1998

Loporto v. Lucy Z. (Loporto) Hoegemann : Amended Brief of Appellant

Utah Court of Appeals

R. Clay Huntsman; Paul R. Christensen; Huntsman and Christensen; Attorneys for Plaintiff and Appellee.
Michael D. Hughes; Samuel G. Draper; Hughes and Read; Attorneys for Defendant and Appellant.

IN THE UTAH COURT OF APPEALS

JOHN A. LOPORTO, Plaintiff/Appellee, v. LUCY Z. (LOPORTO) HOEGEMANN, Defendant/Appellant.	Appellate No. 981114-CA

Argument Priority No. 15

AMENDED BRIEF OF APPELLANT

Appeal from the Judgment and Orders of the District Court of the Fifth Judicial District, the Honorable James L. Shumate, Presiding.

R. Clay Huntsman
Paul R. Christensen
HUNTSMAN & CHRISTENSEN
283 West Hilton Drive, Ste. 3
St. George, UT 84770

Attorneys for Plaintiff and Appellee

Michael D. Hughes (Bar No. 1572)
Samuel G. Draper (Bar No. 7050)
HUGHES & READ
187 North 100 West
St. George, UT 84770

Attorneys for Defendant and Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

JURISDICTION IN THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to§ 78-2a-3, Utah Code Ann. (1996).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1

In light of the defendant's lack of notice of the trial setting, was it proper for the trial court to deny defendant's motion to be relieved from the July 7, 1997 judgment? This issue was raised in plaintiff's Motion for Relief from Decree filed September 18, 1997.

Standard of Review

A denial of a motion to vacate a judgment under Rule 60(b) of the Utah Rules of Civil Procedure is ordinarily reversed only for an abuse of discretion. Katz v. Pierce, 732 P.2d 92, 93 (Utah 1996); Russell v. Martell, 681 P.2d 1193, 1994 (Utah 1984); Baker v. Western Sur. Co., 757 P.2d 878, 881 (Utah App. 1988).

ISSUE NO. 2

In light of the procedural errors of defendant's former counsel, plaintiff's counsel, and the trial court, was it proper for the trial court to deny defendant's motion to be relieved from the July 7, 1997 judgment? This issue was raised in plaintiff's Motion for Relief from Decree, filed September 18, 1997, and Motion to Reconsider, filed December 29, 1997.

Standard of Review

A denial of a motion to vacate a judgment under Rule 60(b) is ordinarily reversed only for an abuse of discretion. Katz v. Pierce, 732 P.2d 92, 93 (Utah 1996); Russell v. Martell, 681

P.2d 1193, 1994 (Utah 1984); Baker v. Western Sur. Co., 757 P.2d 878, 881 (Utah App. 1988). Whether the proper procedures were followed is a question of law and is reviewed for correctness. Hartford Leasing Corp. v. Utah, 888 P.2d 694 (Utah App. 1994). Since this claim presents a question of law, it is reviewed under a correction of error standard, giving no particular deference to the trial court's determination. See Ames v. Maas, 846 P.2d 468, 471 (Utah App. 1993); Holm v. Smilowitz, 840 P.2d 157, 160 (Utah App. 1992).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Section 78-51-36, Utah Code Ann. (1996)

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 are had against him be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

Rule 60, Utah Rules of Civil Procedure

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(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) the judgment is void; (5) 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 (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. 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 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 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 or readiness of trial has been filed.

(2) When 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 and 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.

(4) 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 the unrepresented client of his/her responsibility to retain another attorney or to appear in person before opposing counsel can initiate further proceedings against the client. A copy of the written notice shall be filed with the court and no further proceedings shall be held in the case until 20 days have elapsed from the date of filing.

STATEMENT OF THE CASE

A complaint for divorce was filed in this matter was filed on or about July 18, 1995. The parties have two young children (R. 2-3). During the marriage, plaintiff worked as a pharmicist and defendant was a homemaker.

