1998

John A. Loporto v. Lucy Z. Hoegemann : Brief of Appellee

Utah Court of Appeals

R. Clayton Huntsman; Paul R. Christensen; Huntsman and Christensen; Attorney for Plaintiff/Appellee.
Michael D. Hughes; Samuel G. Draper; Hughes and Read; Attorney for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

JOHN A. LOPORTO Plaintiff/Appellee vs. LUCY Z. (LOPORTO) HOEGEMANN, Defendant/Appellant	BRIEF OF APPELLEE Appellate No. 981114-CA Trial Court No. 954500424

APPEAL from the Fifth District Court,
in and for Washington County, Utah,
Hon. James. L. Shumate, Fifth District Court Judge

ARGUMENT PRIORITY CLASSIFICATION: Rule 29(b)(15), Utah R.App.P.
Domestic/Civil matter--appeal from final judgment

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I. PARTIES TO THE PROCEEDINGS:

All parties to this proceeding are set forth in the caption of the case.

II. TABLE OF CONTENTS:

III. TABLE OF AUTHORITIES:

IV. JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated §78-2a-3(1997).

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1

Did the defendant have notice (constructive or otherwise) and if so was it an abuse of discretion for the trial court to deny defendant/appellant's motion pursuant to Rule 60(b) to be relived from the July 7, 1997 judgment?

Standard of Review

In reviewing the trial court's decision under Rule 60(b) of the Utah Rules of Civil Procedure, it is only reversed if it is **clearly** established that the trial court has abused its discretion. Kanzee v. Kanzee, 668 P.2d 495, 497 (Utah 1983); Corbett v. Fitzgerald, 709 P.2d, 384, 386 (Utah 1985); Airkem Intermountain, Inc. v. Parker, 513 P.2d 429 (Utah S.Ct. 1973); Fackrell v. Fackrell, 740 P.2d 1318 (Utah S.Ct.1987).

ISSUE NO. 2

Were there procedural errors of defendant's former counsel, plaintiff's counsel and the trial court which mandates, as a matter of law, that this case should be remanded for further proceedings at the trial court level?

Standard of Review

In reviewing the trial court's decision under Rule 60(b) of

the Utah Rules of Civil Procedure, it is only reversed if it is clearly established that the trial court has abused its discretion. Kanzee v. Kanzee, 668 P.2d 495, 497 (Utah 1983); Corbett v. Fitzgerald, 709 P.2d, 384, 386 (Utah 1985); Airkem Intermountain, Inc. v. Parker, 513 P.2d 429 (Utah S.Ct. 1973); Fackrell v. Fackrell, 740 P.2d 1318 (Utah S.Ct.1987).

VI. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Rule 60(b) Utah Rules of Civil Procedure

(b) MISTAKES; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.. On motion and upon such terms as are just, the Court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. the motion shall be made within reasonable time and for reasons (1) (2) (3), or (4), not more than three (3) months after the judgment, order, or proceeding was entered or take. A motion under this subdivision (b) does not

affect the finality of a judgment, or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 55(a) Utah Rules of Civil Procedure

(a) Default

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

(2) Notice to Party in default. After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of actions taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in

the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the non-defaulting party.

Section 78-51-36 UTAH CODE ANNOTATED

When an attorney dies or is removed or suspended, or ceases to act as such, a party to an action or proceeding for whom he was acting as attorney must, before any **further proceedings** [emphasis added] are had against him be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

Rule 4-506 Utah Code of Judicial Administration

(1) Consistent with the Rules of Professional Conduct, an attorney may withdraw as counsel of record except when (a) a motion has been filed and is pending before the court or (b) a certificate of readiness for trial has been filed. Under these circumstances, an attorney may not withdraw except upon motion and order of the court. When an attorney withdraws under circumstances where court approval is not required, the notice of withdrawal shall include a statement by the attorney that there are no motions pending and that no certificate of readiness for trial has been filed.

(2) When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the

withdrawing attorney and upon **all parties not in default** [emphasis added] and a certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal served upon the client shall include a notification of the trial date.

