

1980

# Jack M. Helgesen v. Ekerete I. Inyangumia : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JACK M. HELGESEN,

Plaintiff-Respondent,

vs.

EKERETE I. INYANGUMIA,

Defendant-Appellant,

*No. 17088*

APPELLANT INYANGUMIA'S BRIEF

Appeal from an Order of the Second Judicial  
District Court in and for Weber County,  
Utah, Honorable John F. Wahlquist, Judge.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JACK M. HELGESEN,	)	
	)	
Plaintiff-Respondent,	)	
	)	Case No. 17088
vs.	)	
	)	
EKERETE I. INYANGUMIA,	)	
	)	
Defendant-Appellant.	)	

-----

APPELLANT EKERETE I. INYANGUMIA'S BRIEF

-----

NATURE OF CASE

Respondent, Jack M. Helgesen, filed suit in the Second District Court in and for Weber County against Ekerete I. Inyangumia to recover damages allegedly incurred in an automobile accident which occurred on October 12, 1978.

DISPOSITION IN THE LOWER COURT

A Default Judgment was entered against defendant-appellant and the District Court denied the defendant's Motion to Vacate and set aside the Default Judgment.

RELIEF SOUGHT ON APPEAL

Defendant seeks an Order vacating the Default Judgment entered against him.

STATEMENT OF FACTS

The facts out of which this case arises are that on or about October 12, 1978, at or near Harrison Boulevard and 3400 South Street, defendant-appellant and plaintiff-respondent were involved in an automobile accident.

Respondent claims that he sustained injuries in the October 12, 1978 accident and medical expenses and a loss of earnings.

On April 15, 1979, respondent was again involved in an automobile accident with a non-party to this action by the name of Wendy Meenderink. The respondent in a separate claim against Wendy Meenderink has claimed he sustained injuries in the April 15, 1979 accident and has incurred medical expenses and has lost earnings due to said injuries.

Coincidentally, both claims made by respondent Helgesen were referred to Allstate Insurance Company, the insurer for both appellant and Wendy Meenderink.

Plaintiff thereafter proceeded to negotiate settlement of the two claims together with representatives of Allstate Insurance Company. When settlement was not accomplished, respondent filed Complaints, on November 16, 1979, against both appellant and Wendy Meenderink. Allstate Insurance Company also received, at that point in time, a courtesy copy of the suit papers with a cover letter from respondent's counsel suggesting that the matters were still open for settlement jointly in spite of the suits to be brought in the Second District Court.

The record discloses that appellant was served with process on November 24, 1979 and 31 days thereafter a



default hearing was held before the Honorable Judge John F. Wahlquist. The Default Judgment was signed on December 31, 1979.

Although the suit was filed on the same day as the instant case, by plaintiff, was in default no action was taken by plaintiff-respondent towards default.

On January 11, 1980 appellant, immediately after receiving notice of the entry of the default, filed his Motion to Set Aside the Default Judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. Appellant's Motion was supported by an Answer, Affidavit and a Memorandum of Points and Authorities supporting the same. Appellant's Motion to Set Aside the Default was called up for hearing on March 3, 1980. The court conditionally denied appellant's Motion and granted appellant ten days to submit additional Affidavits.

The additional Affidavits of the appellant and Mr. Charles Kent, an adjuster for Allstate, were filed on March 12, 1980. At the court's own initiative, a second hearing was held on defendant's Motion and again the court refused to grant the relief sought.

#### ARGUMENT

##### POINT I.

THE DENIAL OF DEFENDANT'S MOTION TO SET ASIDE  
THE DEFAULT JUDGMENT WAS AN ABUSE OF DISCRE-  
TION UNDER UTAH RULES OF CIVIL PROCEDURE 60(b).



Rule 60(b) of the Utah Rules of Civil Procedure provides as follows:

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 extrinsic, misrepresentation or other conduct of an adverse party;
- (4) When, for any cause, the summons in the 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 applications; or
- (7) Any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable and for reasons (1), (2), (3), or (4) not more than three months after the judgment, order, or proceeding was entered or taken. . . .

