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George W. Flick v. Glen Van Tassell and Van's Service, INC., a utah Corporation : Reply Brief

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY
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GEORGE W. FLICK,
Plaintiff and Respondent,
vs.
GLEN VAN TASSELL and VAN'S
SERVICE, INC., a Utah corporation,
Defendants and Appellants.

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Case No.
14154

APPELLANT'S SUPPLEMENTAL REPLY BRIEF
AND AFFIDAVITS

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

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TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE KIND OF CASE	2
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	14
RULE 60(b) (7) OF THE UTAH RULES OF CIVIL PROCEDURE REQUIRES THE SETTING ASIDE OF A JUDGMENT WHEN SUCH JUDGMENT WAS OBTAINED BY THE GROSS NEGLECT AND NEGLIGENCE OF THE ATTORNEYS REPRESENTING THE INJURED PARTY.	14
CONCLUSION	27
APPENDIX	29
AFFIDAVIT OF ROBERT SYKES	
AFFIDAVIT OF GLEN VAN TASSELL	
AFFIDAVIT OF ERMA VAN TASSELL	
AFFIDAVIT OF JOY VAN TASSELL	

TABLE OF AUTHORITIES

CASES

<u>Coeber v. Rath</u> , 435 P.2d 228 (Colo. 1967)	19
<u>Dudley v. Keller</u> , 521 P.2d 175 (Colo. 1974)	18
<u>King v. Mordowanec</u> , 46 F.R.D. 474 (D.R.I. 1969)	16
<u>Steuart v. Matthews</u> , 329 F.2d 234 (D.C. Cir. 1964)	17
<u>Transport Pool Division v. Joe Jones Truck Company</u> , 319 F.Supp. 1308 (D. Geo. 1970)	17
<u>Treadaway v. Meador</u> , 436 P.2d 902 (Ariz. 1968)	18

STATUTES

Rule 60(b)(7), Utah Rules of Civil Procedure	14
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

GEORGE W. FLICK,	*	
Plaintiff and Respondent,	*	Case No.
vs.	*	14154
GLEN VAN TASSELL and VAN'S SERVICE, INC., a Utah corporation,	*	
Defendants and Appellants.	*	

SUPPLEMENTAL REPLY BRIEF

INTRODUCTION

This Supplemental Reply Brief is filed pursuant to the Order of Chief Justice Henriod dated February 6, 1976, permitting appellants to file a brief going beyond the issues raised by the appellants' brief in chief and also allowing supplemental Affidavits. This Supplemental Brief and accompanying Affidavits are prepared for the purpose of setting forth appellants' contentions that they were denied adequate counsel during the trial and initial appeal of this matter because of the gross negligence of the two attorneys representing appellants. It is further contended by appellants that this conduct has been concealed from the record of this case by these attorneys and it is therefore necessary to supplement the record in order for the truth to be known.

STATEMENT OF THE KIND OF CASE

This was originally an action brought against the defendants by the plaintiff for the return of certain sums of money advanced to defendants and for damages sustained as an alleged result of violation of Utah securities laws.

DISPOSITION IN LOWER COURT

The District Court, Judge Ronald C. Hyde, granted default judgment to plaintiff on March 19, 1974 in the amount of \$263,561.00. (R. 178). A Motion to Set Aside the Default was made by appellants on April 1, 1975 (R. 180-182) and the trial court denied this Motion on May 13, 1975 (R. 217) and entered its Order on June 3, 1975. (R. 230). The Notice of Appeal in this case was filed on June 11, 1975 and erroneously referred to the Order as a "Motion for New Trial" and erroneously referred to the date as May 13 1975 rather than June 3, 1975.

RELIEF SOUGHT ON APPEAL

Defendants-appellants seek an Order setting aside the default entered against defendants on March 26, 1975 or, in the alternative, remand of this case to the trial court for further proceedings as to the grounds for setting aside the judgment.

STATEMENT OF FACTS

Appellants' new counsel in preparing this Supplemental Brief believe that the facts relating to the original lawsuit are basically immaterial to the issue on this appeal except for the purpose of showing that a valid defense does exist and that

should the case be remanded for a new trial it would not be a waste of judicial time. These defenses are discussed in appellants' brief in chief at pages 2, 3 and 8. In addition, it should be noted that a Counterclaim was filed by defendant Glen Van Tassell against plaintiff which has never been decided by the trial court in any of the proceedings. (R. 116).

The main concern of appellants' new counsel is the conduct and gross negligence of appellants' former counsel during the discovery period, during trial, post-trial motions, and the initial appeal to this Court.

In December of 1973 defendant Glen Van Tassell was served with the Complaint. (Affidavit of Glen Van Tassell, ¶¶ 1 and 2 -- Hereinafter referred to as Glen Affidavit --; R. 1-3). Immediately upon receipt of this pleading defendant contacted attorney-at-law Boyd Fullmer to represent him.

During this period of time defendant Van Tassell spent most of his days in Bancroft, Idaho in the Bancroft, Idaho vicinity, but was able to communicate with his Bountiful residence by telephone. He was within three to four hours of traveling time between each location (Glen Affidavit ¶3). While in Idaho his wife informed him by telephone that she had been served with papers from a Constable and defendant Van Tassell instructed her to immediately deliver these papers to Mr. Fullmer. (Glen Affidavit ¶4; Affidavit of Erma Van Tassell ¶3 --Hereinafter

referred to as Erma Affidavit.) Defendant was never personally aware of any date other than February 4, 1974 for the taking of his deposition, at which time he attended. (Glen Affidavit ¶4.) In fact, however, notices of depositions were given on January 21, 1974 and January 11, 1974 (R. 11, 13) and sanctions were requested by plaintiff's attorney on January 23, 1974 for defendant's failure to attend. (R. 18).

At the deposition of February 4th Mr. Fullmer informed plaintiff's counsel that he would turn over to plaintiff's counsel certain mining contracts. Defendant had previously given all copies of such contract to Mr. Fullmer and had no copies in his possession at that time. (Glen Affidavit ¶5.) Defendant was unaware that Mr. Fullmer had failed to turn over such contracts as described in the Affidavit of plaintiff's attorney dated June 24, 1974. (R. 34).

Defendant did not request Mr. Fullmer to represent to the court that an extension was necessary because of defendant's cattle business (R. 24) since it was always inconvenient for defendant to leave his ranch at all times, since only he and his son were running the operation. (Glen Affidavit, ¶¶ 3 and 4).

On June 24, 1974 plaintiff submitted his "First Set of Interrogatories to Defendant Glen Van Tassell". These Interrogatories are critical to this appeal since the failure to answer them was one basis for the default entered against defendants. Defendant was never informed of the existence of these

Interrogatories until the early part of March, 1975. He was never requested to supply any information to answer these Interrogatories. (Glen Affidavit, ¶¶ 6 and 20).