(3) When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, opposing counsel must notify, in writing, the unrepresented client of his/her responsibility to retain another attorney or appear in person before opposing counsel can initiate **further proceedings** [emphasis added] against the client. A copy of the written notice shall be filed with the court and no further proceedings shall be held in the matter until twenty (20) days have elapsed from the date of filing.

VII. STATEMENT OF THE CASE

A Complaint for divorce was filed in Washington County, State of Utah, Fifth District Court on or about July 18, 1995 (R.2). During the process of the divorce litigation, Defendant/Appellant first hired Mr. LaMar J. Winward who later withdrew as counsel for the Defendant/Appellant in July, 1996.

Plaintiff/Appellee through counsel sent a certified letter to the Defendant/Appellant advising her to appear in person or obtain counsel. That certified letter was unclaimed and returned to

plaintiff's counsel's office on September 13, 1996 (attached hereto and incorporated herein by reference as Exhibit "A").

Defendant/Appellant then hired Mr. Harold J. Dent.

After extensive litigation, wherein, among other things the defendant/appellant refused service of process of an Order to Show Cause, and failed to appear at a hearing, the case was set for trial by way of notice from the Fifth District Court Clerk's office, which was sent to both counsels of record on May 21, 1997.

The trial was set for Monday June 23, 1997 (R. 172).

On June 23, 1997, plaintiff/appellee appeared with his witnesses and his counsel, Paul R. Christensen. The defendant/appellant did not appear for the trial (R. 184).

Attorney for the defendant/appellant did appear and notified the court that his client would not be present and then moved the court for leave to withdraw (R. 184).

Said motion was granted and the court had all the pleadings of the defendant/appellant stricken placing her in default (R. 184).

The court instructed counsel for the plaintiff/appellee to take his relief sought as well as attorney's fees and other equitable relief (attached hereto and incorporated herein by reference in Exhibit B a copy of the court transcript of the trial June 23, 1997).

The court found that in view of the defendant's recalcitrance

in prosecuting the litigation and the difficult times that were reflected in the file dictated the relief sought by the plaintiff/appellant (R. 185).

The final order was entered July 7, 1997 (R. 208).

Defendant sought relief from the Judgment by way of a 60(b) motion and a motion for reconsideration.

The trial court denied the motion by an order entered December 19, 1997 (R. 355).

An order denying the motion to reconsider was entered January 21, 1998 (R. 377).

The bases of defendant/appellant's motion to set aside the default judgment are:

(1) Defendant claims she did not receive notice of the trial until June 20, 1998 at the hour of 4:50 p.m.;

(2) She could not appear because of her work schedule;

(3) Her attorney advised her that she could appear by telephone;

(4) She did not know it was the final trial (R. 228-229);

(5) Defendant had a family outing already scheduled for the week end prior to trial date. (Exhibit "C", Affidavit of Harold J. Dent).

This appeal arises from the trial court's denial of both the 60(b) motion and the motion to reconsider.

VIII. SUMMARY OF ARGUMENTS

It is the position of the plaintiff/appellee that the trial court did not abuse its discretion in failing to grant the defendant's motion to set aside the judgment against the defendant/appellant. It is clearly within the court's discretion to let the judgment stand. Plaintiff/appellee asserts that Rule 55(a) of the Utah Rules of Civil Procedure and applicable case law govern the instant case before this court.

The defendant/appellant's position is that the Court of Appeals should reverse the case for further proceedings based upon mistake, excusable neglect, or surprise pursuant to Rule 60(b), Utah R.Civ.P.. The defendant/appellant further asserts that plaintiff's counsel had a duty, pursuant to Rule 4-506 of the Utah Code of Judicial Administration and Utah Code Ann §78-51-36 to advise the defendant that she should appoint or appear in person before judgment was rendered. This argument is not well grounded in law or fact.

