

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:
Respondents' Brief

Utah Court of Appeals

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Malgorzata Jung-Leonczynska; Appellant; Pro Se.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 88-0639

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IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

MALGORZATA JUNG-LEONCZYNSKA,)

Plaintiff-Appellant)

Pro Se,)

vs.)

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-Respondents.)

RESPONDENTS' BRIEF

Case No. 88 0639 CA

Appeal from the Third Judicial District Court
in and For Salt Lake County, Honorable David S. Young, Judge

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DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

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COURT OF APPEALS

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Respondents file this Brief in reply to the Brief of Appellant Malgorzata Jung-Leonczynska ("Leonczynska").

I. JURISDICTION AND NATURE OF THE PROCEEDINGS

This court has jurisdiction over this appeal pursuant to the provisions of Utah Code Annotated, Sec. 78-2a-3(2)(j) (1953).

Leonczynska commenced this action seeking to recover damages from Respondents allegedly arising out of claimed defamatory statements made by Respondents James Elegante and Mary Elegante in a judicial proceeding brought by Leonczynska's husband in federal court. The district court granted Respondents' Motion to Dismiss the Complaint in this action on the basis that the alleged defamatory statements were absolutely privileged. An Order of Dismissal was entered on July 21, 1988. Leonczynska sought at the same hearing to have a Default Judgment entered against Respondents. That motion was denied.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review on this appeal:

1. Did the district court commit error in determining that the alleged defamatory statements with respect to which Leonczynska seeks relief were absolutely privileged as they were made during the course of judicial proceedings?

2. Did the district court commit error in proceeding with the hearing on the Motion to Dismiss the Complaint in view of Leonczynska's claim she did not receive notice of the hearing?

3. Did the district court commit error in refusing to enter Default Judgment against Respondents.

III. STATEMENT OF THE CASE

A. The Proceedings Below.

Leonczynska commenced this action, acting pro se, in March 1988, seeking to recover for alleged defamatory statements made by Respondents James M. Elegante and Mary A. Elegante during the course of a lawsuit filed by Leonczynska's husband in federal court, Boguslaw Leonczynski v. American Express Travel Related Services Co., T.C.O.C., et al., Civil No. 85-C-884 S (the "Discrimination Lawsuit"). Leonczynska's husband sought damages in the Discrimination Lawsuit for allegedly being terminated from his employment by reason of his national origin.

After being served with the Complaint in this action, Respondents removed the case to federal court and filed a Motion to Dismiss, which was opposed by Leonczynska. Thereafter, Respondents determined that the federal court did not actually have removal jurisdiction and caused the lawsuit to be remanded to state court.

On June 22, 1988 (the day the Order remanding the case was signed), Leonczynska sought to have a default judgment entered against Respondents in state court. The clerk did not do so. Respondents that same day, as a precautionary measure, filed in the state court the Motion to Dismiss which had been previously filed in federal court, and noticed a hearing for July 11, 1988. Leonczynska some days later scheduled for the same time a hearing

on a motion to have Default Judgment entered. At the hearing, the court granted the Motion to Dismiss and denied the motion to enter Default Judgment. The formal Order was entered on July 21, 1988. It is from that Order that Leonczynska appeals.

B. Statement of Facts.

Leonczynska's Statement of Facts does not comply with the rules of this court requiring citations to the Record to support the factual assertions. Accordingly, Respondents will set forth their own Statement of Facts.

THE DEFAMATION CLAIM

1. Leonczynska is the wife of Boguslaw Leonczynski, the Plaintiff in the Discrimination Lawsuit. [R. 62]

2. The law firm of Parsons, Behle & Latimer ("PB&L") represented the Defendants in the Discrimination Lawsuit. Mr. Leonczynski sought to disqualify PB&L from representing the Defendants. [R. 62-63]

3. The motion to disqualify filed in the Discrimination Lawsuit was based upon the contention that James Elegante had represented Mr. Leonczynski, and that Mr. Leonczynski, during the course of communications with Mr. Elegante, had disclosed to Mr. Elegante confidential information which PB&L could use against Mr. Leonczynski. Among the communications alleged by Mr. Leonczynski was one that occurred on February 13, 1984, in which Mr. Leonczynski allegedly disclosed confidential facts to Mr. Elegante respecting a potential lawsuit against American Express Travel

Related Services Co., Inc. [R. 62-64]

4. In opposition to Mr. Leonczynski's motion to disqualify PB&L, an affidavit signed by Mr. Elegante was filed in the Discrimination Lawsuit on October 14, 1985. In that affidavit, Mr. Elegante discussed the timing and substance of his various communications with Mr. Leonczynski prior to the filing of the Discrimination Lawsuit. These communications were set forth in relation to the issues before the court as to whether there was an attorney/client relationship between Mr. Elegante and Mr. Leonczynski and whether the subject matter of the communications between them was substantially related to the subject matter of the Discrimination Lawsuit. [R. 63]

