

1987

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

Utah Court of Appeals

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Lloyd C. Eldredge; Attorney for Respondent.

Paul H. Van Dyke; Elggren & Van Dyke.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 87 0490 CA

IN THE UTAH COURT OF APPEALS

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

Brief of the Respondent
Jerry Lawley

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.

Paul H. Van Dyke
Elggren & Van Dyke
444 South State #201
Salt Lake City, Utah 84111

Lloyd C. Eldredge
Attorney for Jerry Lawley
7050 Union Park Avenue, #570
P.O. Box 7005
Salt Lake City, Utah 84107

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COURT OF APPEALS

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Paul H. Van Dyke
Elggren & Van Dyke
444 South State #201
Salt Lake City, Utah 84111

Lloyd C. Eldredge
Attorney for Jerry Lawley
7050 Union Park Avenue, #570
P.O. Box 7005
Salt Lake City, Utah 84107

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JERRY LAWLEY,)
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JAGUAR, DAVID G. BASTIAN,)
an individual,)
Defendant-Appellant.)

Brief of the Respondent
Jerry Lawley

Statement of Jurisdiction

Jurisdiction is vested in the Utah Court of Appeals pursuant to Utah Code Ann. Sections 78-2-2(4) and 78-2a-3(2)(h), 1953 (as amended).

Nature of the Proceedings

An appeal from default judgment entered by the Third Judicial District Court, the Honorable Timothy Hanson, in favor of the Respondent, Jerry Lawley and against the Appellant, Valley Ford, Inc.

Determinative Statues

Rule 55, Utah Rules of Civil Procedure
Rule 60(b), Utah Rules of Civil Procedure
(Attached following brief.)

Statement of the Case

Respondent, Jerry Lawley, filed suit in the Third Judicial District Court in and for Salt Lake County, against Appellant, Valley Ford, Inc., and David Bastian, seeking to rescind a contract for the purchase of a Jaguar automobile purchased from Valley Ford, Inc., (dba Valley Jaguar) and for additional damages, including damages for fraud, on the part of Valley Ford, Inc., and/or its employees, incurred in connection with the sale. Facts relevant to the issue on appeal are as follows:

1. Valley Ford, Inc. was served with Plaintiff-Respondent's Summons and Complaint on June 30, 1986. Service was accomplished by personal service upon Mr. Bryce Wade, Valley Ford, Inc.'s registered agent. (R.10). Mr. Wade is an attorney and member of the Utah State Bar. (R.14).

2. There having been no Answer, nor other appropriate response to the Summons and Complaint filed by Plaintiff-Respondent upon Defendant-Appellant, and the time for answering having expired, the Default of Defendant-Appellant was entered on July 22, 1986. (R.12).

3. Although Defendant-Respondent's registered agent and attorney allegedly attempted to contact Plaintiff-Respondent's attorney to discuss matters concerning the case, he admitted that there was in fact no contact between himself and Plaintiff-Respondent's attorney until after entry of

Default. (R.15)

4. Defendant-Appellant's registered agent's allegation that he had left "numerous" messages with Plaintiff-Respondent's attorney prior to the entry of Default was contradicted by the Affidavit of Claudette Mathie, secretary to Respondent's attorney, which Affidavit indicated that a review of the phone message records kept at the offices of Plaintiff-Respondent's attorney showed no messages were received from Defendant-Appellant's registered agent-attorney until the date of the entry of default. (R.33-35).

5. After a period of attempts for a negotiated settlement, Defendant-Appellant moved the Third District Court to set aside Default, which Motion following a full hearing was denied. (R.37-39).

SUMMARY OF THE ARGUMENT

The trial court's refusal to set aside the Default of Respondent, Valley Ford, Inc., was a reasonable exercise of that court's discretion, based upon the Defendant's failure to meet its burden to show due diligence in preserving its rights, and based upon its further failure to show reasonable justification or excuse within the meaning of Rule 60(b), Utah Rules of Civil Procedure.

ARGUMENT

A. THE DENIAL OF DEFENDANT'S MOTION TO SET ASIDE DEFAULT WAS NOT AN ABUSE OF DISCRETION.

The argument portion of appellant's brief correctly sets before the Court the law concerning the general issue of

abuse of discretion by a trial court in refusing to set aside a default. However, Appellant misses the mark in applying the law to the facts of the instant case. Each authority cited by Appellant requires that "reasonable justification or excuse" be found in the actions of the party seeking to set aside the default prior to a finding by the reviewing court that the failure to set aside a default is an abuse of the authority. (See e.g. Olson v. Cummings, 565 P2d 1123, (Utah 1977) cited in Appellant's brief at Page 7), and that trial courts are endowed with discretion in deciding whether or not "reasonable justification or excuse" exists in the specific set of facts before it. Carman v. Slavens, 546 P2d 601 (Utah 1976.)

