

2008

Kim Fratto v. Dr. Thomas M. McNeilis; Dr. A. Scott Devous; Hensley Family Medical Center, Inc.; Linda R. Hensley; Renette Hensley; and John Does 1-5 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KIM FRATTO,

Petitioner/Appellee,

vs.

DR. THOMAS M. MCNEILIS; FR. A. SCOTT
DEVOUS; HENSLEY FAMILY MEDICAL
CENTER, INC.; LINDA R. HENSLEY;
RENETTE HENSLEY; AND JOHN DOES 1
THROUGH V

Respondents/Appellants.

Case Nos.: 20080473-CA

Third District Court No.: 050919567

Priority

**REPLY BRIEF OF APPELLANTS LINDA R. HENSLEY AND
HENSLEY FAMILY MEDICAL CENTER, INC.**

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ARGUMENT

I. THE MOTION TO SET ASIDE SHOULD HAVE BEEN GRANTED.

The Appellee goes to great length to address whether the trial court had discretion to strike the pleadings and enter the default. This issue, however, is not before the court on appeal. Appellee's Point I and the facts associated therewith, are essentially irrelevant to the appeal.

At issue, is whether the failure to set aside the default judgment was an abuse of discretion.¹ This distinction is important because the court's discretion in entering a default differs from the discretion it has in rejecting a Motion to Set Aside. Utah courts have explained that a court's discretion to deny a motion to set aside is more limited than its discretion to grant it, particularly where the movant's case has not been fully

¹ Plaintiff asserts that the Motion to Set Aside Default was not ruled upon "because it was withdrawn by counsel." (Appellee's Brief, pg. 5). This is incorrect. In fact, the Defendant filed two motions for a new trial and to set aside the default, which were supported by one memoranda and affidavit. (Rec. 661-690). The Motion to Set Aside specifically referenced the memorandum and affidavit as support for the motion (Rec. 661). The court issued a minute entry ruling on April 28, 2008, specifically referencing and rejecting the legal conclusions of the "affidavit" that had been submitted in support of the Motion to Set Aside. The court's ruling also makes clear that it will not reconsider its decision of "striking [the] answer and entering judgment by default." On the same date, the court signed and entered an order that had been filed by the Plaintiff, which made specific reference to the "memoranda" filed by the parties. (Rec. 709-710). Both the ruling and the order referenced the very bases for the Motion to Set Aside – the affidavit and memorandum. However, in order to avoid any confusion regarding the final appealability of the case, the Defendant filed a Notice to the Court. In that Notice, the Defendant informed the court that it deemed the April 28, 2008 minute entry ruling and order as a "denial of her Third Motion to Set Aside." (Rec. 711-712).

considered. Lund v Brown, 11 P.3d 277 (Utah 2000)(citing 11 Wright et al., Federal Practice and Procedure § 2857, at 257-58 (2d ed. 1995)(stating, “There is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits. Based on the remedial nature of Rule 60(b), the discretion of the district court to deny a motion for relief is limited.”)).

Under Utah law, a default judgment is not favored. The Utah courts have made clear that parties should have their cases heard on the merits, rather than having them determined through a default judgment. Id.; Interstate Excavating Inc., v Agla Dev. Corp., 611 P.2d 369, 371(Utah 1980). Likewise, under Utah law, default judgments should be set aside if there is “reasonable justification” excusing the entry of the default judgment. Id. Further, the mere presence of doubt as to the appropriateness of the default judgment is sufficient to warrant the setting aside of the default judgment. Id.

Appellee repeatedly argues that the default judgment should stand because the Appellant did not file a timely challenge to the default judgment. However, to make such an argument, the Appellee wrongly relies on the date of the default, rather than the date of the default judgment. It is clear under Rule 59 and Rule 60, that challenging motions must be filed within time periods that run from the entry of a the “judgment,” not from the entry of the default. The Appellant filed her Motions to Set Aside and For a New Trial on February 19, 2008, 9 days from the date the “judgment” was entered into the registry. The Motion, therefore, was timely filed.

In addition to filing a timely challenging motion, the Appellant here was a pro se litigant. As such, she should have been treated leniently, and the court should not have sanctioned her for her procedural mis-step. See Lundahl v. Quinn, 67 P.3d 1000, 1002 (Utah 2003). This is particularly true where the Appellant is newly pro se. The Appellant had only been acting pro se since August 2007 before being sanctioned in September 2007. Further, the discovery failures that occurred prior to the Appellant becoming a pro se litigant were clearly the fault of the prior counsel, not the Appellant. Even if the Appellant had instructed her attorney not to respond to discovery, as repeatedly alleged by the Appellee, there is nothing in the record to indicate that prior counsel ever informed Appellant that this was not permitted. In fact, the evidence shows quite the opposite. Prior counsel believed that such a failure to respond to discovery was appropriate. A non-lawyer litigant, like the Appellant, cannot be expected to know what even her counsel does not know. There was “reasonable justification” sufficient to at least establish “doubt about whether a default should be set aside.” Id.