Defendant was never informed that an Order on July 15, 1974 issued by Judge Swan compelled him to produce certain financial records, contracts, and tax returns and that an award of \$100.00 attorney's fee was entered. (R. 50-51).

Defendant and his wife left for a world tour in July and August of 1974. Fullmer, however, knew about this trip for three months prior to their leaving and defendants consulted Fullmer and were told that there was nothing for them to do and that they should leave as scheduled. (Glen Affidavit, ¶12). This is contrary to Fullmer's Affidavit, who used their trip as an excuse for failing to produce. (R. 55).

Defendant Van Tassell received no notification by Mr. Fullmer that Judge Gould on September 30, 1974 had entered an Order, by stipulation, that defendant was to answer the June 24th Interrogatories not later than October 20, 1974. (R. 74-75; Glen Affidavit, ¶9).

On October 17, 1974 plaintiff's attorney submitted Request for Production and Request for Admission to Mr. Fullmer. Defendant was not informed that these requests were made. Defendant did not authorize Mr. Fullmer to object to these documents because of defendant's presence in Idaho and would have been willing to come to Utah upon Mr. Fullmer's request that the documents be supplied and the questions be answered. (Glen

Affidavit, ¶¶10 and 11). Once again, however, Fullmer represented that the distance justified delay. (R. 94).

Defendant was never informed by Mr. Fullmer that plaintiff's attorney was moving again for sanctions for failure to answer the June 24th Interrogatories, by requesting a default judgment be entered and by requesting that \$800.00 attorney's fees be awarded. (R. 102; Glen Affidavit, ¶12). Likewise, defendant was not informed by Mr. Fullmer that a subsequent Order by Judge Swan on December 18, 1974 ordered that sanctions be imposed if defendant failed to answer the Interrogatories, Admissions and produce the documents requested in October. (R. 120; Glen Affidavit ¶14).

During this period defendant requested Fullmer to file a claim against plaintiff for the \$200,000.00 remaining to be paid to Van Tassell on the mining claims, for half of the amount necessary to perform the annual assessment work, and for defamation of defendant's character by plaintiff. Fullmer informed defendant that a Counterclaim had been filed concerning all of these claims. (Glen Affidavit ¶13). In fact, however, only the libel claim was filed against plaintiff. (R. 116-117).

Defendant never received or was notified that plaintiff's counsel again made a Motion to Strike defendant's Answer or for failing to respond to the discovery as ordered by the Court (R. 143; Glen Affidavit, ¶15).

Plaintiff's counsel sent to Fullmer and to defendant a "Notice to Appoint Counsel". Defendant, however, did not

personally receive this notice since it was sent to his residence in Bountiful while he was in Idaho. In a telephone conversation between defendant in Idaho and his wife in Utah, defendant advised her to take this document to Mr. Fullmer. It is probable the letter was not even opened. At that time it is believed that defendant's daughter personally delivered the document to Mr. Fullmer. (R. 149; Glen Affidavit, ¶16; Erma Affidavit, ¶¶ 4, 5, 6, 7 and 8; Affidavit of Joy Van Tassell, ¶¶ 2 and 3).

During the middle or latter part of February Mr. Fullmer informed defendant that Fullmer did not have sufficient time to devote to the trial of this case which was supposed to occur in the latter part of March. He suggested that another attorney be obtained. Defendant agreed to get another attorney and Fullmer recommended Mr. Reed Tuft. (Glen Affidavit, ¶19).

In the latter part of February or early part of March a meeting was held with Fullmer and Tuft at which time Tuft agreed to take the case if he could be paid at least \$2,000.00. Defendant agreed to this and subsequently the file was delivered to Tuft including the Interrogatories, Admissions, and Request for Production of Documents. It was during this time that defendant was shown these documents for the first time by Mr. Fullmer and told by Mr. Tuft not to answer them since a continuance would be granted by the trial court. (Glen Affidavit, ¶¶ 19 and 20).

On March 4, 1975 Judge Thornley Swan denied Fullmer's Motion to continue the trial for the purpose of obtaining new counsel, and set a firm date. (R. 151, 153). Defendant was not informed by Fullmer that the court granted until March 14th the time to respond to the Request for Admissions filed in October or that the failure to respond would deem such request admitted. (R. 153; Glen Affidavit ¶21).

On March 5, 1975 Fullmer made a Motion for Withdrawal of Attorney. (R. 152). On March 12, 1975 plaintiff's attorney again sent notice to Fullmer that he would move for a default on March 19th for failure to respond to the Interrogatories, Admissions, and produce documents. Defendant was never notified of this notice. (Glen Affidavit, ¶22).

Between the early part of March and March 19th defendant repeatedly contacted both Mr. Tuft and Mr. Fullmer. He was told by Fullmer to do whatever Tuft requested. Tuft informed him that it would be unnecessary for him to attend the March 19th hearing and told him to tell anyone whol asked that it was his understanding it was a pretrail. On several occasions defendant went to Tuft's office to assist in the trial, but was only asked on each occasion whether he had more money for Tuft. Finally, he was able to raise a total of \$1,700.00 which was paid to Tuft. (Glen Affidavit ¶23).

On or about March 18th defendant contacted Mr. Fullmer and asked him if he needed to attend the hearing on the 19th.

Fullmer said he should not attend if Tuft had told him not to attend. Fullmer stated it was his understanding, having talked with Tuft, that defendant was not to come to the proceeding. Defendant also called Tuft, who again told him not to worry about the March 19th hearing and to be sure to say that it was his understanding that the March 19th proceeding was a pretrial if anyone asked. Defendant did not know the distinction between a pretrial and trial. Tuft told defendant that he would take care of anything that happened and would let defendant know after the hearing. Defendant presumed that Tuft would appear personally at the hearing. (Glen Affidavit, ¶24).

On March 17, 1975 Tuft mailed a copy of a Petition to Appear as Counsel to Fullmer, Findlay and the Court, but made no other personal attempt to gain appearance. (R. 156). It was filed in the Clerk's office on March 19, 1975 -- the day of trial.

It was evidently the purpose of Tuft to prevent the trial court from setting a continuance of one or two weeks. He reasoned that by carefully planning his appearance with Fullmer's withdrawal that Van Tassell would be left with no counsel and that the Court would, therefore, grant a long continuance, (Affidavit of Robert Sykes ¶5 -- hereinafter referred to as Sykes Affidavit). Tuft was surprised when a default rather than a continuance was entered (Sykes Affidavit, ¶7).