In light of the fact that the determination of "reasonable justification or excuse" will depend upon particular fact situations before the trial court, it is not difficult to comprehend that differing opinions or results might be reached based on the specific facts before the court. However, once the trial court has exercised its discretion, that exercise of discretion will not be interfered with by the reviewing court unless it is clearly shown that the trial court acted arbitrarily and an abuse of discretion is clearly shown. Russell v. Martell, 681 P2d 1193 (Utah 1984). See also, Olson and Carman, supra. The question is not whether the reviewing court agrees with the result reached by the court below, but whether an actual abuse" of the discretion of the trial court has occurred.

In defining abuse of discretion, C.J.S. Appeal and Error, Section 1583 states:

"A reviewing court is never justified in substituting its discretion for that of the trial court; in determining whether the lower court has abused its discretion, the question is not whether the reviewing court agrees with the court below, but, rather, whether it believes that a judicial mind, in view of the relevant rules of law applicable to the particular case and on due consideration of all the circumstances could reasonably have reached the conclusion of the court below, of which complaint is made. The mere fact that the appellate court would have decided otherwise does not establish that the discretion has been abused..."

The Utah Supreme Court has repeatedly stressed its adherence to the general principal stated above. In Airkem Intermountain, Inc. v. Parker, 513 P2d 429, 431 (Utah 1973), the Court stated:

"The rule that the courts will incline towards granting relief to a party, who has not had the opportunity to present his case, is ordinarily applied at the trial level, and this court will not reverse the determination of the trial court merely because the motion could have been granted."

More recently, the Court reiterated this principal in Katz v. Pierce, 732 P2d 92 (Utah 1986), wherein the Court stated:

"That some basis may exist to set aside the default does not require the conclusion that the Court abused its discretion in refusing to do so when the facts and circumstances support the refusal."

The reviewing court's duty is to review the record

for evidence that the trial court's reasoning was sound. The mere argument that a reason existed at the trial court level for the granting of the motion, and the court chose not to do so based on the facts and evidence before it does not amount to a showing of abuse of discretion. "Abuse" goes into the realm of the unreasonable, the illogical, the arbitrary or capricious.

In the instant case, the trial court had before it the arguments of the parties, and the affidavits in the record. Based upon all of the information it had, that court determined that "reasonable justification or excuse" for Appellant-Defendant's failure to respond did not exist. Such determination was a reasonable exercise of the discretion of the trial court, not an abuse as suggested by the Appellant.

B. THE COURT OF APPEALS SHOULD ACCEPT THE INTERPRETATION BY THE TRIAL COURT OF THE EVIDENCE PRESENTED AT THE HEARING ON THE MOTION TO SET ASIDE DEFAULT.

It is noteworthy that there is no transcript of the proceedings before the trial court on Appellant's Motion to Set Aside Default. Inasmuch as Appellant's Motion below was based exclusively upon arguments regarding factual matters, the reviewing court may rely upon the judgment of the court below, and that court's determination as to the weight and credibility to be given to the arguments presented by the parties. As noted in Sawyers v. Sawyers, 558 P2d 607, 608 (Utah 1976):

"Appellate review of factual matters can be meaningful, orderly and intelligent

only in juxtaposition to a record by which lower courts' rulings and decisions on disputes can be measured. In this case, without a transcript, no such record was available, and therefore, no measurement of the court's actions may be urged upon us by Defendant."

. . . (U)nder elementary principals of appellate review we:". . . presume the findings of the court to have been supported by admissable, competent substantial evidence . . ."

In the absence of the record below, the Court of Appeals is justified in accepting the interpretation made by the trial court of the facts, arguments, and evidence before it. This statement of the law was reaffirmed in Fackrell v. Fackrell, 740 P2d 1318 (Utah 1987), and adopted and applied by the Court of Appeals in Rayburn v. Rayburn, 738 P2d 238 (Utah Ct. App. 1987).