In any event, the fact remains that the trial court imposed sanctions on a pro se litigant after only a few weeks of pro se litigation experience. Under the circumstances, once the Appellant obtained new counsel and filed her challenging motions, there was no reason that the default judgment should not have been set aside and the matter heard on the merits.

II. THE DISTRICT COURT VIOLATED UTAH LAW.

The Appellee does not dispute that the trial court relied upon evidence prohibited by statute. Instead, Appellee argues that the court should not enforce the statute because no formal objection was made at the evidentiary hearing. The enforcement of a statute, however, is not dependent on the formal objection of a party. Statutes are not unilaterally waived by a party's inaction. Statutes are to be applied as written. The trial court violated the statute by relying on inadmissible testimony when it issued its judgment.

Furthermore, the trial court's reliance on the inadmissible evidence was not known until the trial court actually issued its ruling in which it specifically cited the inadmissible evidence as a basis for the judgment. Contrary to the Plaintiff's inference, the Defendants are not required to submit a post-order notice to inform the district court that its order is based on error. That is what an appeal is for. The district court's violation of a Utah statute when it issued its order is an entirely appropriate subject for appeal.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO RELY ON EXPERT TESTIMONY.

The Plaintiff argues that an expert witness is not necessary in a defaulted medical malpractice case. Plaintiff, however, fails to support the argument with any case law. It is established Utah law that "to prove medical malpractice, a plaintiff must establish '(1) the standard of care by which the (physician's) conduct is to be measured, (2) breach of

that standard by the (physician),’ (3) injury that was proximately caused by the physician's negligence, and (4) damages. Jensen v IHC Hospitals, Inc., 82 P.3d 1076, 1095-1096 (Utah 2003). Further, “the plaintiff is required to prove the standard of care through an expert witness,” and “damages must likewise be based upon expert testimony.” Sohm v. Dixie Eye Center, 166 P.3d 614 (Utah App. 2007). Again, Plaintiff cites no law to suggest that these safeguards are inapplicable in default cases. Whether defaulted or not, “[w]ithout the required expert medical opinion linking the injury to the necessity of the [medical treatment], a jury would simply be speculating about a linkage that is beyond its knowledge and experience.” Beard v. K-Mart Corp., 12 P.3d 1215, 1021 (Utah App. 2000). The Plaintiff’s argument that the mere existence of a default makes baseless speculation appropriate is not supported by law. Even in defaulted cases, the court’s judgment must be based on appropriate evidence.

The Appellee failed to provide any expert evidence upon which the court could find that the standard of care had been breached, and consequently, the damages awarded were purely speculative. By issuing its order in the complete absence of required expert evidence, the district court abused its discretion and committed error.

CONCLUSION

This matter has never been heard on the merits. The court entered an order striking the Answer and entering default against the Appellant at a time the Appellant was representing herself pro-se for the first time during litigation. Challenging motions were timely filed. The Appellant also retained counsel. Considering the circumstances,


the appropriateness of the default judgment was doubtful. It should have been set aside to allow the matter to be heard on the merits. The Defendants' sanction was to extreme under the circumstances.

The court also erred in basing its judgment upon testimony that the Appellant immediately admitted liability for the alleged injury. Reliance on such testimony directly contradicts UCA 78-14-18.

Finally, the court incorrectly entered judgment without expert testimony as required under Utah law. There was no evidence upon which the court could find that the standard of care had been breached, and no evidence that would make damages anything other than pure speculation.

DATED THIS 5 day of ^{Dec} November 2008.

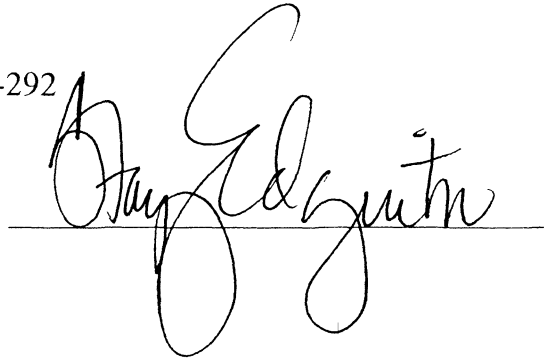
PLANT, CHRISTENSEN & KANELL, PC


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CERTIFICATE OF MAILING

I hereby certify that on the 5th day of December, 2008, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was mailed to the following:

Mel S. Martin
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A handwritten signature in black ink, appearing to read "Mel S. Martin", is written over a horizontal line.