IX. ARGUMENT

A. DEFENDANT HAD EFFECTIVE NOTICE OF THE TRIAL.

Trial in this case was scheduled on June 23, 1997. Defendant's counsel received notice May 21, 1997, of the trial scheduled June 23, 1997 (R. 228). Counsel for the

defendant/appellant made her aware of the court date on by at least the Friday, June 20, 1997, prior to the trial. Defendant asserts that her counsel informed her that she would not have to appear (R. 229). This assertion is disingenuous at best and a fraud upon the court at worst. The defendant/appellant is just not credible based upon her past behavior. At a hearing held in May of 1997, the trial court made it clear that the case would be set for trial at the earliest possible date that could accommodate a one (1) day trial. No other hearings were proposed or notices sent to the parties or their respective counsels of record.

Counsel for the defendant makes the argument that the defendant had no effective notice of the trial. The defendant would have the court believe that although placed on notice the Friday before the Monday trial, this was not effective notice and that her counsel told her that she need not appear and that she could appear telephonically although he was present and asked for leave to withdraw at the time and place set for trial (R. 184).

The trial court **may** in the furtherance of justice relieve a party from a final judgment for mistake, inadvertence, surprise or excusable neglect pursuant to Rule 60 Utah R.Civ.P.. Where any reasonable excuse is offered by the defaulting party, courts generally favor granting relief from a default judgment unless it appears that to do so would result in substantial injustice to the

adverse party. (citing Miller v. Brocksmith, 825 P.2d 690, 692 (1992 Utah App.) and Airkem Intermountain v. Parker, 513 P.2d 429 (Utah 1973)).

In the instant case, the defendant by way of her own affidavit admits to being on notice of the court date scheduled June 23, 1997. There is no reasonable justification for the defendant not to have appeared. Her counsel was present.

After two years of extensive litigation, a substantial injustice would be heaped upon the plaintiff/appellee. Additionally, the court made findings that defendant's recalcitrant behavior was the basis of the judgment. (See Exhibit B, copy of court transcript of June 23, 1997 trial proceedings).

The defendant in her motion and affidavit asserts that a trial on the merits of the case would have resulted in a different outcome. It is not appropriate for the court to examine the merits of such claims Erickson v. Whenkers Int'l Forwarders, Inc., 882 P.2d 1147 (Utah 1994). The defendant would have the court interpose its decision for that of the trial court and find that it is reasonable to believe that: (1) Notice the Friday before trial was not effective, although notice had been hand delivered to defendant's counsel May 21, 1997; (2) that her attorney told her that she need not appear; (3) that he did not advise her that it was trial; (4) that she could appear telephonically.

Plaintiff/appellee's position is that the facts as presented by the defendant/appellant are wholly unreasonable and or not sufficient grounds to find that the trial court's decision was an abuse of discretion.

> The trial court is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from a final judgment under Rule 60(b)(1) U.R.C.P., and this court will reverse the trial court only when an abuse of discretion is **clearly established**. The trial court must balance two valid considerations: on the one hand, to relieve the party of the judgment initiates the effects of res judicata and creates a hardship for the successful litigant by causing him to prosecute more than once his action and subjecting him to the possible loss of collecting his judgment. On the other hand, the court desires to protect the losing party who has not had the opportunity to present his claim or defense. The rule that the courts will incline towards granting relief to a party who has not had the opportunity to present his case, is ordinarily applied at the trial court level, and this court will not reverse the determination of the trial court merely because the motion **could** have been granted. For this court to overturn the discretion of the lower court in refusing to vacate a valid judgment, the requirements of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded him or his legal representative. The movant must show that he has used **due diligence** and that he was prevented from appearing by circumstances over which he had no control. Airkem Intermountain, Inc., v. Parker 513 P.2d 429 (Utah S.Ct. 1973). [Emphasis added].

In the instant case, the Court advised defendant/appellant in May that the trial would be set at the court's earliest possible convenience. No other motions or notices of hearing were sent to the parties or counsels of record. The Court sent notice of the trial setting for June 23, 1997, to both parties' legal

representatives. The defendant admits in her affidavit that she was notified of the June 23, 1997, date the week before the trial. Affidavit of counsel for the defendant specifically states that he told her of the date and that they needed to get together to prepare for trial. (Attached hereto and incorporated by reference as Exhibit C and made a part hereof, Affidavit of Harold J. Dent). The defendant refused and told her counsel that she had a family outing and that she had to work on the following Monday so that she could not be present in court. By these actions of the defendant, she does not show due diligence in defending her position, or in prosecuting her counter-claim.