5. In his affidavit, Mr. Elegante discussed a visit he and his wife had with Leonczynski and his wife in February 1984. In an effort to put before the court the substance of the communications that occurred on that date, Mr. Elegante reported on the conversations that took place. He testified that Mr. Leonczynski asked him if he would be interested in representing Mr. Leonczynski in an action against American Express, but Mr. Elegante said he believed PB&L represented American Express and he did not wish to discuss any such problem. Mr. Elegante further testified in his affidavit that the conversation remained primarily at a "theoretical level" and described the content of that part of the conversation. Leonczynska claims that the following statement contained in Mr. Elegante's affidavit defamed her:

While at our home that night Mr. Leonczynski
and his wife, both of whom were lawyers in Poland

prior to their flight from that country, extolled the virtues of Polish law and its protection of the working class and denigrated United States law, which, they claimed, put U.S. workers in a servile plight. I insisted to Mr. Leonczynska that I did not want to hear about his problems with his employer until I was able to verify the conflict, and thus the conversation remained at a theoretical level.

[R. 64 and 73]

6. On October 16, 1985, the federal court held a hearing on Mr. Leonczynski's motion to disqualify PB&L. At the hearing, Mr. Leonczynski contended that a "strict prophylactic rule" should be applied by the court in order "to prevent any possibilities, however slight, that confidential information acquired from a client during previous relation may subsequently be used to a client's disadvantage. To the same effect, Mr. Leonczynski also stated in that hearing that "all my discussion with Mr. Elegante was with regard to this case." [R. 64]

7. The federal court entered an order in the Discrimination Lawsuit on October 28, 1985, denying the motion to disqualify. Mr. Leonczynski appealed that decision, again putting in issue the content of his communications with Mr. Elegante by arguing that:

The fact is that plaintiff was the client of the said law firm, Ergo, the plaintiff had contacts also regarding this civil action . . . revealing to his attorney all possible pertinent information.

[R. 65 and 141]

8. The Tenth Circuit issued an Order on October 21, 1986, ruling that the denial of the motion to disqualify was procedurally

defective because the record lacked findings of fact on which the appeals court could base its review. [R. 65]

9. In accordance with the Tenth Circuit's Order, the federal court held a hearing on the motion to disqualify on July 10, 1987. Mr. and Mrs. Elegante both testified at that hearing. It is testimony of the Elegantes at that hearing that constitutes the second and third alleged defamatory statements of which Leonczynski complains in this action. [R. 65]

10. In the course his testimony at the July 10, 1987 hearing, Mr. Elegante, as he had done in his affidavit, testified concerning his various communications with Mr. Leonczynski prior to the filing of the Discrimination Lawsuit. The purpose of his testimony was to inform the court of the timing and substance of these communications so that the court could determine whether there was a prior attorney/client relationship and whether there was a substantial relationship between the subject matter of any communications between Mr. Elegante and Mr. Leonczynski and the subject matter of the Discrimination Lawsuit. During the course of this testimony, Mr. Elegante stated:

He [Mr. Leonczynski] began telling me about some problem that he was having with the American Express Company. He raised the conversation almost immediately to a theoretical level and complained at some length about the American social system and the plight of workers in the American social system. He was interrupted by his wife who has a strident voice and who was also a lawyer in Poland. And she launched off into a theoretical discussion or dialectic concerning the benefits of the Polish workers under Polish laws as compared to the workers in America and American law.

[R. 66 and 186]

11. During her testimony at the July 10, 1987 hearing, Mrs. Elegante discussed the nature of the conversation held at her home in February 1984 as follows:

I recall -- I don't recall it as well as Jim does. But I recall the strident nature of the conversation and the fact that it was raised to fever pitch and they were screaming to us about the nature of the plight -- well, the plight of the worker in America and the terrible system of justice in this country, and comparing it to the Polish system of justice. And I remember being very surprised at what was happening.

[R. 66-67 and 194-195]

12. In October 1987, the federal court entered findings of fact and conclusions of law denying the motion to disqualify PB&L. Among other things, the court concluded that PB&L had never acted as counsel for Mr. Leonczynski and at no time did the communications between Mr. Leonczynski and Mr. Elegante ever give rise to an attorney/client relationship. [R. 67-68 and 212-218]

THE REQUEST FOR DEFAULT JUDGMENT

13. Respondents were served with the Summons and Complaint in this action on May 16, 1988. [R. 45]

14. On or about June 2, 1988, Respondents filed a Petition for Removal in federal district court asserting diversity jurisdiction. [R. 489]

15. On June 2, 1988, Respondents hand delivered a Notice of Petition for Removal and a copy of the Petition for Removal to the Third District Court Clerk's office. [R. 494]

16. On June 7, 1988, Respondents filed a Motion to Dismiss in federal court on the basis that the alleged defamatory statements were absolutely privileged as they were made during the course of a judicial proceeding. [R. 490]

