1987

Jerry Lawley v. Valley Ford, Inc., a Utah corporation dba Valley Jaguar David G. Bastian, an individual : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JERRY LAWLEY, Plaintiff-Respondent vs. VALLEY FORD, INC., a Utah corporation dba Valley Jaguar DAVID G. BASTIAN, an individual, Defendant-Appellant	)	CASE NO. 87 0490 CA

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Reply Brief of the Appellant

Appeal from an Order of the Third Judicial District Court in and for Salt Lake County Utah, Honorable Timothy R. Hanson, District Judge

Argument Priority No. 14b.

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Reply Brief of the Appellant

Valley Ford, Inc.

Argument

POINT I

THIS COURT IS NOT BOUND BY THE TRIAL COURTS INTERPRETATION OF THE OPPOSING AFFIDAVITS

Respondent argues that the Court of Appeals should accept the interpretation of the "evidence" presented at the hearing on defendant's Motion to Set Aside the Default Judgment. In fact, the only "evidence" was opposing affidavits. This court is as capable as a trial court in evaluating the opposing affidavits and is not bound by the Trial Court's interpretation thereof.

It would appear that the Trial Court was influenced by the fact that the affidavits were contradictory with respect

to the issue of whether or not calls were actually placed by Bryce Wade, counsel for defendant, to Lloyd Eldredge, counsel for plaintiff, prior to the entry of the default. Although it appears as though the Utah Supreme Court has not ruled on the issue of what a court is to do in ruling on a Motion to Set Aside Default Judgment when faced with contradictory affidavits on the issue of excuseable neglect, and the case law among other jurisdictions is divided, the better rule is stated in 49 CJS Judgments Section 297 (P. 547). Therein it is stated " that where the court is in doubt the better course is to give applicant the benefit of the doubt." Accordingly, this court should accept as true the representation made by Mr. Wade that messages were in fact left with Mr. Eldredge prior to the entry of the default.

POINT II

THE KNOWLEDGE OF PLAINTIFF'S COUNSEL THAT MATTERS WERE IN DISPUTE, COUPLED WITH HIS NOTICE THAT DEFENDANT'S COUNSEL WAS ATTEMPTING TO CONTACT HIM PRIOR TO THE EXPIRATION OF TIME FOR ANSWERING THE COMPLAINT BRINGS THIS CASE WITHIN THE RULE OF HELGESEN.

Respondent's counsel points out that this case is distinguishable from Helgesen v. Inyagumia, 636 P2d 1079 (Ut., 1981). It is true that in this case, actual negotiations did not occur between the time of the filing of the Complaint and expiration of time for answering. Appellant respectively submits, however that the policies enunciated in Helgesen should apply with equal force to the facts of this case and justify a reversal of the Trial

Court's order denying defendant's Motion to Set Aside the Default Judgment.

Factors important to the court in deciding Helgesen were:

1. Plaintiff's actual notice that the allegations of the complaint were in dispute;

2. The defendant attempted to resolve the matter prior to the expiration of time to answer the Complaint; and,

3. The hardship that would result to the defendant if the default were not set aside.

Those same factors are present in the case at bar.

As is inevitable in instances where the Trial Court has been given "discretion," anomalous result occur. See, eg. Annot., 21 ALR 3d 1255. The Utah Supreme Court has, however, in its decision in Helgesen, placed limits on that "discretion" to make the application of Rule 60(b), Utah Rules of Civil Procedure, more predictable and in keeping with the often stated policy of deciding cases on their merits rather than by default. Appellant in this case is simply asking that the court to further delimit the "discretion" exercisable by judges under Rule 60(b) in accordance with the overriding policy of hearing cases on their merits.

POINT III

THIS APPEAL WAS BROUGHT IN GOOD FAITH, IS NOT FRIVOLOUS AND IS NOT INTERPOSED FOR IMPROPER PURPOSES

This Court has held in the case O'Brian v. Rush 754 P2d 306 (Utah App. 1987) that an appeal that "... is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law ..." is not a "frivolous" appeal. Id at 310. Appellant respectively submits that the present appeal is a good faith argument for the extension and modification of existing law, i.e., the rule of Helgesen.

A grey area exists in the law between facts addressed by the Utah Supreme Court in Helgesen and the facts of Katz v. Pierce, 732 P2d 92 (Utah, 1986). This appeal asks the Court to fill in that grey area and further explain the range of "discretion" so as to make application of Rule 60(b), Utah Rules of Civil Procedure, more predictable. Accordingly, this is not a "frivolous" appeal and an award of attorney's fees even in the event appellant is unsuccessful in this appeal is not warranted by law.

CONCLUSION

Based upon the foregoing, appellant requests the court to review the opposing affidavits before the court with the view of giving appellant the benefit of the doubt and to grant the relief requested by the appellant.

DATED this ____ day of March, 1988.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Reply Brief of the Appellant, Valley Ford, Inc., and placed the same in the U. S. Mail, postage prepaid, first class mail, direct to the following:

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