The court below, as noted, had before it the arguments and supporting evidence offered of the parties, and rather than finding reasonable justification or excuse, found that a member of the Utah State Bar, acquainted with the requirements of the Utah Rules of Civil Procedure, was personally served with a Summons and Complaint and failed to file a timely response. The affidavit of Appellant's registered agent-attorney (R. 14-16) admits each of these elements and likewise admits that he, in fact, had no contact with Respondent's attorney until after the entry of default. There simply was no reasonable justification or excuse for Appellant's omissions.

C. THE PRIMARY CASES RELIED UPON BY APPELLANT TO RAISE THE ACTIONS OF ITS REGISTERED AGENT-ATTORNEY TO THE LEVEL OF "EXCUSABLE NEGLIGENCE" ARE READILY DISTINGUISHABLE FROM THE INSTANT CASE.

In Helgesen v. Inyangumia, 636 P2d 1079 (Utah 1981) the Supreme Court overturned the trial court's refusal to set aside a default judgment in a case where active negotiations between the opposing parties occurred following the service of a Summons and Complaint and prior to the entry of Default. The parties in Helgesen were in actual contact, and the Court found a justifiable expectation of an opportunity to respond on the part of the lay Defendant, who was not represented by counsel, and who had been promised that information and documentation would be provided by the Plaintiff, but information which was not provided prior to the entry of Default.

In the case presented for review, by contrast, Appellant admits that no contact occurred between the parties following the service of the Summons and Complaint prior to the entry of Default. Even assuming arguendo, the accuracy of Appellant's assertion that its registered agent-attorney attempted to contact Respondent's counsel, there is nothing to justify an expectation on the part of the Appellant that such "attempts" negated its responsibility to file a timely answer. And while the Helgesen court suggested that certain facts and circumstances may justify a reliance upon what Appellant characterizes as "common professional courtesy", the facts in the instant case simply do not rise to that level. It is

patently unreasonable to expect such standards to be applied, and an automatic extension granted, when no request nor even any contact has been made.

Common experience indicates that "professional courtesy" regarding enlargement of time for response is commonly extended when a request has been made. However, following the entry of a Default, the fact of which has communicated to counsel's client, expectations concerning individual notions of professional courtesy cannot overcome counsel's duty of loyalty to that attorney's own client, nor will they justify actions inconsistent with the interests of that client, particularly when the client has specifically instructed a particular, and legal, course of action.

In Katz v. Pierce, supra, the reviewing court found no abuse of discretion on the part of the trial judge in refusing a defendant's Motion to Set Aside Default. Once again in Katz, actual contact between the parties occurred subsequent to the service of the Summons and Complaint and prior to the entry of default. The court held that if the party seeking to set aside the default had desired additional time in which to present its defenses, it could have obtained the same by a simple request. In Katz, as in the instant case, the Defendant was represented by an attorney acquainted with the requirements of the Utah Rules of Civil Procedure.

The Katz court noted that Plaintiff's counsel had informed Defendant that a timely answer was expected failing

which, default would be obtained. This notification in excess of that contained in the Summons served upon the Defendant was an exercise of "professional courtesy", to be sure, however, it was significant only within the specific facts of Katz. Once again, the clear distinction between Katz and the matter for review is the lack of any contact between the parties.

D. APPELLANT'S FAILURE TO ACT TO PRESERVE ITS RIGHTS, BASED UPON ITS ALLEGED ASSUMPTIONS, DOES NOT RISE TO THE LEVEL OF REASONABLE JUSTIFICATION OR EXCUSE. APPELLANT DID NOT EXERCISE ITS AFFIRMATIVE DUTY OF DUE DILIGENCE TO PRESERVE IT'S RIGHTS.

What is evident in the instant case is that Appellant has failed to meet its obligation to demonstrate that its actions should fall within the protections of Rule 60(b) Utah Rules of Civil Procedure in determining the reasonableness of the conduct. A reviewing court will look to see whether "due diligence" was exercised by the party to protect the party's rights. In Airkem, supra, the Court articulated the moving party's duty:

"The movant must show that he used due diligence and that he was prevented from appearing by circumstances over which he had no control. (Emphasis in original) Id at 431.

Additional language to that same effect is contained in Warren v. Dixon Ranch Company, 260 P2d 741, 743 (Utah 1953).