After extensive litigation, a notice of bench trial scheduled for Monday, June 23, 1997 was served upon the parties' counsel on May 21, 1997 (R. 172). Defendant received no notice of any hearing until the Friday before trial at approximately 4:50 p.m. (R. 228). At that time, her counsel called and notified her that there was a hearing scheduled on the following Monday (R. 228-9). She was told that it was just a hearing and that she could appear by telephone (R. 229).

On the morning of trial, the defendant's counsel sought leave from the court to withdraw (R. 184). Leave was granted, the court struck the defendant's answer, her default was entered, and plaintiff was awarded his attorneys fees and costs (R. 184, 398). Counsel for the plaintiff then requested further relief not in requested in his complaint, which the court granted (R. 184, 398). No notice to appear or appoint counsel was filed. The notice of withdrawal of defendant's counsel was filed until June 25, 1997 (R. 185).

A final order was entered on July 7, 1997 (R. 208). This order included further relief not requested in plaintiff's complaint or at trial (R. 229-30).

Plaintiff filed her Rule 60(b) motion and supporting affidavit on September 18, 1997. Defendant filed his responsive objection to the motion on October 6, 1997. It was unsupported by affidavit or other documentation. No hearing was requested by either party. Defendant filed his reply memorandum on October 14, 1997 and submitted the matter for decision on October 23, 1998. The trial court denied by the motion by an order entered December 19, 1997 (R. 355). Defendant filed a motion to reconsider on December 29, 1997 (R. 358). An order denying the motion to reconsider was entered January 21, 1998 (R. 377).

SUMMARY OF ARGUMENTS

Due to the actions or inaction of her former counsel, defendant was denied effective notice of the trial in this matter. Her failure to appear at trial constitutes a mistake, surprise or excusable neglect pursuant to Rule 60(b)(1), Utah R. Civ. P.

At trial, the defendant's former counsel sought and received the court's leave to withdraw as counsel. Rule 4-506 of the Utah Code of Judicial Administration provides that plaintiff's

counsel was then required to file a notice to appear or appoint counsel and that no further proceedings shall be held in the case until 20 days have elapsed from the filing of the notice. Contrary to Rule 4-506, the court in this matter immediately struck the pleadings of the defendant and granted additional relief to the plaintiff.

ARGUMENT

I. SURPRISE, MISTAKE OR EXCUSABLE NEGLECT

A. Defendant Had No Effective Notice of the Trial

Trial in this case was scheduled for June 23, 1997. Defendant was not made aware that there was a hearing scheduled in her case by her prior counsel until the Friday before trial at 4:50 p.m. (R. 228) He did not make her aware that it was the final trial in the matter and did not informed her that she would not have to appear (R. 229). Mr. Dent consequently sought the leave of the court to withdraw as counsel and filed a notice of withdrawal. The defendant's answer was then stricken, her default entered, and the plaintiff was granted additional relief (R. 229-30, 398). A default judgment was entered July 7, 1997.

On motion and upon such terms are just, the court may in the furtherance of justice relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect. Rule 60, Utah Rules of Civile Procedure. Where any reasonable excuse is offered by the defaulting party, courts generally favor grating relief from a default judgment, unless it appears that to do so would result in substantial injustice to the adverse party. Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, 544 P.2d 876 (Utah 1975). The court in Mayhew v. Standard Gilsonite Company, 376 P.2d 951(Utah 1962) held that:

> It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside.

In the instant matter, the defendant was not effectively appraised of the trial date, apparently due to the neglect, mistake, or inadvertence of her counsel. The fact that she did not appear was due to surprise. The "harsh and oppressive" default judgment issued by the trial court in this matter is contrary to the purpose of Rule 60(b).

The plaintiff, in his response to defendant's motion did not deny or controvert the facts as given in defendant's memorandum. No supporting affidavit was filed with his memorandum. Rule 4-501(1)(B) of the Code of judicial administration provides that "The responding party *shall* file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and *all* supporting documentation." [emphasis added]. As the plaintiff failed to provide any verified facts, the evidence presented by the defendant was the only evidence before the trial court.