17. Leonczynska filed a response to the Motion to Dismiss in federal court and a copy of the response in state court on or about June 20, 1988. [R. 51]

18. After filing the Petition for Removal, Respondents determined that the federal court did not, in fact, have removal jurisdiction. Accordingly, Respondents promptly filed a Petition for Remand and an Order of Remand was entered by the federal court on or about June 22, 1988. Notice of Remand was filed with the Third District Court Clerk on June 23, 1988. [R. 482-485]

19. On or about June 19, 1988, Respondents' counsel received a call from Nelia Barber, law and motion clerk for the Third District Court, requesting a ten dollar fee for the filing of the Notice of Petition for Removal. On June 20, 1988, a ten dollar check was hand delivered to Ms. Barber. Respondents' counsel were then informed that the ten dollar fee was not necessary due to the fact that the case was going to be remanded back to the Third District Court. [R. 494]

20. On June 22, 1988, the same day the Order of Remand was signed, but before the Notice of Remand was filed, Leonczynska appeared at the Third District Court Clerk's office and attempted to persuade the Clerk to enter a Default Judgment against Respondents because the Motion to Dismiss had been filed in federal

court but not in state court. [R. 489-492] Leonczynska did not deliver to the Clerk a Default Certificate or a proposed Default Judgment. Rather, she only delivered an Affidavit and "Request for Default Judgment" in the amount set forth in the Complaint. [R. 251]

21. The Third District Court Clerk refused to enter default judgment. [R. 489, 492]

22. In order to expedite proceedings, and as a precaution, Respondents immediately, on June 22, 1988, refiled the Motion to Dismiss in Third District Court and noticed the motion up for hearing on July 11, 1988, at 9:00 a.m. A copy of the Motion and Notice of Hearing was duly served upon Leonczynska, together with a memorandum and Affidavit of Keith Taylor. [R. 258-259; Transcript of July 11 Hearing, R. 548 at p. 9]

23. After receiving the Motion to Dismiss, and on June 27, 1988, Leonczynska noticed a hearing on the motion to enter default for the same time as the hearing on the Motion to Dismiss. [R. 488] Further, on July 8, 1988, Leonczynska filed a Motion to Strike the affidavit of Keith Taylor. [R. 497]

IV. SUMMARY OF ARGUMENTS

1. The alleged defamatory statement contained in the affidavit of James Elegante filed with the federal court in the Discrimination Lawsuit and the testimony of Mr. and Mrs. Elegante given during the July 1987 hearing in the Discrimination Lawsuit are absolutely privileged because those statements were published during the course of a judicial proceeding. The fact that the

affidavit may have been seen by others outside the courtroom does not destroy the privilege. The affidavit and testimony of which Leonczynska complains were clearly related to the issues which existed on the motion to disqualify in the Discrimination Lawsuit as to the substance of the communications which had occurred between Leonczynska's husband and Mr. Elegante, whether an attorney/client relationship had existed and whether any communications were substantially related to the subject matter of the Discrimination Lawsuit.

2. The district court properly refused to enter Respondent's default. Respondents were not in default as they had filed a Motion to Dismiss in federal court after the case was removed to federal court. The fact that removal jurisdiction did not exist so that removal was improper does not mean that the removal never occurred and Leonczynska's contention to the contrary was rejected by the federal court. Further, Leonczynska did not file a Default Certificate for the Clerk to sign. Leonczynska simply filed a "Request for Default Judgment" without even a proposed default judgment. A default judgment could, in any event, have only been entered by the court after a hearing to establish damages, if any. Respondents filed their Motion to Dismiss in this action long before the July 11, 1988 hearing on the default request, so the court could not have granted a default judgment at that time. Finally, even if it was necessary for Respondents to file a separate Motion to Dismiss in state court in addition to the Motion to Dismiss filed in federal court, any default was technical

and the court properly refused to enter default where the Motion to Dismiss was actually filed by Respondents in state court prior to the hearing, and the merits of the lawsuit were being actively contested by the parties.

3. The district court did not err in proceeding to hear the Motion to Dismiss in the face of Leonczynska's contention she did not receive notice of the hearing. Leonczynska did, in fact, receive notice and actually argued the motion. Further, Leonczynska made no showing as required under Rule 56(f) URCP that she could have marshalled facts to defeat the motion if given additional time.

V. ARGUMENT

A. The Alleged Defamatory Statements Are Absolutely Privileged.

As set forth above, Leonczynska claims that the Elegantes defamed her by publishing three separate statements. The first statement was contained in Mr. Elegante's affidavit filed in connection with the Discrimination Lawsuit in which Mr. Elegante recounted the contents of the communications which occurred between Mr. and Mrs. Leonczynski and Mr. and Mrs. Elegante in February 1984. The second defamatory statement complained of was simply Mr. Elegante's testimony at the July 1987 hearing on the motion to disqualify concerning those same communications. The third allegedly defamatory statement was contained in the testimony of Mrs. Elegante at the July 1987 hearing concerning those same

communications. [See p.5-7, paras. 5, 7 and 10, supra.]