II. NOTICE TO APPOINT COUNSEL OR APPEAR IS INAPPLICABLE TO THE INSTANT CASE

Rule 4-506 of Utah Rules of Judicial Administration and Utah Code Annotated §78-51-36 are inapplicable to this case.

Counsel for the defendant/appellant's position is that on the date of trial, counsel for plaintiff/appellee, Mr. Christensen, had a duty to protect the defendant and that failure to do so is reversible error. Rule 4-506(3) of Utah Code of Jud. Admin. and Utah Code Annotated §78-51-36 require that:

> If an attorney withdraws as counsel of record, the withdrawing attorney must serve written notice of the withdrawal upon the client of the withdrawing attorney and upon all other **parties not in default:** A Certificate of service must be filed with the court. If a trial date

has been set, the notice of withdrawal shall include a notification of the trial date. [Emphasis added].

The court in the instant case struck defendant's pleadings, thus placing her in a position of default. This sanction is clearly within the discretion of the trial court, based upon the Court's making a specific finding of her past recalcitrance and of her own failure to appear and defend at the time of trial.

The language of Rule 4-506 is that "notice of the withdrawal... upon all other parties not in default" obviates opposing counsel's duty to notify the defendant to appear or appoint. The striking of her pleadings, based upon defendant's own recalcitrant behavior towards orders of the court, placed her in default. Defendant/appellant herself, and no one else, is responsible for her default--not her various attorneys, not the court, not opposing counsel, and not plaintiff, although all were victimized by her costly pattern of no-shows, refusals to cooperate, and other recalcitrant behavior, as incorporated in the Court's findings in rendering her pleadings stricken and her cause defaulted.

Counsel for defendant/appellant goes on to argue that it is plaintiff's counsel's responsibility to stop the trial and file the notice to appoint or appear and that no **further proceedings** shall be held until twenty (20) days after service of the notice to appear or appoint. This is wholly inapplicable to the instant

case. The date for trial had come. The proceeding had commenced. No further proceedings were scheduled. The court struck the pleadings of defendant/appellant as indicated above and directed counsel for the plaintiff/appellee to take his judgment. The applicable law in the instant case is governed by Rule 55(a) of the Utah Rules of Civil Procedure, which states:

> A) DEFAULT
>
> (1) ENTRY. When a party against whom a judgment for affirmative relief is sought ha failed to plead or otherwise defend as provided by these rules and that fact is made to appear, the clerk shall enter his default.
>
> (2) NOTICE TO PARTY IN DEFAULT. After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, **it shall not be necessary to give such party in default any notice of actions taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action** or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the non-defaulting party. [Emphasis added].

Rule 55(a) of Utah R.Civ.P. is clear. Once a party is found in default there is no reason for counsel for the opposing party to serve any paper whatsoever upon the defaulting party.

X. CONCLUSION

The trial court did not err or abuse its discretion in refusing

to set aside the default judgment against defendant/appellant. The applicable Utah State law in the instant case is well settled. The Appellate Court must first establish that the trial court **clearly abused** its discretion in failing to set aside a judgment taken by default. Merely because the trial court **could** relieve the defendant/appellant from judgment is permissive only, not mandatory. The trial court, being aware of all the facts in the instant case, **may** relieve a party from judgment by default, but as a matter of law, if no good cause is shown, it is not mandated to do so. The defendant/appellant, not plaintiff/appellee, must show due diligence, and that her failure to defend was caused by circumstances over which she had no control. Defendant has demonstrated no due diligence whatsoever, nor any other good cause, for her failure to appear and defend at the properly noticed trial which she was too busy to attend.

Defendant/appellant's reliance on Rule 4-506 of the U.R.J.A. and U.C.A. §78-51-36 is not well founded. Rule 55(a) of U.R.C.P. is the appropriate statute that governs this case. The trial was set. Notice was full, timely, and proper in all respects. The defendant/appellant failed to appear. The pleadings were stricken and the defendant/appellant was found to be recalcitrant towards the orders of the court. No notice or paper whatsoever needs to be served upon the defendant/appellant once placed in default.