On March 19th, the day of the trial, defendant was at his Bountiful residence and was available for trial had he been notified by his counsel to attend. (Glen Affidavit, ¶24). On March 19th trial was commenced before the Honorable Ronald C. Hyde with plaintiff being represented by Joseph Henriod and Bruce Findlay, and defendant not being present but with an appearance by Boyd Fullmer. (R. 159). At this hearing Mr. Fullmer represented to the Court the following:

"I talked to my client as late as Thursday. The answers to these requests for admissions and interrogatories and the production of documents were due Friday, last Friday, and he was aware of that as late as last Thursday without my prompting him; and I advised him that he had to have those in. I talked to him as late as yesterday and told him that if the court allowed me to withdraw this morning I would withdraw and not further participate in the case. I think he's fully aware," (P. 2, Mar. 19, 1975 hearing.)

When asked if the defendant was personally aware of the setting Fullmer replied:

"Yes. Mr. Tuft is and Mr. Van Tassell is. They are both aware of this. Mr. Findlay and I have both received the notice of Mr. Tuft to enter his appearance as counsel for the defendant. . . . I do so desire to withdraw. I don't have the file. I don't feel that on memory I should attempt to try this case, and I feel that whatever I could do at this moment, with the file in the hands of the other counsel, would be a disservice to the other counsel." (P. 3, Mar. 19, 1975 hearing.)

Upon Mr. Fullmer's representation he was allowed to withdraw from the case and the trial proceeded in the absence of any attorneys or opposition. Evidence was then offered by the

plaintiff and a judgment was granted as prayed for in the amount of \$265,561.55 plus interest of 6%, (R. 159). Findings of Fact and Conclusions of Law together with the Judgment were subsequently entered by the trial court. (R. 160-178).

On the day following the trial defendant called Tuft and asked him what had developed. Tuft informed him that the hearing was under advisement and that the defendant should call him in three or four days. Defendant was unclear as to what was under advisement but Tuft would be no more specific. (Glen Affidavit ¶25). Several days later defendant called Boyd Fullmer who informed him that a judgment had been entered upon the day of trial. Defendant was understandably upset and immediately called Tuft, who confirmed that the judgment had been entered but reassured defendant that it would be set aside, and told defendant not to worry, that Tuft would take care of everything. Tuft informed defendant that he would have to send him more money, however, at that time. (Glen Affidavit, ¶26).

On April 1st defendant went to the offices of Reed Tuft to sign a document entitled "Motion to Met Aside Default Judgment". (R. 180-182). On this occasion defendant asked Tuft why it was stated that his residence was in Idaho and Tuft explained that residence was a technicality and that it was proper to say this. He told Tuft that it was rare he could not be reached by telephone, but Tuft said not to be concerned about it.

(Glen Affidavit, ¶28). He also informed Tuft that he did not consider a communication problem existed with Fullmer or that there was any tension as stated in the document. Tuft informed defendant that this was Fullmer's view and Tuft's view, and that defendant should not worry about this either. (Glen Affidavit, ¶29). Defendant was then told to sign this document, but did not understand what effect the signature could be given. (Glen Affidavit, ¶31). At this time he stated to Tuft and Sykes that he had not been told by anyone to be in Court on March 19th. (Sykes Affidavit, ¶7).

Around April 23rd defendant was informed by Tuft to go to the Davis County Courthouse where a hearing would be held to set aside the Judgment. He informed defendant not to worry, that everything would be taken care of. (Glen Affidavit, ¶32).

Despite the suggestions of Sykes, a lawyer associated with Tuft and working on the case, Tuft instructed John Marshall to handle the argument. Marshall was quickly briefed by Sykes shortly before arriving at the courthouse. (Sykes Affidavit, ¶¶8 and 9).

On April 24th defendant met Tuft, John Marshall, Tuft's partner, and Robert Sykes, an associate of Tuft and Marshall, at the courthouse doors. At this time Marshall stated that he was not prepared to adequately handle it. Tuft told Marshall that it would work better with Tuft not present and that Marshall should do the best he could. Tuft told defendant, as they were proceeding into the courthouse, to be sure to mention that the March

19th proceeding was a pretrial. (Glen Affidavit, ¶32).

A hearing was held by Judge Hyde at this time on the Motion to Set Aside the Judgment with defendant Van Tassell and Boyd Fullmer both testifying. Mr. Marshall asked Van Tassell certain questions designed to show confusion on the part of defendant. Defendant testified throughout, however, that he was told that he did not need to come for trial, and that he did not know the difference between a pretrial and a trial. (P. 13 of April 24 hearing). No testimony was taken to the reasons for delaying the discovery, or as to the conversations and conduct between Mr. Tuft and defendant. In the opinion of Mr. Sykes, because of Mr. Marshall's ignorance of the facts and law he was unable to properly show the conduct of defendant and his attorney as it related to discovery delays, and failed to attend trial. (Sykes Affidavit, ¶¶ 10 and 11). He did not believe that the Court was fully advised as to what had actually occurred. (Sykes Affidavit, ¶11).

On May 13, 1975 Judge Hyde issued a Memorandum Decision denying the Motion to Vacate and an Order was entered accordingly on June 3, 1975. (R. 216-217, p. 230).

Shortly thereafter Tuft informed defendant that he would not represent him any further unless defendant would give him a \$25,000.00 mortgage on defendant's property. When defendant refused, Tuft informed him that he should seek other counsel. (Glen Affidavit, ¶34). Thereafter, defendant contacted Mr.

Fullmer, who said he would represent him on appeal. (Glen Affidavit, p. 35). Defendant paid to Fullmer approximately \$5,000.00 to handle this litigation from its inception to the filing of the appellants' brief. (Glen Affidavit, ¶34).

Since March 19, 1975 there have been a total of less than \$5,000.00 in judgments outstanding against defendants, and the amount of potential awards now in litigation is \$10,000, even assuming maximum recoveries. Defendants' present assets greatly exceed these amounts. (Glen Affidavit, ¶).

The law firm of Worsley, Snow & Christensen was retained after the appellee's brief had been submitted to the Court and application was made to the Court for permission to file this Supplemental Brief and Affidavit.

ARGUMENT

POINT I

Rule 60(b)(7) of the Utah Rules of Civil Procedure requires the setting aside of a judgment when such judgment was obtained by the gross neglect and negligence of the attorneys representing the injured party.

Appellants submit that this case is a classic of the cover-up schemes so predominant with the Watergate investigation. This case involves an instance where defendant Van Tassell hired two separate attorneys who he believed were competent and would do whatever necessary to protect his interests but who neglected and purposely conducted themselves against Van Tassell. These

same attorneys were the ones who established the record in the lower court and who carefully kept the facts from becoming known to the trial court as to the grounds why the default judgment should be set aside. For these reasons, this is an extraordinary case which requires this Court to correct an intollerable injustice.