It is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside. Mayhew v. Standard Gilsonite Company, 376 P.2d 951, 952 (1962).

The negligence of attorneys are ground to remove default judgments under the rubric of

mistake, surprise or excusable neglect. See Warren v. Dixon Ranch Co., 260 P.2d 741 (Utah 1953); Interstate Excavating, Inc. v. Agla Dev. Corp., 611 P.2d 369 (Utah 1980); Helgesen v. Inyangumia, 636 P.2d 1079 (Utah 1981).

B. Rule 60(b) Motion was Timely and Defendant had Meritorious Defense

In order for defendant to be relieved from a default judgment, she must not only show that the judgment was entered against her through any reason specified in Rule 60(b), but she must also show that his motion to set aside the judgment was timely, and that she has a meritorious defense to the action. State ex rel. Utah State Dep't of Social Servs. v. Musselman, 667 P.2d 1053 (Utah 1983). The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case. Heathman v. Fabian, 377 P.2d 189 (Utah 1962). In the instant matter, defendant has filed her motion within 90 days of the judgment being entered and defendant alleges that several portions of the decree would have been different had the issues been litigated (R. 229-30). Further, the plaintiff did include relief in the decree which he did not request in his complaint (R. 229-30). This relief would not have been available at trial. The defendant was awarded attorneys fees, without the trial court having made findings regarding plaintiff's financial need, the defendant's ability to pay, or the reasonableness of the fees as required by Larson v. Larson, 888 P.2d 719, 726 (Utah App. 1994).

The defendant in her affidavit and motion asserts that a hearing on the merits of the case would have resulted in a different outcome and that the decree entered by the court contains relief which the plaintiff did not request in his complaint (R. 229-30). Usually, it is not appropriate to

examine the merits of such claims. Erickson v. Shenkers Int'l Forwarders, Inc., 882 P.2d 1147 (Utah 1994).

Clearly, under these circumstances, where the defendant was (1) not notified of the hearing date until 4:50 p.m. on the Friday before trial, (2) her attorney told her that she did not have to appear, (3) her attorney did not tell her that it was the final trial in the matter but only another hearing, and (4) her attorney told her that she could appear telephonically for whatever hearing was to take place, it was an abuse of discretion for the trail court to deny defendant's Rule 60(b) motion.

II. NO NOTICE GIVEN TO DEFENDANT TO APPEAR OR APPOINT COUNSEL

A. Rule 4-506 Not Complied With

As was held in Sperry v. Smith, and 694 P.2d 581 (Utah 1984) and Interstate Excavating, Inc. v. Agla Dev. Corp., 611 P.2d 369 (Utah 1980), after the withdrawal of an attorney the unrepresented party must be given notice to appear or appoint counsel before further proceedings are held. Rule 4-506 of the Code of Judicial Administration requires that:

> 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 against the client. A copy of the written notice shall be filed with the court and *no further proceeding shall be held in the matter until 20 days have elapsed from the date of filing.* [emphasis added]

This procedure was clearly not complied with in the instant matter. After the court allowed Mr. Dent to withdraw, the plaintiff was granted default judgment against the defendant. The first sentence of 4-506(3) imposes a burden upon Mr. Christensen, which he did not fulfill. The second sentence imposes a burden upon the court that nor further proceedings be held until Mr.

Christensen does his duty. Here, after Mr. Dent withdrew, Mr. Christensen did not file the appropriate notice. Further, the court took action against the defendant before the proper notice was filed. The rule is clear that not further proceeding may be held until 20 days after filing of the notice. The rule grants no discretion to the trial court to ignore or waive its provisions.

