounds of appeal based upon the appellant's former counsel's gross neglect and negligence which was not before it at the first hearing. A hearing on a Rule 60B Motion (where a judgment has been entered) is hardly the equivalent of a new trial (where both sides are able to go into the proceeding with a clean slate).

Finally, it should be pointed out that the affidavits filed in this case are not made solely by the losing party, Glen Van Tassell. Robert Sykes, a practicing and licensed lawyer in the state of Utah who was associated with one of the appellant's former counsel, substantiates the affidavit of the defendant. Some weight must be given to the axiom that Lawyers are reluctant to testify against one another

unless there is some extreme reason compelled by basic justice and morality. As this Court will recall, even opposing counsel representing the respondent admitted in oral agrument that there were improprieties in the case. He too, throughout this appeal, has been aware of his responsibility as an officer of this court to present the full picture of the events occurring in this unfortunate case and has admirably allowed the truth to come forth without objection. In addition, appellant's present counsel have certainly voiced their opinions as to their investigation of the case. This combined effort by members of the bar is certainly more than bare allegations in a "loser's" affidavit.

Appellant would cite to the court the recent cases of Carman v. Slavens, Number 14046 decided February 4, 1976 and Michelson v. Shelley, Number 14037 decided November 21, 1975 as authority to support appellant's contentions. The principle that the facts of each case must govern the setting aside of a default judgment was reaffirmed.

In the Carman case the defendant Slavens had been served with a deposition notice but failed to personally appear. His attorney withdrew and the opposing

attorney filed motions for summary judgment against Slavens. No objections were filed on behalf of Slavens. Several months later a new attorney was retained by Slavens who filed an amended pleading together with an affidavit. The trial court held that because there did not appear in the record to be any justification for Slavens failure to appear at the deposition and produce the documents he would order Slavens' answer to be strickened and his default entered. This court in reversing the trial court's decision and the entry of the default judgment stated

> "Fundamental to the concept of the rule of law is the principal that reason and justice shall prevail over the arbitrary and uncontrolled will of any one person; and that this applies to all men in every status: to courts and judges, as well as to monarchs and magistrates. The meaning of the term "discretion" itself imports that the action should be taken within reason and good conscience in the interest of protecting the rights of both parties and serving the ends of justice. It has always been the policy of our law to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy.

Similarly, appellant, Van Tassell, would urge that his failure to appear at trial and to answer the interrogatories was no different than Slavens' failure to appear at a deposition and that both men had no counsel of record at the

time of crucial proceedings involving the merits of their case. The only difference between the Slavens case and this case is that Slavens was lucky enough to obtain counsel who established some record in the district court before going on appeal. In the instant case, however, appellant, Van Tassell, was not so lucky and was forced to submit affidavits to this court to consider under its equity power. This Court too has "discretion" in allowing at least a hearing on the Motion to Set Aside the Default so that the truth of the previous delays can be adjudicated.

The Michelson case is also appropriate for this court to consider. In that case an answer was filed by the defendant. Approximately five pre-trial conferences were scheduled but none were attended for various reasons. On March 21st counsel for the defendant withdrew and counsel for the plaintiff served notice to the defendant to obtain new counsel. On April 5th no one appeared at the pre-trial conference and the court continued the matter without date. On April 10th the counsel for plaintiff notified the defendant that the conference scheduled for April 12th had been cancelled and that the judge would reschedule the hearing. On November 11th the counsel for plaintiff mailed a notice

of readiness for trial to the defendants and on December 10th the court set the matter for pre-trial on January 3rd. On this date the counsel for plaintiff appeared at the pre-trial but the defendants did not appear and the case was set for trial on January 22, 1975. Notice of the trial setting was mailed by the clerk on January 14, 1975. At trial only the plaintiff and his counsel appeared at trial. Testimony was given and judgment rendered against the defendants in the amount of $20,000 principal and $4,000 interest.

After the default judgment had been taken, the defendant moved for a new trial and filed affidavits showing the circumstances of his being unavailable at the trial. The trial court denied the motion for a new trial and an appeal was taken. The majority of this court remanded the case to the district court stating "it seems to us in view of all the circumstances in this matter that the court abused its discretion in ~~trying~~ failing to set aside the judgment".

The failure of Michelson to attend his trial is no different from Van Tassell's failure except that the record for such failure in Michelson was presented before

the trial court and not before this Court. Once again, Michelson was lucky in having competent trial counsel who established the lower court record and who did not actually cause the entry of default.

A fact this Court should also consider in its equity power is that the judgment entered in the present appeal greatly exceeds both Michelson and Carman since it involves over $300,000 in affirmative damages against the appellant and a loss of at least $200,000 from valid claims appellant has against the respondent.

There has been no showing of prejudice to the plaintiff-respondent if the district court is given an opportunity to review the circumstances surrounding the failure to attend the trial and to answer the interrogatories. Certainly, when this much money is involved and there are affidavits and statements of lawyers in the record supporting defendants' contention that he was misrepresented and misled by his counsel and cases from other jurisdictions granting relief from gross neglect of a litigant's counsel, a remand to the district court is, as Justice Crockett in the Carman case stated, "within reason and good conscience in the interest of protecting the rights of both parties in serving the ends of justice".

Appellant would respectfully submit that this Court reconsider its previous opinion in light of the fact that a new trial is not being sought and that appellant is only seeking an opportunity to have an "evidentiary hearing" concerning the circumstances surrounding the record at the time the trial court denied the motions to set aside the default judgment.

Respectfully submitted,

WORSLEY, SNOW & CHRISTENSEN

By Craig S. Cook
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