Appellants would submit that the trial court was correct in its finding that the evidence submitted to it did not justify a conclusion of "excusable neglect" as required by Subsection 1 of Rule 60(b). The facts in this case clearly show that the neglect to answer the Interrogatories, Admissions, and to produce the documents was in no way "excusable." Likewise, the failure of defendant or counsel to be at the March 19 trial was also not "excusable." Thus, the failure of discovery and the failure to attend trial constituted complete disregard for the judicial process and should not be tollerated by any court. Appellants state for the record that they believe both the trial court and the attorneys for Respondent were more than fair in giving Appellants every opportunity to remedy the discovery failure. The record shows that the Court gave Appellants' counsel numerous opportunities to comply with the requests of Respondent's counsel, but that in each case the opportunities were ignored. The persons who constituted a threat to the judicial process were not the Appellants in their individual or corporate

capacity but were rather the attorneys representing Appellants. These individuals completely ignored their duty to their client and forgot their function as officers of the judicial system.

It is well settled that a client is entitled to relief from the gross neglect and negligence of his attorneys when no showing of prejudicial harm can be made to third parties. Rule 60(b)(7) states the following:

"Upon 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 (7) any other reason justifying relief from the operation of the judgment."

Subdivision 7 is identical to subdivision 6 of the Federal Rules of Civil Procedure and is identical to other rules of surrounding states. For this reason, references made in the following cases may be to different subdivision numbers but they are referring to the exact language contained in subdivision 7 of the Utah Rules.

In King v. Mordowanec, 46 F.R.D. 474 (D. R. I. 1969) the Court granted a motion made by plaintiff's new attorney some one and one-half years after an action had been dismissed with prejudice on the grounds that plaintiff's former attorney committed such gross neglect of plaintiff's case that justice required the reinstatement of the claim. The Court stated:

"[G]ross neglect of a lawyer in failing to prosecute his client's case is beyond Rule 60(b)(1) and, hence, within Rule 60(b)(6), as long as the client is unaware of and does not share in his

lawyer's negligence."

Because the plaintiff in the King case had not been notified of his attorney's neglect of his case until it was discovered subsequently that it had been dismissed, the District Court stated:

"It would be the practice of this Court to notify clients, where possible, of their lawyer's dilatoriness in cases such as this and to use the fine as a means of enforcing the Court's rule rather than to use the dismissal as a means of visiting upon the often innocent client the sins of his attorney." Id at 478-579.

In Transport Pool Division v. Joe Jones Truck Company, 319 F. Supp. 1308 (D. Geo. 1970) the Court set aside a default judgment when it was obtained because of the gross neglect of the defendant's counsel. The Court stated:

"[T]he reason and answer was not filed in the first place and the reason the motion was not filed in the second was not the neglect of Jones but the gross and inexcusable neglect of his counsel. At least one other court has held that dismissal resulting from counsel's inexcusable neglect does not amount to a dismissal for plaintiff's excusable neglect and thus is not within the one year limit of Rule 60(b). . . . Here the defendant was an uneducated layman. He does not read well and even after patient explanation has difficulty comprehending the involutions of a legal proceeding. . . . Certainly justice requires that in the circumstances of this case this default judgment be set aside." Id. at 1311-1312

In Steuart v. Matthews, 329 F.2d 234 (D. C. Cir. 1964) the Circuit Court upheld a lower court's decision allowing the reinstatement of a complaint after it had been dismissed for over two years with prejudice. The Court in this case

stated as to the conduct of plaintiff's attorney:

"But the District Court did not act on the theory on excusable neglect. On the contrary, it expressly applied the 'catch-all rule' 60(b)(6). Counsel's neglect was not excusable and the Court, by clear implication, so found. The judge said he felt 'that in this particular case the client, plaintiff, a person unfamiliar with court procedures, should not be penalized by the action of his counsel, who admittedly did not attend to the matter when he received notice of the contemplated dismissal.' Id. at 235.

State Courts have also granted relief from the inexcusable neglect and negligence of an attorney. In Treadaway v. Meador, 436 P.2d 902 (Ariz. 1968) the court held that the trial court abused its discretion in failing to set aside a judgment of dismissal entered for failure of the plaintiffs to answer Interrogatories. The Supreme Court found that the plaintiff had engaged an attorney and had fully attempted to comply with the Court's directions to answer the interrogatories but that the attorney himself failed to answer them. In addition, the attorney was subsequently disbarred for his conduct in this and similar cases.

In Dudley v. Keller, 521 P.2d 175 (Colo. 1974) the Court upheld a lower court's determination that a default judgment of \$50,000 should be set aside because of the inexcusable neglect on the part of the defendant's former counsel. Counsel in this case failed to answer a Complaint and failed to attend a hearing at which time default judgment was entered. The Court stated:

"Gross negligence on the part of counsel resulting in a default judgment is considered excusable neglect on the part of the client entitling him to have the judgment set aside."

Finally, in Coeber v. Rath, 435 P.2d 228 (Colo. 1967) the Supreme Court of Colorado reversed a lower court's refusal to set aside a default judgment granted upon the failure to answer interrogatories. This case is very similar to the case above. The representations made to the client in that case were similar to those made here. The Court quoted the testimony of the client in the Coeber case:

"And Mr. Morgan went on to say, 'Don't worry about this.' He said, 'I will go to court to protect your interests. . . . And at the time I had no idea what interrogatories and pleadings were. . . and he said that if he needed anything he would get in touch with us. . . . I contacted Mr. Morgan after that. I don't remember how soon after that, just to ask him if he had gotten these papers (the interrogatories) and he said that he had. That was the extent of my conversation with Mr. Morgan. And I, of course, assumed he was taking care of it." Id. 230.

And commenting upon the facts of this case as related to the Rule 60(b) motion the court stated:

"In the instant case the defendants had alleged a meritorious defense; the case was at issue before the entry of the default judgment. From the foregoing factual recitation, it is clear that defendant's counsel was negligent. That neglect was the primary cause for the defendants' failure to answer the interrogatories. Counsel neglect was inexcusable but, under the circumstances here, this neglect should not be imputed to the defendants."

The Trial Court, in the Coeber case while denying the relief to the clients submitted a letter to the Bar Association

requesting that an investigation be conducted of the attorney's conduct. The Supreme Court in commenting upon this letter said:

"It is obvious from this letter that although the Court recognized the gross neglect of counsel, yet, by its very action, it punished the defendants, whose only dereliction was the misplacing of confidence in their attorney. There is nothing to indicate that setting aside the default and ordering a trial on the merits would unwarrantedly prejudice the plaintiffs. . ." Id. 232

Thus, the rules clearly provide for the setting aside of default judgments when such judgments were obtained by the gross neglect and negligence of the defendant's counsel. Examining the record in this case reveals the following:

1. That sanctions were brought against appellants for failure to attend two depositions in January of 1974 when Mr. Fullmer failed to inform defendant, residing principally in Idaho, of the dates of said depositions. As in the Coeber case, Van Tassell automatically sent all papers and documents to his attorney, Boyd Fullmer, with the presumption that Fullmer would advise him what to do. This presumption was obviously incorrect.