The district court correctly ruled that Leonczynska could not recover for the allegedly defamatory statements for the simple reason that those statements were absolutely privileged because they were made during the course of judicial proceedings. Prosser summarizes the absolute privilege which attaches to statements made during the course of judicial proceedings as follows:

It likewise has been conferred upon witnesses, whether they testify voluntarily or not, and even though their testimony is by affidavit or deposition. The resulting lack of any really effective civil remedy against perjurers is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say. Likewise, the privilege extends to counsel in the conduct of the case; and since there is an obvious public interest in affording to everyone the utmost freedom of access to the courts, it extends also to the parties to private litigation, as well as to defendant and instigators of prosecution in criminal cases. The privilege covers anything that may be in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court.

Prosser and Keeton on Torts, Sec. 114 (5th Ed. 1985) [Emphasis Added].

Similarly, Restatement (2d) of Torts, Sec. 588 states:

A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.

In Reliance Insurance Co. v. Hollands, 395 P.2d 537, 538 (Utah 1964), the Utah Supreme Court recognized the absolute privilege in connection with allegedly defamatory allegations

contained in a complaint, stating:

The cloak of protection in judicial proceedings and the pleadings incident thereto seems imperative and obvious in almost all cases, and certainly this one, else few matters would be instituted or tried for fear of inability to prove an alleged wrong.

See also, Beezley v. Hansen, 268 P.2d 1057 (Utah 1955).

Leonczynska erroneously argues that the statements are not privileged because they supposedly had no "nexus or relevancy" to the disqualification motion in the Discrimination Lawsuit. In determining the relevance of an allegedly defamatory statement, the courts have adopted a broad standard holding that if the statement has any possible pertinence, the absolute privilege attaches. Irwin v. Ashurst, 74 P.2d 1127, 1131 (Ore. 1934) (all doubts must be resolved in favor of relevancy or pertinency); Jensen v. Olson, 141 N.W.2d 488, 490 (Minn. 1966); Club Valencia Homeowners vs. Valencia Association, 712 P.2d 1024, 1027-28 (Colo.App. 1985). Comment C of Sec. 588 of the Restatement of Torts quoted above discusses the requirement that a statement have relevancy to the proceeding:

The testimony to be privileged need not be material or relevant to the issues before the court, nor does the fact that the testimony is offered voluntarily and not in response to a question prevent it from being privileged if it has some reference to the subject matter of the litigation.

The case of Bailey v. Superior Court, et al., 636 P.2d 144 (Ariz. 1981) illustrates the breadth of the standard of relevancy which has been employed by the courts. In that case, an attorney

filed a complaint before the Commission on Judicial Qualifications against a Justice of the Peace and in the course thereof published allegedly defamatory statements about the plaintiff, a stranger to those proceedings. The court, nevertheless, found the absolute privilege principle applicable so long as the statements bore some relationship to the proceeding. Addressing the required relevance, the court stated:

The defense of absolute privilege is available if the defamatory statements have some relation to the judicial proceedings, even though they may not constitute evidence relevant and material from a strictly legal evidentiary viewpoint. [citation omitted] A defamatory statement contained in pleadings is absolutely privileged if it is connected with, has any bearing on, or is related to the subject of inquiry. If the party is made subject of a suit for defamation, all doubts as to relevancy should be resolved in his favor. [636 P.2d at 146]

Similarly, in Club Valencia Homeowners v. Valencia Associates, supra, the court held that the absolute privilege attached to letters from counsel to a homeowners association with respect to prospective litigation, stating:

To be privileged, the alleged defamatory matter must have been made in reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it. [citations omitted] The pertinency required is not technical legal relevancy, but rather a general frame of reference and relation to the subject matter of the litigation. [citation omitted] Thus, the privilege embraces anything that possibly may be relevant. [712 P.2d at 1027]

The question of whether an alleged defamatory statement is sufficiently relevant to the lawsuit to give rise to the absolute

privilege is always a question of law which is reserved exclusively for the court to decide. Circus Circus Hotels, Inc. v. Witherspoon, 657 P.2d 101, 105 (Nev. 1983); Jensen v. Olson, 141 N.W.2d 488, 490 (Minn. 1966).

It is simply beyond dispute in the present case that the substance of the communications which occurred between Leonczynska's husband and Mr. Elegante prior to the filing of the Discrimination Lawsuit were at the very core of the issues involved in the disqualification motion. Those issues included whether the communications had given rise to an attorney/client relationship and whether the content of the communications was substantially related to the Discrimination Lawsuit. See, e.g., Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985).

