

1988

Malgorzata Jung-Leonczynksa v. American Express  
Travel Related Services Company, Inc. Travelers  
Cheque Operation Center; James Elegante,  
individual, Mary Elegante, individual; Parsons,  
Behle, and Latimer Law Firm, a Professional  
Corporation, and John Does 1 through 5 : Brief of  
Appellant

Utah Court of Appeals

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Burbidge and Mitchell Law Firm; Counsels for Appellees.

Malgorzata Jung-Leonczynska; Appellant--Pro Se.

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UTAH  
BRIEF

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DOCUMENT

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CKET NO. 88-0639

IN THE UTAH COURT OF APPEALS

MALGORZATA JUNG-LEONCZYNSKA )

Plaintiff-appellant )  
pro se, )

v. )

AMERICAN EXPRESS TRAVEL RELATED SERVICES )  
COMPANY, INC. TRAVELERS CLUB OPERATION )  
CENTER; )

JAMES ELEGANTE - Individual )

MARY ELEGANTE - Individual )

PARSONS, BEHLE & LATIMER LAW FIRM )

a Professional Corporation )  
and )

JOHN DOES 1 through 5 )

Defendants-appellees )  
)

Case No. 880639 - CA  
=====

DEPOSITED BY THE  
STATE OF UTAH

AUG 17 1990

BRIEF OF APPELLANT

Appeal from the Order of the Third Judicial  
District Court in and for Salt Lake County, State of Utah,  
granting defendants' Motion to Dismiss Complaint with Pre-  
judice, rendered on 21st day of July, 1988 by District Judge

Honorable David S. Young  
Civil #: C-88-01577-DY

Burbidge & Mitchell Law Firm  
Counsels for Appellees  
139 East South Temple, #2001  
Salt Lake City, Utah 84111

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Telephone # (307) 721.4967

IN THE UTAH COURT OF APPEALS

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MALGORZATA JUNG-LEONCZYNSKA	)
Plaintiff-Appellant	)
pro se,	)
v.	)
AMERICAN EXPRESS TRAVEL RELATED SERVICES	)
COMPANY, INC. TRAVELERS CHEQUE OPERATION	)
CENTER;	)
JAMES ELEGANTE - Individual	)
MARY ELEGANTE - Individual	)
PARSONS, BEHLE & LATIMER LAW FIRM	)
a Professional Corporation	)
and	)
JOHN DOES 1 through 5	)
Defendants-Appellees	)

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## CONSTITUTIONS, STATUS AND OTHER AUTHORITIES

The United States Constitution

The Constitution of the State of Utah

United States Code 28 USC Sec. 1446(e)

The Utah Rules of Civil Procedure: 12(b)(6)  
   55(a)(1)  
   55(b)(1)  
   56and Rule 8 & 11

Rule 3 of the Practice - Third Judicial District.

Restatement 2d. Torts Sec. 586,587,588

47 Am Jur, 2d Section 1151, 1153

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether defamatory statements could be absolutely privileged if were made preliminary to a judicial proceeding and next during a hearing of a proceeding regarding a person who no time was neither a party in a litigation nor a witness and in fact was a mere stranger to the civil action
2. Whether a political belief of a person who was a mere stranger to a judicial proceeding could be relevant or pertinent to resolve a legal dispute regarding disqualification of a law firm for an unethical conduct ?
3. Whether an affirmative defense which is absolute privilege, no time was pleaded, can be considered by lower court, since it was presented in motion to dismiss only ?
4. Whether civil action was removed from state court to federal court where defendants did not comply with legal provisions and did not file with the state court a copy of petition for removal and did not pay due fee ?
5. Whether lower court's clerk denying to certify a default of defendants contrary to court's record violated the provisions of Rule 55(a)(1) and (b)(1) U.R.C.P., since a clerk's duties in this matter are declaratory only. ?
6. Whether plaintiff-appellant was abridged by the lower court her constitutional rights of due process of law since than plaintiff was not notified about the hearing on defendants motion to dismiss if the lower court was aware about it, proceeded the said motion ?
7. Whether the lower court erred if proceeded a colloquial hearing on defendants motion to dismiss complaint, without giving plaintiff an opportunity to be reasonably prepared to present evidence and legal arguments ?
8. Whether defendants attempted to remove civil action from state court to federal court based on a false representation and fraudulent statements should they be afforded a benefit of extension or tolling time to make an appearance before state court ?