This case is similar to Sperry v. Smith, 694 P.2d 581 (Utah 1984). There, the defendants retained an attorney to represent them. He later notified them of a hearing for summary judgment but and withdrew as their counsel. The attorney filed and served a notice of withdrawal on plaintiff's counsel. At the summary judgment hearing, the defendants did not appear and summary judgment was granted. The defendants then re-retained the same attorney and he filed a Rule 60(b) motion based upon subsections 60(b)(3) ("misconduct of an adverse party") and (6) ("any other reason justifying relief from operation of the judgment"). The defendants complained that plaintiff's counsel had failed follow the predecessor to Rule 4-506. Specifically, plaintiff's counsel had failed to provide a notice to appear or appoint counsel before further proceedings were had against the defendants.

In Sperry, the plaintiff claimed that the district court had the right to waive compliance with the predecessor to Rule 4-506, Rule 2.5 of the Rules of Practice of the District Court of the State of Utah. The Utah Supreme Court did not necessarily fault the plaintiff's counsel for failing to comply with procedural requirements, as he did not receive a copy of the notice of withdrawal. However, the trial judge was aware of the withdrawal. The Supreme Court held that:

> [T]he trial judge should have required plaintiff's attorney to then give notice to [the defendants] in accordance with Rule 2.5 before proceeding to hear and grant the motion for summary judgment. Since the judgment was entered after the failure of the court to

> follow one of its own rules, we conclude that the trial court abused it discretion in refusing to set aside the summary judgment when the error was brought to its attention.

Sperry, 694 P.2d at 583. The situation in Sperry was the very situation which Rule 4-506 was designed to address. Justice Howe, joined in his opinion by Chief Justice Hall, and Justices Stewart, Durham and Zimmerman, held that the defendants "should not be deprived of the salutory protection of the rule." The summary judgment was vacated.

In this case, the defendant also received notice of a hearing, but she was told she did not need to appear and was not told the nature of the hearing. The defendants in Sperry were notified of these facts. The defendants in Sperry had some advanced notice of their attorneys withdrawal, and the defendant here did not. Counsel for the plaintiff in Sperry had no actual notice of the withdrawal of opposing counsel, but Mr. Christensen was standing in the court room in this case. In both cases, the trial court allowed further proceedings to take place without a notice to appear or appoint being filed and served. Sperry is a less egregious abuse of discretion than the instant matter. In that case, the defendants and plaintiff's counsel had greater knowledge of the situation than here.

In Interstate Excavating, Inc. v. Agla Development Corp., 611 P.2d 369 (Utah 1980), the defendant's attorney withdrew at the pretrial conference. A notice of withdrawal was filed by the defendant's attorney and a notice to appear or appoint filed by plaintiff's counsel. The defendant denied receiving either notice. When defendant did not appear at trial, a default was entered against it. A Rule 60(b) motion was denied and, as here, the trial court made no findings other than the denial of the motion. After reciting that courts are generally indulgent toward the setting aside of default judgments and "where there is doubt about setting it aside, the doubt should be

resolved in favor of doing so," the court concluded that the interests of justice would be served by setting aside the default and allowing the parties to present their side of the controversy. The default judgment was vacated. In this matter, the defendant maintains that she had no knowledge that the trial was to be held on June 23, 1997 and had been told by her counsel that she did not need to appear (R. 229). No contrary evidence was presented prior to the matter being submitted for decision. There was evidence before the court in Interstate Excavating that the defendants had been sent the notice of withdrawal and notice to appear or appoint prior to the default having been entered. Here, it is clear that the defendant was not mailed the notice of withdrawal until after the default was entered and that Mr. Christensen, plaintiff's counsel, never served a notice to appear or appoint. As was the case in Sperry, the Interstate Excavating case is a much less agregious abuse of discretion than the instant matter.