Leonczynska's husband sought disqualification of PB&L on an extremely broad basis, at one point claiming that all communications he had with Mr. Elegante constituted the basis for disqualification of PB&L. Thus, all communications between Mr. Elegante and Leonczynska's husband were placed in issue. The allegedly defamatory statements complained about by Leonczynska were made during the course of a conversation between the Elegantes and the Leonczynskis which occurred at the Elegante home in February 1984. In fact, during this same conversation, Mr. Elegante had informed Leonczynska's husband that he did not want to hear about his legal problems until Mr. Elegante had a chance to check any possible conflicts. Moreover, the alleged defamatory statements were relevant because they supported the position of Mr.

Elegante and PB&L that the communications with Leonczynska's husband prior to the filing of the Discrimination Lawsuit were "theoretical" in nature and not in specific relation to Mr. Leonczynski's problems with American Express.

Leonczynska also argues that the statement contained in Mr. Elegante's affidavit is not privileged because it had to be seen by other people, such as the PB&L secretary who typed it, outside the courtroom. This contention is frivolous and would virtually emasculate the privilege. Obviously, any time allegedly defamatory statements are contained in affidavits, pleadings or depositions, those statements will be seen or heard by someone outside of court. The privilege does not simply apply to statements made in court, but to statements made during the course of judicial proceedings, whether inside or outside of the courtroom, as the authorities cited above demonstrate. For example, Restatement (2d) of Torts, Sec. 586 and Comment A thereto state:

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Comments:

A. . . . the publication of defamatory matter by an attorney is protected not only when made in the institution of the proceedings or in the conduct of litigation before a judicial tribunal, but in conferences and other communications preliminary to the proceeding.

The cases cited by Leonczynska in her Brief do not detract from the foregoing principles. For example, in Wright v. Lawson, 530 P.2d 823 (Utah 1975), relied upon by Leonczynska, the defendants were shareholders of Marketing Systems, Inc. which entered into an acquisition agreement with Com Tel, Inc. The agreement provided for a transfer of all of the stock of Marketing Systems to Com Tel in exchange for a specific number of Com Tel shares. The defendants brought a suit in federal court against Com Tel and its directors, alleging breach of the agreement and fraud in connection therewith. Thereafter, counsel for the defendant shareholders sent a letter which the plaintiff directors claimed defamed them. The letter dealt almost exclusively with claimed wrongful actions which occurred at a shareholders meeting having nothing to do with the acquisition agreement. The Utah Supreme Court simply held that the fact that the letter contained a brief reference to the federal court action did not make the entire letter privileged because the statements made in the letter concerning the annual meeting had no relevance to the dispute concerning the acquisition agreement which was in litigation. Respondents have no quarrel with the decision in Wright, but the situation in Wright is a far cry from the facts of the present case.¹

¹ Leonczynska also erroneously cites Green Acres Trust v. London, 688 P.2d 617, 621 (Ariz. 1984) for the proposition that "a speaker's motive is considered as a crucial element in the area of absolute privilege." [Brief, p. 7] However, the quotation from that case included in the Brief absolutely rebuts this claim.

Leonczynska's Brief on this appeal, which is replete with outlandishly libelous statements towards Respondents, demonstrates more clearly than Respondents ever could the wisdom of affording litigants an absolute privilege to make defamatory statements during the course of presenting their position in litigation. Absent the existence of the very absolute privilege which Leonczynska is now challenging, Leonczynska would be faced with defending a defamation action for her reckless charges.

The district court clearly acted properly in determining that the alleged defamatory statements were absolutely privileged and in dismissing the Complaint.

B. The District Court Properly Refused To Enter Default.

On June 2, 1988, Respondents caused this case to be removed to federal court on the mistaken belief of counsel that removal was proper on the basis of diversity. Respondents promptly filed a Notice of Removal in state court, but neglected to pay a \$10.00 fee which apparently was required. On June 7, 1988, Respondents filed in federal court the same Motion to Dismiss as was ultimately granted in state court. Leonczynska filed a response to that Motion both in federal court and in state court. When Respondents' counsel later realized that removal was not proper, Respondents promptly filed a Petition for Remand with the federal court. An Order remanding the case was signed on June 22, 1988. On June 23, 1988, a Notice of Remand was filed in state court.

On the afternoon of June 22, 1988, Leonczynska attempted

to have a Default Judgment entered against Respondents, even though she knew that the case had been removed to federal court and even though she knew that Respondents were actively litigating the case. Leonczynska did not present the court with the required Default Certificate, but only with an Affidavit and Request for Default Judgment in the amount sought in the Complaint. Leonczynska did not even present a proposed judgment. When the district court clerk would not enter a default judgment, Leonczynska filed her Request for Default Judgment on June 22, 1988, at 3:22 P.M. [R. 251] Respondents filed their Motion to Dismiss in state court as a precaution less than one hour later on June 22, 1988, at 4:15 p.m. [R. 249] At the same time, Respondents scheduled a hearing on the Motion to Dismiss for July 11, 1988, at 9:00 a.m. [R. 258] Five days later, on June 27, 1988, Leonczynska mailed out a notice scheduling a hearing on her default request for the same time as the hearing on the Motion to Dismiss. [R. 488].