IN THE UTAH COURT OF APPEALS

---

MALGORZATA JUNG-LEONCZYNSKA	)
Plaintiff-Appellant	)
pro se,	)
v.	)
AMERICAN EXPRESS TRAVEL RELATED SERVICES	)
COMPANY, INC. TRAVELERS CHEQUE OPERATION	)
CENTER;	)
JAMES ELEGANTE - Individual	)
MARY ELEGANTE - Individual	)
PARSONS, BEHLE & LATIMER LAW FIRM	)
a Professional Corporation	)
and	)
JOHN DOES 1 through 5	)
Defendants-Appellees	)

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Case No. 880639 - CA

=====

Pursuant to the Rules of the Utah Court of Appeals, plaintiff-appellant ( hereinafter - appellant ) respectfully submits this brief in total opposition to the District Court Order entered on 21st. day of July, 1988.

JURISDICTION of this Court of Appeals is conferred by Utah Code Annotated 1953, Sec. 78-2a-3(2)(a), as amended.

STATEMENT OF THE NATURE OF THE PROCEEDING

This is an appeal from an order entered by the Third Judicial District Court in and for Salt Lake County, State of Utah.

The order appealed was entered on the 21st. day of July, 1988. The notice of appeal was filed in the lower court on the 18th day of August, 1988.

## STATEMENT OF THE CASE

### Facts:

On March 10th, 1988, this civil action was commenced before the Third Judicial District Court in and for Salt Lake County, State of Utah, against the above enumerated defendants.

On May 16th and 17th, 1988 the defendants were validly served with process.

Plaintiff has alleged that the defendants had defamed her by making malicious, totally irrelevant, unprivileged libellous and slanderous statements which were published preliminary to a judicial proceeding and during judicial proceeding before the United States District Court, District of Utah, Central Division and that the defendants' conduct was otherwise tortious.

This particular case arose from the fact that Boguslaw Leonczynski - plaintiff against American Express et al. moved the said United States District Court with a Motion to Disqualify the Parsons, Behle & Latimer Law firm as a counsel to defendants, upon severe violation of the Rules of Professional Conduct.

This statement of the facts in this action will be incompleated unless the following background is presented:

- In August 1983 Parsons, Behle and Latimer Law Firm hired and used the service of an expert witness Boguslaw Leonczynski in M. Konarska petition to the Immigration & Naturalization Service.  
  
( Leonczynski v. American Express, Civil No.: 85-C-884 )  
( Konarska v. Parsons, Behle & Latimer Law Firm, Civil No.: 88-0906641 )
- From November 1983 to February 1984 the said law firm represented the B. Leonczynski before Utah State Bar Association regarding a licence.

- On November 10th, 1983 Parsons, Behle & Latimer Law Firm on Boguslaw Leonczynski's request and on his behalf made the verification and certified mortgage payments to American Express Co. because of the employer and the employee dispute regarding reimbursement.
- On February 13th, 1984 B. Leonczynski, during fiduciary attorney-client conference, revealed all confidential information and possessed documents as a potential client against American Express.
- On or about February 25th, 1984 B. Leonczynski was turned down as a client with explanation that Parsons, Behle & Latimer Law Firm is counsel to American Express what was not true.
- In March 1984 Vice President of the American Express Co. knew that B. Leonczynski was going to sue them.
- B. Leonczynski commenced his civil action in the end of July 1985 and Parsons, Behle & Latimer became very first time a counsel to American Express on August 19th, 1985.

Due to the fact that Parsons, Behle & Latimer had the access and had obtained the confidential information in the case Leonczynski v. American Express prior the said lawsuit was commenced, B. Leonczynski brought the Motion to Disqualify the P.B.&L. Law Firm.

The said Motion to Disqualify developed a fury and an anger of P.B.&L and its puppet attorney J. Elegante.

The fear of losing a lucrative client - Am. Express Co. - for which P.B.&L solicited badly, developed distasteful, primitive and a hypocritical defense based on lies, defamations and betrayals of its own clients.

P.B.&L. and Elegantes' outrageous and malicious defense disgraced the Legal Profession in the State of Utah and it has been a dishonor and an infamy to the American Lawyers.

In this scenerio defendant J. Elegante made defamatory statemnt about appellant, published it to third persons preliminary to a judicial proceeding and next stated it in his fraudulent Affidavit dated October 14th, 1985.

His maliciously made untrue, libellous and slanderous " story " about appellant' s visit at Elegantes' house in February 1984, was calculated for no other purpose than to conceal and to hide the fact that the fiduciary client - attorney conference took place of February 13th, 1984 at the P.B.&L's office, between B. Leonczynski and J. Elegante.