Therefore, the defendant/appellant's appeal should be dismissed and costs and attorneys fees should be awarded to plaintiff/appellee.

Respectfully submitted this 15th day of September, 1997.

HUNTSMAN & CHRISTENSEN

Paul R. Christensen

PAUL R. CHRISTENSEN
Attorney for Plaintiff and
Appellee

R. CLAYTON HUNTSMAN
Attorney for Plaintiff and
Appellee

17 September 1997

CERTIFICATE OF SERVICE BY MAILING

I do hereby certify that on the 17th day of September, 1998, I mailed two true and correct copies of the above and foregoing , **BRIEF OF APPELLEE**, by placing same in the United States Mail, first-class postage prepaid, to the following, to wit:

Samuel Draper
HUGHES & READ
187 North 100 West
St. George, Utah 84770

R. CLAYTON HUNTSMAN
Attorney for Defendant and Appellant

EXHIBIT A

ISMAN & CHRISTENSEN
Southgate Professional Center
283 West Hilton Drive
Suite 3
St. George, Utah 84770

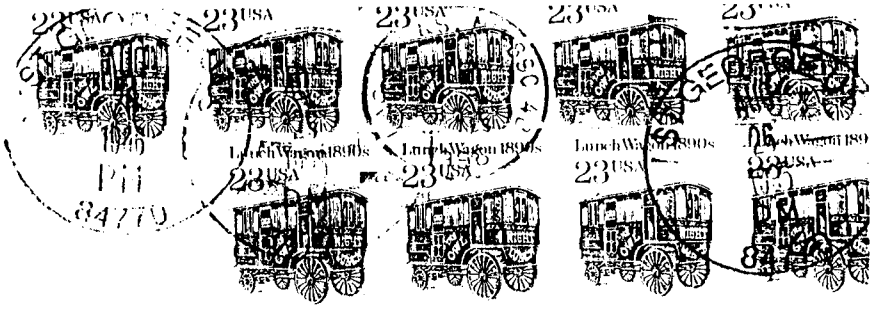
Id at line over top of enve
the right of the return add

CERTIFIED

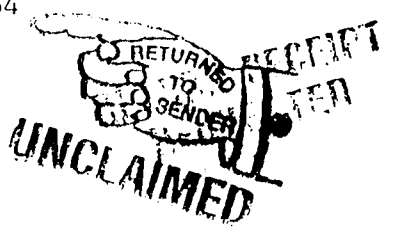
277 691 260

MAIL

ORDER FROM PRECISION BUSINESS FORMS (800) 231-6739



Lucy Hoegeman
2200 Ft Apache Rd
Canyon Lake Apartment #1154
Las Vegas NV 89117



R/9.13

Delivery Notice/Reminder/Receipt
3 part Delivery Notice Form 3849, May 1994

ORIGINALY

Paul R. Christensen
Attorney for Plaintiff
HUNTSMAN AND CHRISTENSEN
283 West Hilton Drive
St. George, Utah 84770
Phone: (801) 628-2846

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR

WASHINGTON COUNTY, STATE OF UTAH

JOHN ANTHONY LoPORTO, Plaintiff vs. LUCY ZUNIGA LoPORTO, Defendant	NOTICE TO APPOINT COUNSEL OR, IN THE ALTERNATIVE, TO APPEAR IN PERSON Civil No. 954500424

TO THE DEFENDANT: You are hereby notified that LaMar J. Winward has withdrawn as attorney for defendant in the above-entitled matter. Pursuant to Section 78-51-31 of the Utah Code Annotated (1953) as amended, you are hereby given notice to appoint another attorney to act for you in the above-entitled action, or to appear in person to defend said action.

DATED this 25th of July, 1996.