At the hearing on July 11, 1988, Judge Young refused to enter default on the basis that even if it was assumed for purposes of argument that a default existed, it was technical only, would readily be set aside and did not prejudice Leonczynska. The district court's determination in this regard was clearly proper.

In the first place, no default existed. The case was removed to federal court. The state court had no jurisdiction to proceed further with the case unless and until the case was remanded. 28 U.S.C., Sec. 1446(e); Polyplastics Inc. v. Transconex, Inc., 713 F.2d 875 (1st Cir. 1983); Artists'

Representatives Ass'n. Inc. v. Haley, 274 N.Y.S.2d 442 (1966) (later remand does not validate state court order after removal.) Even if Respondents had failed to file a copy of the Removal Petition in state court (as opposed to neglecting to pay the \$10.00 fee), that would not have ousted the federal court of jurisdiction. Manufacturers & Traders Trust Co. v. Hartford Acc. & Indem. Co., 434 F.Supp 1053 (D.C.N.Y. 1977); Dukes v. South Carolina Ins. Co., 770 F.2d 545 (5th Cir. 1985). During the time the case was pending in federal court, Respondents timely filed a Motion to Dismiss. As a precaution, Respondents also filed the Motion to Dismiss in state court on June 22, 1988, the same day the Order remanding the case to state court was signed and one day before the Notice of Remand was filed in state court. Leonczynska approved the Order of Remand as to form. Further, Leonczynska's argument that the case had not been removed because Respondents did not pay the \$10.00 fee was rejected by the federal court and was not appealed. [See Leonczynska's "Motion to Relief From Order of Remand" and the federal court's Order attached hereto as Appendix A and B. Respondents request this court to take judicial notice of these pleadings.] That determination is binding on Leonczynska.

Moreover, even if it is assumed that Respondents were in default as of June 22, 1988, when Leonczynska requested entry of Default Judgment, Leonczynska did not follow the proper procedures to have a default entered by the clerk. Leonczynska complains that the clerk did not enter a Default Judgment under Rule 55 of the Utah Rules of Civil Procedure. However, under Rule 55, the clerk

is only authorized to enter a judgment if the claim is for a sum certain. In this case, where the damages sought were not liquidated, an evidentiary hearing before the court would have been required to establish the amount of damages, if any, before a default judgment could have been entered. Russell v. Martell, 681 P.2d 1193 (Ut. 1984); Finch v. Big Chief Drilling Co., 56, F.R.D. 456 (E.D., Tex. 1972). The only action the clerk could have taken in this case would have been to sign a Default Certificate. However, not only didn't Leonczynska present the clerk with a proposed judgment, she did not even present the clerk with a Default Certificate. The only documents presented by Leonczynska were an Affidavit and a Request for Default Judgment. The clerk was not required to prepare Leonczynska's pleadings for her. Moreover, even if the clerk could have entered a default judgment, the clerk could not have done so unless and until the Default Certificate was entered. P & B Land, Inc. v. Klungervik, 751 P.2d 274 (Utah App. 1988).

Within an hour after Leonczynska filed her default documents, Respondents, as a precaution, filed their Motion to Dismiss in state court. Leonczynska did not even notice up a hearing before the judge on her request for a default judgment until five days later. By the time the Request for Default Judgment came before the court on July 11, no default existed. Unless and until a Default Certificate or judgment is entered, a party is entitled to file a responsive pleading, even though late. DeTore v. Local No. 245, etc., 511 F.Supp. 171 (D.N.J. 1981); Dr.

ING. H.C.F. Porsche AG v. Zim, 481 F.Supp. 1247, 1248 at fn.1 (N.D. Texas 1979).

Finally, and perhaps most importantly, the district court refused to enter a default under the circumstances of this case where it was absolutely clear that the case was being actively litigated by Respondents and, in fact, at the time of the hearing on Leonczynska's request to have default entered, Defendant's Motion to Dismiss was also heard. Under these circumstances, the court acted well within its discretion in refusing to enter Respondents' default and that default would have been routinely set aside under Rule 60(b) of Utah Rules of Civil Procedure. See, e.g., Heathman v. Fabian & Clendenin, 377 P.2d 189 (Utah 1962); Westinghouse Electric Supply Co. v. Paul W. Larson Contractor, Inc., 544 P.2d 876 (Utah 1975); McKnight v. Webster, 499 F.Supp. 420 (E.D. Penn. 1980).

Leonczynska complains at length that the court violated her constitutional rights to "fundamental fairness and an access to the court" by refusing to enter default judgment against Respondents. To the contrary, the only party who attempted to deny anyone fair play, fundamental fairness and access to the courts was Leonczynska by her attempt to have Respondents' default entered without notice or warning, based upon a hypertechnical reading of the removal statutes and court rules.

C. The District Court Did Not Err in Proceeding With The Hearing On The Motion to Dismiss.

Finally, Leonczynska argues that the district court violated her constitutional rights by proceeding with the Motion to Dismiss because she supposedly was not notified of the hearing on the motion. This argument is without merit.