James Elegante's Affidavit was delivered to third persons including defendant American Express and subsequently it was filed by the American Express with the United States District Court in case Leonczynski v. American Express et al. No.: 85-C-384.

The alleged defamatory statements were repeated by J. Elegante before the U.S. District Court on July 10th, 1987.

His perjured testimony was supported by slanderous testimony of his wife - defendant M. Elegante.

All defendants knew that the defamatory statements were not relevant in any way to the P.B.&L's disqualification.

All defendants have known or possessed appellant's records that she left her homeland - Poland due to communist oppression and applied for a political refugee status.

Cours of the proceeding:

In the course of this proceeding, on June 2nd,1988 defendants filed Petition for Removal with the United States District Court claiming diversity jurisdiction.

The said petition was made upon defendants' fraudulent statement that American Express TRS,TCOC. has principal place of busines in the State of New York.

Keith Taylor's verification for removal was made in bad faith and it was patently false.

On June 6th,1988 appellees filed their Motion to Dismiss with the said federal court which no time acquired jurisdiction over parties and in fact diversity jurisdiction no time was available.

The matter of fact was that this civil action no time was removed from the state court because defendants did not filed a copy of their Petition for Removal with the state court and due fee was not paid.

Defendants and their counsel Burbidge perverted the truth and made the false representation to the federal court and appellant in this matter.

Defendants having been properly served with process neither appeared nor answer appellant' s Complaint until June 22d,1988 at 3:22pm, ergo , appellees' appearance before lower court took place after 34 days from service of process.

On June 22d,1988 appellant moved the Clerk of the lower court, pursuant to Rule 55(a)(1); (b)(1) Utah Rules of Civil Procedure and sought the default of the defendants.

The Clerk of the lower court denied to certify the default of the defendants upon telephone conversation with Mr.Burbidge, contrary to the record.

As the record reflects defendants appeared before the lower court due to telephone conversation between the Clerk and Mr. Burbidge in the presence of appellant, and after couple of hours, defendants filed their Motion to Dismiss - "nota bene" the same which was filed before federal court.

The hearing on a judgement by default was scheduled by the Clerk Office on July 11th, 1988.

From the lower court's calendar appellant had learned that on the same day of the said hearing was also scheduled defendants' Motion to Dismiss.

Appellant immediately informed the lower court that she no time was notified regarding the hearing on the defendants Motion to Dismiss.

Judge D. Young ignored appellant's statement and proceeded on defendants Motion to Dismiss, denying appellant's constitutional rights of due process and equal protection of law to present evidence and arguments on her Motion for Entry of Default.

The lower court ignoring fundamental principles of our justice system granted appellees' Motion to Dismiss with prejudice.

The lower court's Order was entered on July 21st, 1988.

#### ARGUMENT

A POLITICAL BELIEF OF APPELLANT, WHO WAS NOT A PARTY,  
WAS NEITHER RELEVANT NOR PERTINENT TO THE LITIGATION  
FOR DISQUALIFICATION OF THE PARSONS, BEHLE & LATIMER  
IN THE CASE LEONCZYNSKI v. AMERICAN EXPRESS.

The District Court had erred when determined that an absolute privilege applies in this civil action for the reason that the appellees' malicious statements were neither relevant nor pertinent.

Appellant points out that, nearly all of the american courts alarmed at the idea that a court of justice might become a place where extraneous

defamation may be published with complete freedom, have said that there is no immunity of an absolute privilege unless the particular statement is in some way " relevant or pertinent " to some issue in the case. ( Prosser, Law of Tort, 4th Ed. p. 778 )

In Wright v. Lawson, 530 P.2d 823,825 ( Utah 1975 ) Utah Supreme Court did not find sufficient relationship to existence of an absolute privilege and stated:

The majority of American courts have adopted the rule that there is no immunity unless particular statements are in some way " relevant " or " pertinent " to some issue in the case. The words " relevant " and " pertinent " have a technical meaning in legal parlance, and we believe it would be advantageous to adopt a rule that the statement alleged to be libelous must have some relationship to the cause or subject matter involved.

In Anonymus v. Trenkman, 48 F.2d 571,573 ( 2nd Cir. 1931 ) the Court held:

The rule is that the privilege is lost if the libel is irrelevant.

In light of the above this is appellant's contention that neither a relevancy nor a pertinency to the civil action Leonczynski v. American Express before federal court has existed, and appellees cannot validly claim an absolute privilege.