Surely Appellant did not meet its burden of due diligence (all that was required was that an answer be filed and actual contact be made), and/or circumstances beyond its

control. The requirement of due diligence is an affirmative duty, and a standard to which the actions of Appellant simply do not attain. While it may be common professional courtesy to grant additional time to respond when requested, it is likewise common professional practice to file even a minimally sufficient Answer or other response, in order to preserve rights, when contact cannot be made with opposing counsel in order to request an extension. Appellant failed on both counts: no request was made, and no effort to file even a superficial response was attempted. In short, the affirmative duty of Appellant to act with due diligence was not met.

E. THE KNOWLEDGE THAT MATTERS ARE IN DISPUTE WILL NOT JUSTIFY INACTION BY APPELLANT, NOR WILL IT REQUIRE EXTRAORDINARY ACTION BY RESPONDENT.

Appellant's Brief attempts to advance the notion that the purported assumptions of its registered agent-attorney regarding the availability of an extension of time for answer is justified based upon supposed knowledge by Respondent's counsel that the issues in the case were disputed, and that an answer should be expected. Such reasoning simply does not follow.

It would not be unreasonable to assume in every case filed in any court of this state that the issues of those cases are in dispute. Were there no dispute, there would be no purpose for the filing. It would likewise not be unreasonable to assume that an Answer or other response, would be forthcoming in every case. There must be more, as for

example was present in Katz, supra, to justify a failure to act in response to a Summons, or to require additional action by the author of a Summons, than the bare knowledge that issues are in dispute.

There were no ongoing settlement negotiations at the time of, nor were there any prior to, the filing of the Complaint in the instant case. There was no active communication between the parties. The facts are that Plaintiff caused Defendant to be served with a Summons and Complaint which stated the allegations of the Plaintiff against Defendant. The Summons clearly stated that an answer was required within twenty (20) days of service of the Summons upon Defendant, as required by the Utah Rules of Civil Procedure, and further clearly stated what the result of a failure to respond within the indicated time frame would be: the entry of default judgment for the relief demanded in the Complaint. Those facts lay the responsibility for action squarely upon the Appellant, not upon Plaintiff's counsel.

Nothing in the law, nor in supposed expectations concerning "common professional courtesy", requires Plaintiff's counsel to act in a manner or course contrary to that taken. Appellant admits it was represented by counsel upon whom personal service was accomplished, it was not incumbent upon Plaintiff's counsel to advise Defendant, particularly when the Summons clearly stated the intentions of the Plaintiff.

F. RESPONDENT SHOULD BE AWARDED HIS COSTS ON APPEAL.

The instant case is appropriate for an award of attorney's fees and costs on appeal to Plaintiff-Respondent, consistent with the determination of the Court of Appeals in O'Brien v. Rush, 744 P2d 306 (Utah Ct. App 1987), wherein the Court applied Rule 33(a), Rules of Appellate Procedure, to award attorney's fees to the Respondent based upon an appeal taken under the Rules which was frivolous or for the purpose of delay. Such is clearly the case in this action. The law governing the matter is well settled, no abuse by the trial court has been shown, and the facts and evidence justifying the actions of the trial court are undisputed.

The appeal is frivolous and intended only to delay Respondent's recovery.

CONCLUSION

Based upon the foregoing, the Respondent, Jerry Lawley, respectfully requests that the Court of Appeals uphold the refusal of the court below to set aside the Default of Defendant, and affirm the Judgment awarded Plaintiff. Additionally, Respondent requests that he be awarded his costs on appeal, including reasonable attorney's fees, and such other relief as the court deems proper.

DATED this _____ day of February, 1988.

Lloyd C. Eldredge
Attorney for Respondent

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand-delivered a true and correct copy of the above and foregoing Brief of Respondent, Jerry Lawley, to the following: Paul H. Van Dyke, Elggren & Van Dyke, Attorney for Appellant, 444 South State, Suite 201, Salt Lake City, Utah 84111, this _____ day of February, 1988.

Lloyd C. Eldredge
Attorney for Respondent

research under 28 USCS § 1920 or Rule 54(d),
Federal Rules of Civil Procedure, 80 A.L.R.
Fed. 168.

Key Numbers. — Appeal and Error ⇐ 24 to
135; Costs ⇐ 78 et seq., 195 et seq., 221 et seq.,
Judgment ⇐ 1.

Rule 55. Default.

(a) Default.

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

(b) Judgment. Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) **Setting aside default.** For 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).

(d) **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment against the state or officer or agency thereof.** No judgment by default shall be entered against the State of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(Amended, effective Sept. 4, 1985.)

Rule 60. Relief from Judgment or Order

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his 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) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.