The record clearly indicates that Leonczynska was mailed a copy of the Motion to Dismiss, Memorandum, Affidavit of Keith Taylor and Notice of Hearing on June 22, 1988. [R. 249-250 and 258-259]. The hearing was scheduled for July 11, 1988. Five days later, on June 27, 1988, Leonczynska sent out a notice scheduling a hearing on her Request for Default for the same time. Further, on July 5, 1988, she mailed out a Motion to Strike the Taylor Affidavit which she had been mailed. At the hearing on the Motion to Dismiss, Leonczynska acknowledged receiving the motion. [Transcript of July 11, 1988 Hearing, R. 548 at p. 9] At the hearing, Leonczynska asked for time both to argue her default motion and to rebut Respondents' Motion to Dismiss and Leonczynska actually did argue the Motion to Dismiss. [*Id.* at p. 9-13] Leonczynska did not file an affidavit under Rule 56(f) of the Utah Rules of Civil Procedure or otherwise suggest to the court below what evidence could be marshalled by her to somehow avoid the absolute privilege which protected the alleged defamatory statements in the present case. The district court was not required to believe Leonczynska's assertion that she did not receive notice or allow her additional time to no purpose. The

district court clearly acted well within its discretion in hearing the Motion to Dismiss.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the district court's Order dismissing the Complaint should be affirmed.

DATED this 7th day of April, 1989.

BURBIDGE & MITCHELL

By: 

RICHARD D. BURBIDGE

By: 

STEPHEN B. MITCHELL

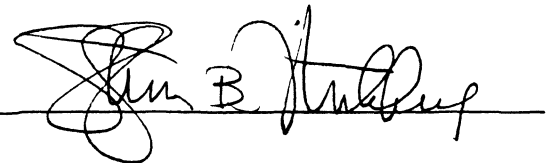
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 1989, four true and correct copies of Respondents' Brief was mailed, postage prepaid, to the following:

Malgorzata Jung-Leonczynska
Appellant Pro Se
Aspen Square
PO Box 6044
Laramie, Wyoming 82070

ddPBLMalg.Brf



Malgorzata Jung-Leonczynska
Aspen Square
P.O.Box 6044
Laramie, Wyoming 82070

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH
JUL 19 11 38 AM '88
MARKUS B. ZIMMER
CLERK
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

MALGORZATA JUNG - LEONCZYNSKA)
)
Plaintiff - pro se)
(Respondent))
)
v.)
)
AMERICAN EXPRESS TRAVEL RELATED)
SERVICES CO, INC., TRAVELERS)
CHEQUE OPERATIONS CENTER)
)
JAMES M. ELEGANTE; - individual)
)
MARY A. ELEGANTE - individual)
)
PARSONS, BEHLE & LATIMER LAW FIRM-)
PROFESSIONAL CORPORATION,)
and)
)
JOHN DOES 1 - 5)
)
Defendants)
(Petitioners))
)

CIVIL NO.: 88-C-0493 G
=====

RULE 60 (b)(2)&(3) F.R.C.P.
=====

(State Court Civil No.:
C-88-01577 , Third District
Court, Salt Lake County, Utah

WITH REQUEST FOR EVIDENTIARY
H E A R I N G
=====

COMES NOW plaintiff-respondent and moves the Court pursuant to the Rule 60 (b)(2)&(3) F.R.C.P. to relieve the respondent from ORDER OF REMAND, signed by Judge J.Thomas Greene Jr. on June 21st,1988, entered on June 22nd,1988, for reasons of fraud upon this Court and misrepresentation of the adverse parties and its counsel Mr.Richard D.Burbidge.

This Motion should be granted for reasons as follows:

1. The defendants and their counsel intentionally made a false representation of fact by words and by conduct, by false and misleading assertion, and by concealment upon this Court and respondent that the civil

action No.: C-88-C1577 was ^{not} removed from the Third District Court, Salt Lake County, Utah, to this United States District Court.

2. Defendants and their counsel at least knowingly did not comply with the provisions of 28 U.S.C. 1446 (e) and they intentionally made a false representation which led the mind of the Court and respondent to an apprehension of the conditions other and different from that which existed, and were calculated for the purpose of inducing the Court and respondent in reliance upon it and to surrender legal rights by respondent.
3. Defendants and their counsel intentionally perverted the truth and concealed the fact that the civil action was never removed from the State Court to this Court.
4. Defendants and their counsel intentionally submitted to Hon. J. Thomas Greene Jr, the U.S. Judge two proposed orders with false statements and false representation that the civil action "...was first removed..." from the State Court, what was done for the purpose to mislead this Court and respondent, and concealed the facts which should have been disclosed that notice upon the State Court with due fee was not given.
5. Defendants and their counsel intentionally deceived this Court and respondent so that she acted upon it to her legal injury including "approval as to form" the second proposed order.