Paul R Christensen

Paul R. Christensen
Attorney for Plaintiff

MAILING CERTIFICATE

I do hereby certify that on this 25 day of July, 1996, I did mail a true and correct copy of this above and foregoing document, by placing the same in the United States mail, first class postage prepaid, to the following, to wit:

Mrs. Lucy Hoegemann fka
Lucy Zuniga LoPorto
2200 South Fort Apache, #1154
Las Vegas, NV 89117

Secretary

EXHIBIT B

COPY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

HON. JAMES L. SHUMATE, judge

JOHN A. LOPORTO, Plaintiff, vs. LUCY Z. (LOPORTO) HOEGEMANN, Defendant.	)	Civil No. 954500424 (Videotaped Proceedings)

REPORTER'S HEARING TRANSCRIPT
Monday, June 23, 1997

APPEARANCES OF COUNSEL:

For the Plaintiff: HUNTSMAN & CHRISTENSEN
BY: PAUL R. CHRISTENSEN, ESQ.
283 West Hilton Drive, Suite 3
St. George, Utah 84770

For the Defendant: SCARTH & DENT
BY: HAROLD J. DENT, ESQ.
150 North 200 East, Suite 203
St. George, Utah 84770

PAUL G. MCMULLIN
CERTIFIED SHORTHAND REPORTER
P.O. BOX 1534
ST. GEORGE, UTAH 84771
(801) 674-1283

ST. GEORGE, UTAH; MONDAY, JUNE 23, 1997

-oOo-

THE COURT: Good morning, Ladies and Gentlemen. The record will reflect that today is the 23rd day of June, 1997, and the hour is 9:03 A.M.

Two matters are on the calendar for a hearing on this morning's date. The first one is Loporto versus Loporto. The file number there is 954500424.

Mr. Loporto is present. His counsel, Mr. Christensen, is also present.

Counsel, I am informed by Mr. Dent, through the clerk's office, that he does not have his client here, intends to ask leave of the Court to withdraw, and based upon that, would basically leave this matter in a position of entering a default.

Is that your understanding as well?

MR. CHRISTENSEN: That's my understanding, Your Honor.

THE COURT: Here comes Mr. Dent right now, so I'll stop talking for him and let him say it himself.

Mr. Dent, I just put on the record the information that was conveyed to me in Loporto that indicated that your client was not here. That you had difficulty, apparently, in your relationship with the

client and had asked leave to withdraw in Loporto.

Is that correct, Counsel?

MR. DENT: That's correct, Your Honor.

THE COURT: All right. Your motion to withdraw is granted. The pleadings of the defendant are ordered stricken.

Mr. Christensen, you may take your relief sought, and you may take attorney's fees as well.

MR. CHRISTENSEN: Thank you, Your Honor. My one concern is -- is that there's a retirement fund in this particular matter. And under the Woodward v. Woodward, the defendant would be entitled to one half of that. However, based upon the facts that we haven't received child support or any of the other costs such as medical care or child care, we would be seeking for having her waive any entitlement to that retirement.

THE COURT: Counsel, the Court, in view of this defendant's recalcitrance in prosecuting this litigation, the difficult times that this file shows that have gone on through this manner, I think the equities in the case firmly support the award of the entire retirement fund.

MR. CHRISTENSEN: Thank you, Your Honor.

THE COURT: So you may draft your pleadings accordingly, and I'll sign them.

MR. CHRISTENSEN: Thank you, Your Honor.

THE COURT: Thank you, counsel.

MR. DENT: Thank you, Your Honor.

(Whereupon, the matter was concluded.)

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, a Certified Shorthand Reporter and Notary Public duly qualified in and for the State of Utah, do hereby certify:

That the foregoing matter, to wit, **JOHN A. LOPORTO VS. LUCY Z. (LOPORTO) HOEGEMANN, CIVIL NO. 954500424**, was videotaped at the time and place therein named and thereafter, to the best of my listening and understanding, reduced to computerized transcription.

I further testify that I am not interested in the event of the action.

WITNESS my hand and seal this 2nd day of December, 1997.

PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah

MY COMMISSION EXPIRES: 3-17-99

NOTARY PUBLIC
PAUL G. MCMULLIN
423 North 55 West Circle
St. George, UT 84770
My Commission Expires
March 17th, 1999
STATE OF UTAH

EXHIBIT C

COPY

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

JOHN A. LOPORTO,)

Plaintiff,) AFFIDAVIT OF HAROLD J. DENT, JR.

vs.)