2. As early as July 15, 1974, an Order was entered by Judge Swan requiring the production of certain documents and a fee of \$100.00 to be paid to plaintiff's attorney. The rest of these documents were retained by Boyd Fullmer and out of the control of Van Tassell. Van Tassell was never advised of this Order nor of the \$100.00 fine.

3. On June 24, 1974, a set of interrogatories were served upon Mr. Fullmer. These interrogatories were never answered. On September 30 an Order was entered to answer the interrogatories or sanctions would be imposed. A similar Order was made on December 18, 1974, and March 5, 1975, and a motion was made by Mr. Findley on March 12 to enter default if discovery was not completed. During this time, Mr. Fullmer used the excuse of defendant's presence in Idaho and his unavailability during a world tour even though defendant was always reachable by telephone and within four hours of Salt Lake and even though Fullmer had three months' notice of the world tour trip.

4. On October 17, 1974, plaintiff served Request for Admissions and Request for Production of Documents upon Mr. Fullmer. None of these admissions or documents were ever answered or produced. Van Tassell was not informed of these admissions or requests until March of 1975 and then was told not to worry about them. He was not told about the December 18 Order requiring that the Admissions be answered, nor the March 4 Order that all Admissions would be deemed admitted unless answered by March 14.

5. Within approximately 30 days before the trial date, Fullmer informed Van Tassell that Fullmer did not have time to represent him in the trial. Vantassal agreed to obtain Reed Tuft and the file was turned over to Mr. Tuft.

Mr. Tuft was made aware of these discovery requests but told Mr. Van Tassell not to worry since a continuance would be granted.

6. During the month of March, Van Tassell was told by both Fullmer and Tuft that the March 19 hearing was a pretrial and to tell anyone who asked that that was his understanding. It was obviously Tuft's intention to protect himself by alleging confusion in the event that his strategy for delaying the trial did not work out.

7. That on the eve of trial Van Tassell asked both Fullmer and Tuft whether he should appear at the "pretrial" hearing. He was told by both of them not to worry and not to appear. Tuft then sent in a Notice of Appearance two days before the trial so that it would not arrive until the day of trial. Tuft's strategy as explained by an associate in his firm (Sykes' affidavit) was to get a long continuance rather than a two week continuance which was commonly granted in such cases.

8. On the date of trial, Mr. Fullmer correctly advised the Court that Van Tassell had been made aware of the Admissions and Interrogatories and correctly advised the Court that Fullmer had told Van Tassell that Fullmer would withdraw from the case. Mr. Fullmer incorrectly stated, however, that Van Tassell was made aware of the serious consequences of failing to answer these documents or that

he was aware that Tuft would not be appearing to represent him. No effort was made by the Trial Court to contact Van Tassell personally or to contact Mr. Tuft. Thus, the half truths of Mr. Fullmer seemingly convinced the Trial Court that Van Tassell had failed to cooperate and was willing to be liable for a \$300,000 judgment against him and waive a valid claim of \$200,000 against Mr. Flick.

9. It was several days after the judgment had been entered before Van Tassell learned of the judgment by calling Mr. Fullmer, not Mr. Tuft. Even in spite of the judgment, Tuft was evidently confident that the Trial Court would overturn the default judgment using his "confusion" theory.

10. Tuft prepared an affidavit for Van Tassell with several inaccuracies but convinced him that they were "technicalities" or points which did not matter and Van Tassell signed the Motion not understanding that he was in effect testifying. The Motion itself is improper since it includes legal argument and facts not known to Van Tassell personally. Evidently, Tuft was hesitant in signing a Motion himself for fear of the consequences.

11. On March 22, Tuft obtained an Order from the Court allowing him to represent Van Tassell. Tuft and Marshall argued to the Trial Court that they had some confusion in thinking that a formal order of entry had to be made separately from a withdrawal of counsel. This again, according to the

Affidavit of Robert Sykes who was associated with Tuft at that time, was a method of protecting Tuft from appearing at the trial.

12. On April 24, 1975, the date of the hearing to set aside the judgment, Tuft delegated this important task involving Van Tassell's \$300,000 to John Marshall, his partner, who had had little connection with the case. Marshall, in turn, relied upon the briefing by Robert Sykes of the pertinent facts and law of the case even though Sykes had not even entered the firm until after the default judgment was obtained. Marshall was forced to proffer testimony of Tuft as to the explanation of his conduct in not appearing. (Page 27 Transcript of April 24, 1975). Mr. Van Tassell testified at this hearing that Fullmer had specifically told him not to come for the trial (page 13) and that he had been told that "this trial coming up was a pretrial" (page 11). He also stated he did not know the difference between a trial and a pretrial (page 13). Marshall admitted that Van Tassell would testify that he had not received a copy of the discovery papers until March 10 which is in accord with Van Tassell's testimony. (page 31) The crux of Marshall's argument for "excusable neglect is succinctly stated in this passage:

"Well, that's all, is that Mr. Tuft would testify that he told everybody that he was not going to appear as long as the case was really in Mr. Fullmer's hands, until he was relieved he was not going to appear. The reason we did

not make motions together is he did not understand there was a trial date. He stated that his understanding was the same as Mr. Van Tassell's, but it was a pretrial that was coming up. Now I think that the evidence shows that there is purely excusable neglect." (Pages 27-28)

If this were the case that Fullmer failed to inform Mr. Tuft of the trial date after filing a formal notice of withdrawal, then Mr. Fullmer must be deemed grossly negligent. It is more likely, however, as stated in the Sykes affidavit, that it was Tuft's strategy not to appear at the trial so that a long continuance would be granted.

13. As a final blow to Van Tassell, Tuft would not represent him in the appeal unless he agreed to give to Tuft a mortgage for \$25,000. Van Tassell fled back to Fullmer for representation knowing no other attorneys. Fullmer in his normal manner improperly appealed to the Supreme Court from an Order which did not exist and which, if it had, would have been non-appealable. Neither Tuft nor Fullmer appealed from the April 2, 1975, judgment which would have allowed Van Tassell to raise questions on the merit concerning the admissions made by Flick as to certain amounts owing to Van Tassell.