Trial courts are given no discretion to ignore the provisions of Rule 4-506. In Hartford Leasing Corp. v. State, 888 P.2d 694 (Utah App. 1994), the trial court excused the State for failing to provide a notice to appear or appoint. The court held that "the rule's provisions, however, offer no room for such discretion to excuse noncompliance: 'opposing counsel *must* . . . *before* opposing counsel can initiate further proceedings.'" [citation omitted]. Hartford Leasing Corp, 888 P.2d at 700. The prohibition against any further proceedings being held is likewise mandatory: "no further proceedings *shall* be held . . ." [emphasis added] Utah Code of Judicial Administration, Rule 4-506(3).

B. Section 78-51-36 Not Complied With

Further, a notice to appear or appoint is required by statute. Section 78-51-36 of the Utah Code provides that:

> 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 are had against him be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

Mr. Dent's withdrawal of counsel on the morning of trial is the same as if the he died or been suspended. He ceased to act and Ms. Hoegemann's attorney without providing the reasonable notice as required by Rule 1.16(d) of the Rules of Professional Conduct. Again, the procedure required by statute was not followed, and the defendant was not given proper notice to appear or appoint counsel before further proceedings were initiated against her.

CONCLUSION

The evidence before the court was that the defendant was contacted by her attorney on the Friday before an Monday trial setting. She had no knowledge that a hearing was scheduled, and the attorney did not notify her that it was the final trial. He told her that she did not have to appear. At trial, he withdrew as counsel with the leave of the court and without providing any prior notice to the defendant. The court then proceeded to strike the defendants answer and grant additional relief to the plaintiff. The defendant's failure to appear is clearly due to surprise, mistake and the neglect of her counsel under Rule 60(b)(1). The failure of Mr. Christensen to file a notice of appearance of counsel is a violation of Rule 60(b)(3), as his taking further action against the plaintiff was a violation of his responsibilities under Rule 4-506. Finally, the court's entering of the default after the withdrawal of defendant's counsel and the granting of further relief was a violation of Rule 4-506(3), which provides that "no further proceedings shall be held in the case until 20 days have elapsed from filing of the date of filing." This entitles the defendant to relief under Rule 60(b)(6). As discussed above, in Sperry and Interstate Excavating

the rules were followed to a much greater degree and the defendants were in a much better position than here. As stated in Mayhew v. Standard Gilsonite Company, 376 P.2d 951(Utah 1962):

> To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside.

In both Sperry and Interstate Excavating, where less egregious abuses of discretion occurred than the instant matter, the appellate court vacated the judgments which resulted from the defendants' failure to appear. That relief should be granted to defendant here and the she should be afforded an opportunity to present her side of the case.

Dated this 17th day of August, 1998.

Samuel G. Draper, for
Hughes & Read

CERTIFICATE OF SERVICE

I, Samuel G. Draper, certify that on August 17, 1998, I served two copies of the attached Brief of Appellant upon R. Clay Huntsman, the counsel for the Appllee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

R. Clay Huntsman
Paul R. Christensen
HUNTSMAN & CHRISTENSEN
283 West Hilton Drive, Ste. 3
St. George, UT 84770

Attorney of Record

ADDENDUM

MINUTES OF BENCH IAL

FIFTH DISTRICT COURT-ST GEORGE COURT
WASHINGTON COUNTY, STATE OF UTAH

JOHN A LOPORTO, Plaintiff,	:	MINUTES BENCH TRIAL
vs.	:	Case No: 954500424 DA
LUCY Z LOPORTO, Defendant.	:	Judge: JAMES L. SHUMATE Date: June 23, 1997

PRESENT

Plaintiff(s): JOHN A LOPORTO
Plaintiff's Attorney(s): PAUL R CHRISTENSEN
Defendant's Attorney(s): HAROLD J DENT
Video
Tape Number: 970234 Tape Count: 9:06
Clerk: gwynm

TRIAL

TAPE 970234
TIME 9:06
On record
At the time of the trial a record is made in reference to Mr. Dent withdrawing from the case. Pleadings are moot. Mr. Christensen's motion for default, attorney fees and waiver of defendant's entitlement to the retirment fund. Motion is granted and counsel is to prepare the order.
TIME 9:08
Off record