Appellant presents this Court attention the analysis that matter as follows:

As the record of the federal proceeding reflects that James Elegante during the hearing on July 10th,1987 was asked a question ( Fed.Court transcript pp.28,31 line 1 - 4 )

Q. Will you explain to the court how that document (Dr.Brown's letter) came into your possession ?

One must agree that this question was simple without any ambiguity.

However, as the said record reflects James Elegante had some problem with it and with the stright answer he help himself by making maliciously a story about appellant.

His testimonies about appellant was neither relevant and pertinent to the above stated question nor to the issue regarding disqualification P.B.&L. Law Firm. Due to the fact that appellant was no time a party in the federal litigation and the appellant's a political belief had no relevancy nor pertinency in resolving the issue of a moral conduct and a professional standard of the P.B.& L. and James Elegante.

In a logical process of thinking one must agree that no matter what a political belief is of a mere stranger, not a party to the civil action, who is the wife of litigant, such a belief has neither nexus nor relevancy to the proceeding regarding disqualification of the P.B.& L. Law Firm.

Further analysis of J.Elegante testimonies indicate beyond any reasonable doubt upon preponderance evidence that his libelous and slanderous statements about appellant were made for the selfish purpose and for the sake of the outrageous defense.

As the said federal record reflects ( p. 31 line 7 - 9 ) J.Elegante was able to answer properly the same question which was asked second time.

Q. Did he ( B.Leonczynski ) leave any document with you at that time...?

A. He did not leave any documents with me and he did not have any documents with him when he came to the house that night.

It must be pointed out in this place, that a speaker's motive is considered as a crucial element in the area of an absolute privilege.

In Green Acres Trust v. London, 688 P.2d 617,621 ( Ariz.1984 )

Court held:

Defamation defense is absolute, in that the speaker's motive, purpose or reasonableness in uttering a false statement do not affect the defense.

The facts in this case speak for themselves and it does not have to be further discussed that the malicious libelous and slanderous actions of the defendants - appellees did positively affect their defense.

The fabricated facts by the appellees have created a fallacy and an absurd of a relevancy and a pertinency to the subject of the inquiry.

In the Memorandum in support of defendants' Motion to Dismiss it has been stated:

"..The alleged attorney-client relationship was based broadly on a series of conversations and meetings between Boguslaw Leonczynski on one hand and defendant James Elegante on the other, including one which occurred in the presence of Mary Elegante at the Elegante home in February of 1984..."

( page 2 of the Memorandum )

and further, ( page 5 of the Memorandum )

"... by reason of the broad claims of Mr.Leonczynski, all conversations and meetings between he and Mr.Elegante were placed in issue..."

Appellant underlines that it has been one problem only with the above that OCCURRED MEETINGS ONLY AND CONVERSATIONS COULD BE PLACED IN ISSUE but never a visit " in February 1984 at the Elegante home " for the simple reason that such a visit never took place.

Additionally, it must be pointed out that B. Leonczynski Motion to Disqualify has been certainly stated and does not contain " the broad claims".

Appellant also moves this Court attention that a doctrine of an absolute privilege rests upon a public policy.

Appellant broadly discussed it in her Response to appellees Motion for summary disposition and respectfully requests this Court to consider the arguments presented in the said Response.

Additionally, appellant points out that in Bradley v. Hartford Acc.Co., 106 Cal. Report. 718, 723 ( 1973 ) the Court held:

Whether or not the defamatory publications should be accorded and absolute privilege, special emphasis must be laid on the requirement that it be made in furtherance of the litigation and to promote the interest of justice.

One must agree that in this particular case the outrageous and malicious defense of the all defendants- appellees were not undertaken for the sake of justice and did not promote the interest of justice, therefore they should not be afforded absolute privileges as stated in the Restatement on Torts Second.

- \* -

REJECTION TO ENTER DEFENDANTS-APPELLEES DEFAULT VIOLATES EQUAL PROTECTION CLAUSE OF THE FOURTEEN AMENDMENT TO THE UNITED STATES CONSTITUTION, UTAH STATE CONSTITUTION AND PERTINENT RULES OF LAW.

Pursuant to provisions of 28 U.S.C. Section 1446(e) defendants "shall file a copy of the petition ( for the removal ) with the clerk of State Court, which shall effect the removal..."

Defendants did not comply with this provision and as the Court record reflects the State Court no time was notified about defendants desire to remove this case to the Federal Court.

Court record reflects also that the due fee for removal no time was paid by defendants.

Because of lack of such legally required notice and lack of the due fee, the fact of the filing the Petition for Removal with the Federal Court did not per se effect the removal.

Additionally, defendants' said Petition and its verification was made in bad faith, was based on fraudulent premises and because of that, it constituted some sort of fraud upon the U.S. District Court.