The present case involves a rather simple yet understandable situation of confusion and mistake that was precipitated by months of negotiations between the respondent's counsel and claims representatives of Allstate

Insurance Company. When all of the circumstances, shown by Affidavits in the record, are examined together it is clear that the relief sought by appellant in the court below was erroneously denied contrary to the interests of fundamental fairness and efficiency and the denial was an abuse of discretion.

The underlying principle of Rule 60(b) Utah Rules of Civil Procedure, is to balance the interests of the defendant in having his day in court and being heard on the merits against plaintiff's interest in the finality of the judgment.

A motion to vacate a default judgment, and particularly when timely filed, is to be treated to best serve the ends of justice and preserve to a litigant his day in court. It is said that the court must, in a proper case, upon such a motion, yield the procedural exactitudes to the more basic rules of fundamental fairness. On the other hand, relief from a default judgment on the basis of equitable principles is to be granted only when the occasion demands it, or when the exercise of such power is necessary to prevent injustice. In any determination of whether a default judgment should be set aside the court is guided by equitable principles requiring that a defendant be given a fair opportunity to litigate a disputed obligation, and also requiring that a plaintiff who has, according to regular legal proceedings, secured judgment, be protected against a violation of the rule which requires the sanctity and security of a valid judgment. 46 Am.Jur.2d Judgment §686.

This court on various occasions has indicated its agreement with the position stated in the noted authority immediately above. In the recent case of Olsen v. Cummings, 565 P.2d 1123 (1977), this court repeated its position as to vacation of Default Judgments:

Although a trial court is endowed with considerable latitude of discretion in granting or deny a motion to vacate a final judgment, it cannot act arbitrarily. . . . 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. (Quoting from Mayhew v. Standard Gilsonite Company, 376 P.2d 951, (1962))

Because an application to set aside a default is equitable in nature and is addressed to the conscience of the court, all of the attendant circumstances should be considered. Relief in doubtful cases generally will be granted so a party may have a hearing. See also Baird v. Intermountain School Federal Credit Union, 555 P.2d 877 (Ut. 1975).

The scope of discretion of the trial court in the review of its exercise was discussed by this court in the recent case of Carmen v. Slavens, 546 P.2d 601 (1976). In the Carmen case the trial court granted a Default Judgment against one of two defendants pursuant to Rule 37(d) of the Utah Rules of Civil Procedure because the defendant failed to appear at his deposition as ordered. This court's review of the facts pointed out that there had been some confusion in the defendant's relationship with his attorney, although service and notice of the deposition were not questioned. This court vacated the default, commenting on the trial court's discretion as follows:

It is true that where the authority to perform a proposed action rests with the discretion of the court we must allow considerable latitude in which he may exercise his judgment. But this does not mean the court

has unrestrained power to act in an arbitrary manner fundamental to the concept of the rule of law is the principle that reason and justice shall prevail over the arbitrary and uncontrolled will of any one person; and that this applies to all men in every status: To courts and judges as well as to autocrats or bureaucrats. The meaning of the term 'discretion' itself imports that the action should be taken within the reason and good conscience in the interests of protecting the rights of both parties and serving the ends of justice. It always has been the policy our law to resolve doubt in favor of permitting parties to have their day in court on the merits of a controversy. 546 P.2d at 603.

In an earlier decision, Kelly v. Scott, 5 Ut.2d 159, 298 P.2d 821 (1956), this court also spoke concerning the discretion granted to a trial court in setting aside a Default Judgment pursuant to Rule 60(b).

The following observation was made:

Although this court has been reluctant to reverse a trial court on a decision not to vacate a default judgment and will not do so where it appears that all elements were considered, we have here the somewhat dubious advantage of viewing the entire confused record and there appears to be no equities, other than the time involved, which mitigate against the rule that discretion must be exercised in the furtherance of justice and that ordinarily the court should incline towards granting relief so that the matter might be heard on its merits. 298 P.2d at 823.