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

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

AFFIDAVIT OF LUCY HOEGEMANN

CONFORMED
COPY

FILED
IN THE DISTRICT COURT
97 SEP 18 PM 4 18
WASHINGTON COUNTY
BY _____

SAMUEL G. DRAPER (Bar No. 7050)
HUGHES & READ
Attorneys for Defendant
187 North 100 West
St. George, Utah 84770
Telephone: (801) 673-4892
Fax: (801) 673-2774

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

JOHN A. LOPORTO, Plaintiff, v. LUCY Z. (LOPORTO) HOEGEMANN, Defendant.	**AFFIDAVIT LUCY HOEGEMANN** Case No. 954300424 Judge James L. Shumate

STATE OF UTAH)
: ss.
COUNTY OF WASHINGTON)

Defendant LUCY HOEGEMANN, being first duly sworn, states and alleges as follows, to-wit:

1. I am an adult resident of Clark County, State of Nevada, and am fully competent as to the matters set forth herein, and do so based upon my own personal knowledge.

2. The trial in this case was scheduled for Monday, June 23, 1997.

3. I was represented by Jay Dent.

4. He did not notify me of the hearing date until the Friday prior to trial at 4:50 p.m.

5. At that time, he told me that, because of his partner's illness,

my paperwork was lost. This was the reason that I was not notified sooner.

6. I reside in Las Vegas and had committed to work on the following Monday.

7. At the time I was notified of the hearing date, there was no one I could have requested the day off from around.

8. Mr. Dent called me on Sunday night at my home, and told me that he would contact me on Monday from the courtroom, and that at that I could appear by telephone.

9. At no time did he tell me it was for the final trial in this matter; he told me it was just a hearing.

10. He said that he was going to tell the judge that the parties were close to settlement and there were just a few issues to work out.

11. Consequently, I did not appear at the hearing. Indeed, I was the only person working at my office on Monday and could not have taken the day off on such short notice.

12. After the date of the hearing, I received a notice of withdrawal of counsel from Mr. Dent and a Notice of Entry of the decree.

13. I relied on my attorneys assertion that I did not have to appear for the hearing scheduled for hearing.

14. In the event my case had proceeded to trial and I had been present, I believe that the decree would have been different in relation to child support, property division, and visitation.

15. Some of the property awarded to the plaintiff in the decree was

my premarital property, and should have been awarded to me.

16. Some of my personal items which had been awarded to me in prior court orders were also awarded to the plaintiff.

17. The income numbers in the child support calculation in the decree are incorrect, as is my place of employment and occupation.

18. The restrictions placed on my visitation are unreasonable and would not have been ordered by the court should the case have been tried.

19. I believe that it is in the best interests of the children that these issues be tried by the court.

20. The allocation of attorneys fees is also unfounded in law or equity and this issue should be tried by the court.

21. The allocation of Jerry Thamert's costs to me is also unreasonable and unfounded.

FURTHER THY AFFIANT SAYETH NOT.

DATED THIS 8 day of September, 1997.

LUCY HOEGEMANN

On the 8 day of September, 1997, personally appeared before me LUCY HOEGEMANN, the signer of the foregoing affidavit, who duly acknowledged to me that she executed the same.

NOTARY PUBLIC
Residing at:
My commission expires:

Notary Pu... STATE OF U... Washington, Co... MICHELLE M. GOD...