The preceeding examples illustrate the gross negligence conducted by Mr. Fullmer and Mr. Tuft in the representation of Van Tassell. If this were not bad enough, Van Tassell was represented by the partner of one of the negligent lawyers in the only evidentiary hearing held to examine

the reasons for the default. An examination of this transcript clearly shows that the conduct of Tuft was never touched upon and that the conduct of Fullmer preceeding the default and the discovery problems was not examined in any detail whatsoever. Appellant's new counsel would submit that both Fullmer and Marshall attempted to conceal the gross injustice which had been perpetrated on Van Tassell. For this reason, as stated previously, the trial court was correct in finding no excusable neglect and had no other course of action open to it from the evidence presented at this hearing.

Therefore, Appellants submit that the supplemented records before this Court is sufficient for a finding that the default judgment should be set aside. As stated in defendant's affidavit, there have been only minor judgments and other law suits brought against defendant since the time of this judgment and unless plaintiffs can show to the contrary, there will be no harm to the plaintiffs by proceeding to trial on the merits. In the alternative, appellants would request that a full evidentiary hearing be held in the District Court with the opportunity of appellants to cross-examine the various parties to this matter so that the trial court may have a full disclosure of the events leading to the default and the subsequent events thereafter. The only other alternative, that of a malpractice action against the attorneys,

is totally inadequate in light of the amount of award and irreparable harm which would occur to Van Tassell during the pendency of such a suit.

CONCLUSION

All of the reasons as outlined in respondent's brief supporting the default and outlined in his argument at the hearing (p. 29-31) as seen from an examination of the affidavits filed in this case by the defendant and his family and also by an attorney practicing with Mr. Tuft at the time, shows that these occurrences were solely caused by the negligence and gross neglect of either Mr. Fullmer or Mr. Tuft or both. Failure to attend trial, the failure to move for a continuance, and the failure to respond to discovery were all caused by the attorneys; not by the client. While litigation must have finality, a judgment, especially of this size and magnitude, must be based upon a full disclosure of the reasons giving rise to the judgment. Through the conduct of these attorneys in the trial court a full opportunity to review the record was never given. It is ludicrous to think that a man such as Mr. Van Tassell would jeopardize his assets by ignoring repeated orders of the Court and by failing to attend a trial in which he had a substantial interest both in losing and in gaining. The more logical assumption must be, therefore, that for whatever reasons, Mr. Van Tassell was misled and

and misinformed by his attorneys who he relied upon to represent him in this litigation. Since the only damage done to plaintiffs would be the cost of this litigation up to this point, a cost which appellants would gladly pay, and since there is no showing on any prejudice resulting from the setting aside of this judgment, justice requires a reversal as a matter of law of the Court's order or, at the least, an opportunity for a full hearing as to the conduct of the parties.

Respectfully submitted,

WORSLEY, SNOW & CHRISTENSEN
Craig S. Cook
Michael R. Carlston
701 Continental Bank Building
Salt Lake City, Utah 84101

APPENDIX

AFFIDAVIT OF ROBERT SYKES

AFFIDAVIT OF GLEN VAN TASSELL

AFFIDAVIT OF ERMA VAN TASSELL

AFFIDAVIT OF JOY VAN TASSELL

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE W. FLICK,

Plaintiff-Respondent,

AFFIDAVIT OF
ROBERT SYKES

vs.

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

Case No. 14154

Defendants-Appellants.

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

Robert Sykes, after being first duly sworn, deposes
and says:

1. I am a practicing and licensed lawyer in the
State of Utah.
2. From late March through early June, 1975 I was
associated with Tuft and Marshall, attorneys at law, on
a percentage basis.
3. On approximately March 21st, I was told by
Mr. Tuft to read the file in the Flick vs. Van Tassell
case and to give my opinion as to what should be done.
4. During my first week of work, I learned that a
default judgment had been entered against Glen Van Tassell

in excess of \$250,000.00. I further learned that Mr. Tuft did not appear on behalf of defendant at this hearing.

5. In conversations I had with Mr. Tuft during late March 1975, Mr. Tuft explained why he did not appear at the trial. He informed me that he did not appear because he felt the trial court would have only given him a 2-week continuance before the trial and that he did not feel that that was sufficient time for preparation. He stated that for this reason he had carefully drafted a petition for his appearance and timed it to arrive very shortly before the trial date in order to make it impossible for the judge to order him to try the case on March 19th. As part of his strategy, Mr. Tuft said that he couched the language of the petition to make it conditional upon Mr. Fullmer's withdrawal. Mr. Tuft informed me that it was also his strategy to make Mr. Van Tassell appear to be without legal counsel on the trial date so that Mr. Tuft would not be forced to try the case on the 19th and so that Van Tassell would be granted a substantial continuance (i.e. longer than two weeks).

6. Mr. Tuft informed me that he was surprised when the

default was actually entered rather than a continuance being granted.

7. On or about April 1, 1975, I first met Mr. Van Tassell personally. On this and several subsequent occasions he informed me and Mr. Tuft that he had not been told by anyone that he need come to court on the trial date.

8. During the two weeks prior to April 23rd, I asked Mr. Tuft what should be done to prepare for the April 24th Motion to set aside the default. I was told by Mr. Tuft not to do any more on the case until we were paid the balance of \$2,000.00 allegedly due from Van Tassell. On the evening of April 23rd at approximately 5:00 p.m. I telephoned Mr. Tuft and Mr. Marshall at Murdock Engineering in Clearfield. I asked Mr. Tuft if he would be arguing the Motion on the 24th and if I should do anything in preparation for it. He said I should speak with John Marshall about it. John Marshall, his law partner, told me that he would probably argue the Motion himself and that I should do a memorandum in support of the Motion. I expressed my reservations about having John do the argument since he was not as

familiar with the facts of the case as were Mr. Tuft and myself. I had previously expressed my concern to Mr. Tuft that he appear and argue the Motion himself.

9. During that night and into the early hours of April 24th, I researched the law concerning the setting aside of default judgments and prepared a memorandum of points and authorities. The memorandum was typed early on the morning of the 24th. I drove with Mr. Marshall from Salt Lake to Bountiful and gave him a brief recitation of the facts and the law of the case. When we arrived in Farmington, Mr. Tuft and Mr. Van Tassell were present. When I saw Mr. Tuft I thought he was now going to argue the Motion but he soon stated that he would probably leave and that it would be better anyway if John Marshall argued the Motion for him. He stated that he had to return shortly to Murdock Engineering in Clearfield but said that he was only 20 minutes away if we needed him.

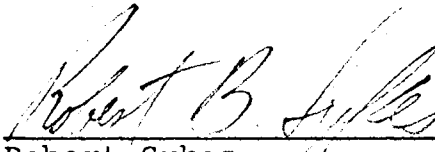
10. I witnessed the argument of Mr. Marshall and the entire proceeding that day and believe that Mr. Marshall did an excellent job under the circumstances. However, because he did not have the time to

familiarize himself with the complex facts of the case, I do not believe he was able to adequately show the conduct of Van Tassell and his attorneys as to the discovery delays and the failure to attend the trial.