On July 11th, 1988 plaintiff-respondent newly discovered evidence that this Court Order of Remand signed on June 21st, 1988, entered on June 22nd, 1988 "ordered that within action is forthwith remanded to the Third Judicial District Court in and for Salt Lake County, State of Utah, from which the action was first removed." was rendered based upon fraud and false representation upon this Court.

The matter of fact is that the civil action no time was removed from the State Court to the Federal Court because defendants-petitioner and their counsel did not comply with the provisions of 28 U.S.C. Section 1446 (e).

Petitioners did not file a copy of the Petition for Removal with the Clerk of the State Court and due fee was not paid.

Since petitioners knew that their action no time effected removal, they perverted the truth and made a false representation to this Court and respondent to propose the said Order of Remand.

This kind of artifice was employed by defendants-petitioners and counsel for the purpose to deceive this Court and respondent.

It should be underlined that if petitioners and counsel had disclosed the truth regarding the facts of not complying with the law, this Court would not have signed the said Order for Remand.

The same applies to respondent as well who approved it as a form.

Elementary rules of logic dictates that a case which never was remove could not be remanded, however, it was possible only because this Court and respondent as well relied on allegations which in fact were fraud and has been perpetrated upon this Court.

In light of the above respondent respectfully prays as follows:

1. to set aside the said Order for Remand.
2. to schedule evidentiary hearing as soon as possible after July 25. on which respondent desires to call for direct examination:
 - all defendants
 - Mr. Burbidge } from Burbidge & Mitchell Law Firm
 - Mr. Shaughnessy }
 - Ms. Barber } from the Third District Court
 - Mr. Shewell }
3. to relief plaintiff-respondent from the Order for Remand.

and this Motion should be granted for the sake of justice.

DATED this 15th day of July 1988.

M. Jung - Leonczynska
Malgorzata Jung - Leonczynska
(Respondent)

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid a true and correct copy of the foregoing Motion to Relief from Order of Remand to the following on this 15th day of July 1988:

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

ATTEST: A TRUE COPY
MARKUS B. ZIMMER, CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
BY S. Wright
DEPUTY CLERK

M. Jung - Leonczynska
M. Jung - Leonczynska

RICHARD D. BURBIDGE, Esq.
STEPHEN B. MITCHELL, Esq.
BURBIDGE & MITCHELL
Attorneys for Defendants
139 East South Temple
Suite 2001
Salt Lake City, Utah 84111
(801) 355-6677

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH
DEC 14 9 33 AM '88
MARLUS B. ZIMMER
CLERK
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MALGORZATA JUNG-LEONCZYNSKA,)
)
Plaintiff, pro se,)
)
vs.)
)
AMERICAN EXPRESS TRAVEL)
RELATED SERVICES CO., INC.,)
TRAVELERS CHEQUE OPERATIONS)
CENTER; JAMES M. ELEGANTE,)
individual; MARY A. ELEGANTE,)
individual; PARSONS, BEHLE)
& LATIMER LAW FIRM, a)
Professional corporation;)
and JOHN DOES 1 through 5,)
)
Defendants.)

ORDER

Civil No. 88-C-0493-G

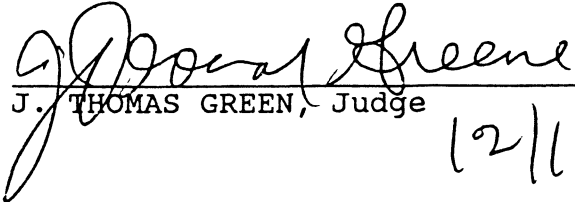
Plaintiff's "Motion To [sic] Relief From Order of Remand" and Plaintiff's "Motion to Continue" the hearing on the "Motion To [sic] Relief From Order of Remand" came on regularly before the above-entitled court on December 6, 1988, at the hour of 11:15 a.m. Defendants appeared by and through their counsel, Richard D. Burbidge of Burbidge & Mitchell, and the Plaintiff did not appear.

The court having reviewed the file in this matter, having heard arguments of counsel and being fully apprised in the

premises,

HEREBY ORDERS, ADJUDGES AND DECREES as follows: The Motion To [sic] Relief From Order of Remand and Motion to Continue are hereby denied.

BY THE COURT


J. THOMAS GREEN, Judge 12/13/88

CERTIFICATE OF SERVICE

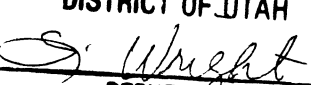
I hereby certify that on the 6th day of December, 1988, a true and correct copy of the foregoing Order was mailed, postage prepaid, to the following:

Malgorzata Jung-Leonczynska
Aspen Square
PO Box 6044
Laramie, Wyoming 82070



ddPBL-MalJ.Len

Copies mailed to counsel, 12-14-88jm
Malgorzata Jung-Leonczynska
Richard D. Burbidge, Esq.

ATTEST: A TRUE COPY
MARKUS B. ZIMMER, CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
BY 
DEPUTY CLERK