CERTIFICATE OF MAILING

I hereby certify that a full, true and correct copy of the above and foregoing **AFFIDAVIT OF LUCY HOEGEMANN** was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid, on the 18th day of September, 1997, addressed as follows:

John A. Loporto
228 South 2100 East
St. George, UT 84770

ORDER

Paul R. Christensen USB No. 5677
HUNTSMAN & CHRISTENSEN
Attorney for Plaintiff
283 West Hilton Drive, Ste. 3
St. George, Utah 84770
Telephone: (435) 628-2846
Facsimile: (435) 628-3049

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

JOHN A. LOPORTO, Plaintiff, vs. LUCY Z. (LOPORTO) HOEGEMANN, Defendant.	)	ORDER Case No. 954500424 DA Judge James L. Shumate

This matter came on regularly for hearing before the above-entitled Court on Thursday, December 4, 1997 on Defendant's Motion to Strike Hearing scheduled for December 5, 1997. Plaintiff appeared personally, and was represented by Paul R. Christensen of the law firm of HUNTSMAN & CHRISTENSEN. Defendant did not appear, but was represented by Samuel G. Draper of the law firm of HUGHES & READ. The Court made a record that the Motions and Memoranda of the parties had been read. The Court heard argument from counsel of both parties. No witnesses were called.

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

The hearing heretofore set for December 5, 1997, at the hour of 2:00 p.m. on Defendant's Motion for Relief from Decree is stricken.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

Defendant's Motion for Relief from Decree is denied.

Dated this 19 day of Dec, 1997.

BY THE COURT:

COPY

JAMES L. SHUMATE
FIFTH DISTRICT COURT JUDGE

Approved as to Form ~~and Content~~

Samuel G. Draper
HUGHES & READ
Attorneys for Defendant

CERTIFICATE OF SERVICE BY MAILING

I do hereby certify that on the 4th day of [illegible], 1997, I mailed a true and correct unsigned copy of the above and foregoing ORDER by placing same in the United States Mail, first-class postage prepaid, to the following to wit:

Samuel G. Draper
HUGHES & READ
Attorney at Law
187 North 100 West
St. George, Utah 84770

Secretary

CERTIFICATE OF SERVICE BY MAILING

I do hereby certify that on the 22nd day of December 1997, I mailed a true and correct signed copy of the above and foregoing ORDER by placing same in the United States Mail, first-class postage prepaid, to the following to wit:

Samuel G. Draper
HUGHES & READ
Attorney for Defendant
187 North 100 West
St. George, Utah 84770

Secretary

ORDER

ORIGINAL

FILED
FIFTH DISTRICT COURT
'98 JAN 21 PM 2 30
COUNTY
BY

SAMUEL G. DRAPER (Bar No. 7050)
HUGHES & READ
Attorneys for Defendant
187 North 100 West
St. George, Utah 84770
Telephone: (435) 673-4892

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

JOHN A. LOPORTO, Plaintiff, v. LUCY Z. (LOPORTO) HOEGEMANN, Defendant.	**ORDER** Case No.: 954500424 Judge:JamesL.Shumate

Defendant, by and through her attorney, Samuel G. Draper, having motioned the court to reconsider it's Order entered December 19, 1997, and Plaintiff, by and through his attorney, Paul Christensen having filed an Objection and Memorandum in opposition thereto, and the matter having been submitted for decision.

IT IS HEREBY ORDERED AS FOLLOWS:

☐ Defendant's Motion to Reconsider is hereby granted, and defendant is relieved from the July 7,1997 decree.

"

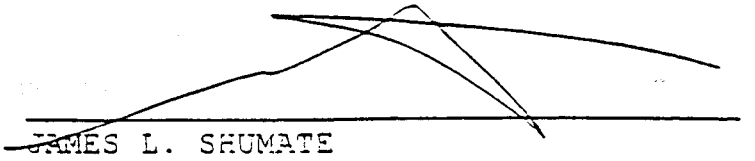
"

"

Defendant's Motion to Reconsider is denied.

DATED this 16 day of January, 1998.

BY THE COURT:



JAMES L. SHUMATE
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a full, true and correct copy of the above and foregoing **ORDER**, was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid, on the 15th day of January, 1998, addressed as follows:

Paul R. Christensen
HUNTSMAN & CHRISTENSEN
283 West Hilton Drive, Suite 3
St. George, UT 84770