LUCY Z.(LOPORTO), HOEGEMANN,) CASE NO. 954500424

Defendant.) Honorable James L. Shumate

STATE OF UTAH)
: SS
COUNTY OF WASHINGTON)

COMES NOW HAROLD J. DENT, JR., who having been duly sworn upon oath deposes and says as follows:

1. That I am a licensed attorney practising in St. George, Utah, and formerly represented Mrs. Hoegemann, the Defendant in the above -entitled action.

2. That I undertook this case after my predecesor had done considerable work on behalf of Mrs. Hoegemann.

3. That Mrs. Hoegemann was never satisfied with the work that was done on her behalf as indicated in my letter to her dated July 17, 1997, a copy of which is attached hereto and incorporated herein by reference as EXHIBIT A.

4. That Mr. Christensen and I had worked dilligently to work out a resolution of the issues and reach a stipulated settlement that would save our clients time and money.

5. That on several occassions I presented a proposed agreement to Mrs. Hoegemann to which she would agree and subsequentoly decide that certain of the terms were unacceptable.

6. That on May 23, 1997, at an Order to Show Cause, certain matters were heard and resolved by the Court and it was determined that an early trial setting was needed although I don't recall whether or not a specific date was set in open court.

7. That in fact a trial date was set for June 23, 1997, and notice of that setting (dated two day prior to the Order to Show Cause) was provided to me and Mr. Chirstensen. A copy of the Court's notice is attached hereto and incorporated herein by reerence as EXHIBIT B.

8. That during the interval between May 23, 1997, and right up to the date of trial Mr. Christensen and I continued to work on a resolution of the matter.

9. That it is our office procedure to forward all notices of Court dates to our clients and my asssumption is that the Notice appearing as EXHIBIT B was sent to Mrs. Hoegemann; however, I am not certain of that fact.

10. That my associate ~~in~~ our Kanab office also worked on a negotiated settlement in an effort to obviate the necessity of trial. A copy of one of her letters to Mr. Christensen is attached hereto and incorporated herein by reference as EXHIBIT C.

11. That Mrs. Hoegemann was not pleased with Ms. Johnstone's efforts on her behalf and Ms. Johnstone came to the conclusion nothing more could be done to please her.

12. That I filed a Motion to Continue the trial date, which motion was denied.

13. That during the week preceeding the trial date I was in another jurisdiction in northern Utah and returned on thursday whereupon I called Mrs. Hoegemann to arrange a meeting time over the week-end for trial preparation. Mrs. Hoegemann informed me she would be unable to meet with me because of a family outing and further, that she would be unavailable for the trial because of her work schedule. She denied having received notice of the trial.

14. That during my phone conversation with Mrs. Hoegemann we discussed the most recent settlement proposal, which I did recommend. At that time she, for the first time to my knowledge insisted that vehicles owned by the parties be sold and the proceeds divided. It was as if we were right on the verge of settlement until this new demand was put forward and we were back to square one.

15. That I again asked Mrs. Hoegemann specifically if she would meet for trial preparation and make arrangements to attend trial and her reply was that she would not. I told her I would speak to Mr. Christensen again about a resolution and would appear at court.

16. That Mr. Christensen and I spoke at least twice during the week-end prior to trial but could not reach agreement because of the recalcitrance of my client. I advised Mr. Christensen of my intent to ask the Court for permission to withdraw.

17. That I appeared in Court on June 23, 1997, briefly explained that I was unable to work with my client and requested permission to withdraw which was granted.

DATED this 31 day of October, 1997.

HAROLD J. DENT, JR.

SUBSCRIBED and sworn to before me this 31 day of November, 1997.

NOTARY PUBLIC

My Commission Expires : 9/21/2001

VICKI LASSWELL
NOTARY PUBLIC • STATE of UTAH
150 NORTH 200 EAST
ST. GEORGE, UT 84720
COMM. EXP. 9-21-2001