11. It is my opinion that crucial lines of testimony were not explored or adequately presented to the Court by Mr. Marshall (through no real fault of his own) or by Mr. Findley and that the trial court was not fully advised as to what actually happened concerning the events leading to the default judgment.

12. It is my belief that defendant has a valid defense and counterclaim against plaintiff.

13. I have since left the employment of Mr. Tuft and am now practicing law with another firm in Salt Lake City.


Robert Sykes

Subscribed and sworn to before me this 12th day
of February, 1976.


NOTARY PUBLIC
Residing at Salt Lake City

My Commission Expires:

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE W. FLICK,

Plaintiff-Respondent,

AFFIDAVIT OF
GLEN VAN TASSELL

vs.

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

Case No. 14154

Defendants-Appellants.

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Glen Van Tassell, after being first duly sworn,
deposes and says:

1. That I am the individual defendant in the
above-entitled case and am the major shareholder and
President of Van's Service, Inc.
2. In December of 1973 I was served with a
Complaint in the above-entitled action and immediately
contacted Attorney Boyd Fullmer to represent me in this
matter.
3. During a large part of 1974 I commuted between
Bountiful, Utah and Bancroft, Idaho and spent approxi-
mately six out of seven days in Idaho. I was reachable
by telephone and within three hours of each location.

I worked with only my son during this period.

4. While in Idaho, I did not personally receive any notices that my deposition was to be taken prior to February 4, 1974 but I believe my wife was served with some kind of papers in January 1974 and, since I was in Idaho, I instructed her to deliver the papers to my attorney, Boyd Fullmer. I was never informed by Mr. Fullmer of any date for my deposition other than February 4, 1974 and never requested him to reschedule my deposition because of my cattle business.

5. At the time of my deposition Mr. Fullmer had the only copies of the Idaho mining claims contract and he agreed to give plaintiff's attorney a copy at the time of my deposition.

6. During the entire course of proceedings up until the early part of March, 1975 I was never shown or informed by Mr. Fullmer that I was to answer the Interrogatories submitted by plaintiff's counsel on June 24, 1974 nor was I requested to supply information.

7. I was never informed by Mr. Fullmer that I was to produce documents listed in a July 15, 1974 Order of Judge Thornley Swan nor was I informed that I was to pay

\$100.00 attorney's fee for Mr. Fullmer's failure to attend the trial.

8. While it is true that I went on a world tour in July and August of 1974, Mr. Fullmer knew that I would leave for this trip three months before, and I consulted Mr. Fullmer and asked him if there were anything I should do before leaving, and he informed me that there was nothing to do at that time.

9. I was never informed by Mr. Fullmer in September of 1974 that an Order was entered by Judge Gould commanding me to answer the June 24 Interrogatories by October 20, 1974.

10. I was never informed by Mr. Fullmer of the Request for Admissions filed by plaintiff's attorney on October 17, 1974 or the Request for Production of certain documents filed upon the same day until the early part of March, 1975 and was told then they need not be answered or produced.

11. I never authorized Mr. Fullmer to object to answering the admissions or producing the documents. While it is true that I was in Idaho I had available two telephone numbers at which Mr. Fullmer could reach me,

had continual mail service, and was only four hours away from my Utah residence and would have been willing to come to Utah upon Mr. Fullmer's request had I been so informed.

12. I was never informed by Mr. Fullmer that plaintiff's attorney was again moving for sanctions for failure to comply with discovery and that he was seeking attorney's fees of \$800.00 as outlined in his Motion of November 15, 1974.

13. I asked Mr. Fullmer if we could make a claim against plaintiff for the amount owing to me of approximately \$200,000.00 on the mining claims which I sold plaintiff, for half of the amount necessary to perform the annual assessment work, and for the defamation of defendant's character by plaintiff. Mr. Fullmer informed me that he filed a Counterclaim concerning all of these claims.

14. I was not informed by Mr. Fullmer of the December 18, 1974 Order entered by Judge Swan ordering that sanctions be imposed for failure to answer the Interrogatories, Admissions, and Production of Documents which I was still unaware even existed.

15. I never received nor was informed of the existence of a document known as "Notice of Motion" dated February 19, 1975 informing Mr. Fullmer that a Motion to strike my Answer would be entered for failure to respond to discovery.

16. I personally never received a "Notice to Appoint Counsel" dated February 28, 1975 which was submitted by plaintiff's attorney. I do remember that I was in Idaho during that period and talked to my wife about a letter which had come from the plaintiff's law firm. She asked me what to do with it and I told her to take the letter to Mr. Fullmer. I am informed that my daughter delivered this letter to Mr. Fullmer's office.

17. I was not informed by Mr. Fullmer that an Order had been entered by Judge Swan on March 4, 1975 to strike my Answer if discovery was not completed by March 14th.

18. Sometime in the middle or end of February Mr. Fullmer informed me that he did not think he had sufficient time to try my case in the latter part of March and wanted to withdraw.

19. I agreed he should withdraw. He recommended

that I retain Mr. Reed Tuft as my new attorney. A meeting was held with Mr. Tuft in the latter part of February or the first part of March at which time Mr. Tuft informed me that he would handle my case presuming that I paid him at least \$2,000.00. Mr. Tuft told me not to worry about anything and that he was going to get an extension from the March 19th date which he said was a pretrial and that the court would grant additional time. Fullmer concurred in this statement.

20. On this same day Mr. Fullmer delivered my file to Mr. Tuft. Mr. Fullmer showed Mr. Tuft the Interrogatories, and Requests. This was the first time I was shown these documents. Mr. Tuft informed me that there was no point in answering them at that time since a continuance would be granted by the trial court. I was perfectly willing and able to try to answer those questions had Mr. Tuft advised me to do so.

21. I was not informed of Judge Swan's denial of Fullmer's Motion for a Continuance nor that the admissions would be deemed true if not answered by March 14th.

22. I was never informed by Mr. Fullmer of the notice sent to him on March 12, 1975 by Mr. Findlay,

counsel for plaintiff, noticing that plaintiff's counsel would move for a default for a failure to respond to the discovery request.

23. Between March 3rd and March 19th I repeatedly called both Mr. Tuft and Mr. Fullmer. I was told by Mr. Fullmer to do whatever Mr. Tuft requested. Mr. Tuft informed me that it would be unnecessary for me to attend the March 19th trial and told me to tell anyone who asked me that it was my understanding that it was a pretrial. Mr. Tuft requested that I go to his office during this period and I did go to his office on three or four occasions. Upon each time, however, he merely asked me for more money and informed me that I need not worry as long as I pay him the money. I paid him \$1,700.00.