Considering all facts and circumstances in this case plaintiff strongly stands on the position that the defendants on June 22nd, 1988 until

..... 3:22 pm were defaulted, and the Clerk of the Court should certify it and enter defendants's default.

" The true purpose of the entry of a default is to keep the docket current and expedite the disposal of causes thereby preventing a dilatory or procrastinating defendants from impeding the plaintiff in the establishment of his claim....

... Judgement by default is to be distinguished from the mere entry of default, the entry of a default does not constitute a judgement, but rather an order precluding the defaulting party from making any further defense in the case as far as his liability is concerned..." ( 47 Am. Jur. 2nd Section 1151, 1153 )

The Rule 55 U.R.C.P. does not refer to any request for the entry of a default.

Since it provides that when the fact of default has been made to appear based upon the court record, the clerk "shall" enter it, especially that the entry of a default is a formal matter and it is in no sense a judgement by default.

Even if a default judgement does not follow as a matter of right and " uniformly acknowledge policy of the law is to accord litigant for

a hearing on the merits" ( Interstate Excavating, Inc. v. Agla Development, 611 P.2d.369 (Utah 1980) ), however, once default is entered the defaulting party loses its certain rights. eg. the defaulting party loses its standing before the court and its right to present evidence on issues other than unliquidated damages.

In this case it has been beyond any doubt that the default of the defendants was not entered by the Clerk of the Court due only to defendants' counsel explanation as repeated by the Clerk to the plaintiff and stated in the plaintiff-appellant's letter addressed to the Clerk of the lower court.

The said letter was filed with the Court after it was read and confirmed by Mr. Dave Shewell. The all facts stated in the said letter were approved as true and accurate.

Neither defendants nor its counsel did not submit and did not produce any evidence to support its defense that the copy of the Petition for Removal was filed with the State Court and due fee was paid.

Since the defendants undertook the defense after being notified by the Clerk of the Court that the default is sought by plaintiff, the simplest rules of the fair play to the party and the duty to the Court requires from defendants to confirm truthfulness of their statements. ( Rule 11 U.R.C.P. )

This is the appellant's contention that her due process rights to the fundamental fairness and an access to the court secured by the the Equal Protection Clause of the Fourteenth Amendment were severely violated by the lower court.

The lower court erred when relied on the Affidavit of Todd M. Shaughnessy for the reason that the said affidavit indicates that it was made at least in the bad faith.

One knows that Ms. Nelia Barber, an employee of the lower court did not work on June 19th, 1988 because the Clerk's Office of the said court is closed on every Sunday.

Additionally, Mr. Shevell from the Clerk's Office of the lower court did not have any possibility to know on June 20, 1988, that the United States District Court will render its order to days later, and also Mr. Shevell is not in the position of making a decision of waiving due fees for removal.

The District Court severely violated appellant's rights and Rule 3 of Practice - Third Judicial District, due to the fact that the lower court refused to hear plaintiff-appellant's Motion for an Entry of default.

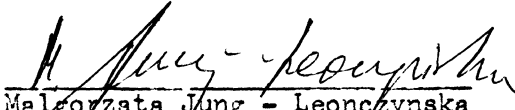
The lower court also violated appellant's rights of due process for the reason that being advised by plaintiff that she no time was notified of a hearing on the defendants' Motion to Dismiss, the lower court proceed with the said motion.

The lower court erred and did not comply with the Utah Supreme Court decisions in: - Lind v. Lynch, 665 P.2d 1276 ( Utah 1983); Strand v. Assoc. Students, 561 P.2d 191 (Utah 1977); Gill v. Timm, 720 P.2d 1352 (Utah 1986) Bekins Bar V Ranch v. Utah Farm Product, 587 P.2d 151 ( Utah 1981)

CONCLUSION

In conclusion appellant strongly believe that a judicial proceeding cannot be abuse by parties, witnesses and counsels for making maliciously false, not relevant and not pertinent defamatory statement, WHEREFORE appellant prays for reversal of the lower court Order and to remand with adequate instructions.


Respectfully submitted this 6<sup>th</sup> day of March 1989.

  
Malgorzata Jung - Leonczynska  
Plaintiff-Appellant - pro se.

MAILING CERTIFICATE

I hereby certify that two copies of the foregoing appellant Brief was mailed on this 6<sup>th</sup> day of March 1989 - by first class mail, postage prepaid to:

Burbidge & Mitchell Law Firm  
139 East South Temple, # 2001  
Salt Lake City, Utah 84111

  
M. Jung - Leonczynska