24. On approximately March 18th I again called Mr. Fullmer and asked him if I needed to attend the hearing and he said don't attend it if Tuft tells you not to. He stated it was his understanding that I was not to come. I called Mr. Tuft and he told me not to worry about it and to be sure to say that it was my understanding that it was a pretrial if anyone asked. I did not know the distinction between a pretrial and trial.

He said that he would take care of everything and would let me know what to do. I presumed Tuft would appear personally at the hearing.

25. On March 19, 1975 I was at my Bountiful residence and would have been available for trial within one hour after being notified had my counsel telephoned me.

26. On March 20, 1975 I called Mr. Tuft and asked him what had developed. He informed me it was under advisement and to call him in three or four days. No mention of any "judgment" was made in the conversation and I was unclear what was being considered.

27. I talked to Fullmer two or three days later and was informed by him that a judgment had been entered against me on March 19. I was very upset and immediately called Tuft and he said a judgment had been entered but that it would be set aside. He told me not to worry and that he would take care of it if I sent him more money.

28. On April 1st I went to the offices of Reed Tuft to sign a document he had prepared for me. I asked him why he said in the documents I had moved my residence

to Idaho when I was still living in Bountiful and he explained that residence was a legal term and that I was now technically resided in Idaho. I also told him it was rare that I could not be reached by telephone but he said that wasn't important and not to worry about it.

29. I told Mr. Tuft that I did not consider myself unable to communicate with Mr. Fullmer or that there was any tension between us as stated in the documents. He informed me that Mr. Fullmer believed there was such a failure and tension and therefore it was proper for me to make this statement since Mr. Fullmer would not. I was surprised at this representation but was assured that it wasn't important either.

30. I told him I didn't understand or know the information contained in the last part of the paper concerning Tuft's reasons, not having counsel, and prejudice but was told by Tuft that it was just a formality and that this was "lawyer talk."

31. Mr. Tuft told me to sign the document in two places and that it would be submitted to the court. I signed the document as instructed by Mr. Tuft but did not understand why it was necessary for me to sign it or that it was like testifying in court.

32. Around April 23rd I was informed by Mr. Tuft to go to the Davis County Courthouse the next day where a hearing would be held to set aside the judgment. He told me not to worry, that everything would be taken care of.

33. On April 24th I met Mr. Tuft, Mr. Marshall, his law partner, and Mr. Sykes, an associate, at the courthouse doors. Mr. Marshall stated that he was not prepared to handle it. Mr. Tuft told Mr. Marshall that it would work better without Mr. Tuft present and that Marshall should do the best that he could. As we were leaving Mr. Tuft told me to be sure to testify that the March 19th proceeding was a pretrial.

34. At the hearing I testified as best I could although I had not gone over the dates with any attorneys prior to my entering the room. I told the court that I thought it was a pretrial on March 19th as Mr. Tuft had instructed me to do and truthfully told the court that I did not know the difference between a pretrial and a trial.

35. Around May 15th Mr. Tuft told me he would continue to represent me in the case if I would give him a \$25,000.00 mortgage on my property as security for his

attorney's fees. I told him that I would not do that and he informed me to seek other counsel.

36. I then contacted Mr. Fullmer who said he would represent me on the appeal.

37. To my best information and belief I have paid Mr. Fullmer approximately \$5,000.00 to handle this litigation from its inception to the appeal.

38. Since March 19th I have had judgments obtained against me for less than \$5,000.00 although one such judgment was entered by default since Mr. Fullmer failed to respond. I presently have pending other lawsuits in which the maximum potential recovery is approximately \$10,000.00. My assets greatly exceed these liabilities.

39. I have been fully advised by my counsel that the signing of this document is the same as testifying in court under oath and I have carefully reviewed this Affidavit and believe that it accurately reflects what really happened during the proceedings of this case.


Glen Van Tassell

Subscribed and sworn to before me this 12th day

of February, 1976.

Ignacio Lopez

NOTARY PUBLIC

Residing at _____

My Commission Expires:

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE W. FLICK,

Plaintiff-Respondent,

AFFIDAVIT OF
ERMA VAN TASSELL

vs.

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

Case No. 14154

Defendants-Appellants.

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Erma Van Tassell, after being first duly sworn,
deposes and says:

1. That I am the wife of Glen Van Tassell,
defendant in the above-entitled action.
2. That my husband was frequently in Idaho during
the proceedings of this lawsuit.
3. In the early part of 1974 I was served with
papers. I talked to my husband who was in Idaho who
told me to deliver them to Boyd Fullmer since he would
know what to do with them. I either gave them to my
daughter or son for delivery or mailed them to Mr. Fullmer.
4. That on several occasions documents arrived in

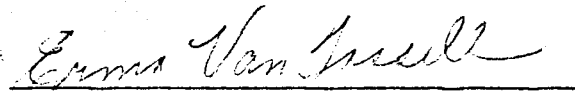
letters with law firm letterheads to our residence in Bountiful. I generally did not open these letters.

5. To the best of my memory I received one such letter from the law firm of Nielsen, Conder, Henriod & Gottfredson, who I knew to be the firm representing Mr. Flick.

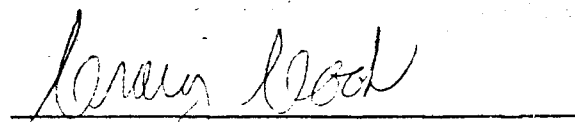
6. That upon receipt of this letter I contacted my husband in Idaho and he informed me that I should send it to Mr. Fullmer immediately.

7. I gave this letter to my daughter Joy and told her to take it to Mr. Fullmer.

8. Upon return she informed me that she had delivered it to his office.


Erma Van Tassell

Subscribed and Sworn to before me this 11th day
of February, 1976.


NOTARY PUBLIC
Residing at _____

My Commission Expires:

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE W. FLICK,

Plaintiff-Respondent,

AFFIDAVIT OF
JOY VAN TASSELL

vs.

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

Case No. 14154

Defendants-Appellants.

STATE OF UTAH)
 : ss
COUNTY OF SALT)


Joy Van Tassell, after being first duly sworn,
deposes and says:

1. That I am the daughter of the defendant Glen Van Tassell.
2. That on several occasions I delivered documents to Mr. Boyd Fullmer's office.
3. That I cannot specifically remember what documents I delivered but believe that I made one such trip sometime in the latter part of February or early March.


Joy Van Tassell

Subscribed and sworn to before me this 16th day

of February, 1976.



NOTARY PUBLIC

Residing at _____

My Commission Expires:

RECEIVED
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05 MAR 1976

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School