In the instant case each and every criteria required for the relief sought from the default judgment has been satisfied. Accordingly, the trial court has abused its discretion in denying the defendant-appellant's Motion. In



particular, the Findings and Fact and Conclusions of Law entered in this matter clearly demonstrate that the court below has misinterpreted the import of Rule 60(b) and incorrectly applied the controlling rule of law.

The trial court found that (1) the defendant-appellant had not presented the court with any substantial issue on the question of liability and (2) the reasons presented by the defendant-appellant for its failure to respond in a timely fashion to plaintiff's Complaint did not constitute mistake, inadvertence or excusable neglect justifying relief under Rule 60(b).

The trial court has abused its discretion by going beyond the parameters of Rule 60(b) in that the trial court, instead of determining if justice required that the judgment be set aside due to the fact of mistake and inadvertence, has made a finding as to the sufficiency of the Affidavit and reasoning proffered to support defendant's 60(b) Motion.

A careful review of the Affidavit offered by defendant, of Mr. Charles Kent, an adjuster for Allstate Insurance Company, clearly reveals that Mr. Kent was "mistaken" as to the intentions of plaintiff and his attorney because of a certain letter received by Allstate Insurance Company prior to the filing of the Complaint in this matter. Mr. Kent, by Affidavit, explains that he was responsible for the adjusting

of two separate claims being made by the plaintiff-respondent against two Allstate insureds, and additionally that considerable negotiations entertained by plaintiff's counsel and himself relative to settlement. Mr. Kent, also by Affidavit, explains that plaintiff's counsel was insistent that the two claims be settled for one lump sum, which offer Mr. Kent continually rejected. The real confusion actually arose when on or about November 12, 1979 Mr. Kent received a letter from plaintiff's counsel, a copy of which is attached to Mr. Kent's Affidavit, in which plaintiff's attorney again offered that his client's claims be settled for the one payment of \$18,000.00. Mr. Kent mistakenly understood Mr. Hasenyager's letter, coupled with the earlier negotiation conferences, to mean that plaintiff was still interested in effecting a settlement and there would be further contact and negotiation over the matter. The Complaint in this matter was not filed for several days after Mr. Kent received his courtesy copy of the Complaint, nor was the defendant-appellant served for some time thereafter. The following language taken from Mr. Hasenyager's letter was the reason for Mr. Kent's misunderstanding and "mistake":

Our efforts to settle these two cases for the sum of \$18,000.00 will remain open through the 20 day period for answering the respective complaints, otherwise the cases will be tried.

Mr. Kent mistakenly understood Mr. Hasenyager's letter to indicate that the offer would remain open "through" the particular time for answering the Complaint. Mr. Kent's interpretation of the term "through," whether reasonable or not, was that Mr. Hasenyager planned to file his Complaints and have the insureds served but that time for accepting the offer of settlement or answering the Complaints would remain open "beyond" the 20 days rather than "during" the 20 days for answering. Mr. Hasenyager, plaintiff's counsel, use of the term "through" is nebulous and ambiguous and in this case tended to create a confusion which resulted in the defendant-appellant's failure to respond prior to the entry of a Default Judgment.

The court below after reviewing the Affidavit of Mr. Kent, which Affidavit was uncontroverted, found that the Affidavit was not sufficient to constitute mistake, inadvertence or inexcusable neglect. The very wording of the court's Findings of Fact and Conclusions of Law indicates that the court seemingly has applied Rule 60(b)(1) with a qualifying factor to each of the particular criteria upon which relief can be granted. A careful review of 60(b) will find that only the criteria "neglect" is qualified by the term "excusable." The references to mistake or inadvertence are unqualified and do not require or allow a finding of the court as to whether the same are excusable, reasonable or justified. The term "mistake" in and of itself is not



qualified as being excusable or not. Webster defines mistake as:

1. An error caused by lack of skill, attention, knowledge, etc.;
2. A misunderstanding or misconception;
3. To regard or identify wrongly;
4. To understand, interpret, or evaluate wrongly: misunderstand.

Clearly Mr. Kent has indicated that the failure to respond was due to his mistake or misconception of what plaintiff was requiring of the defendant and its insurer. The affidavit of Mr. Kent recites the necessary underlying factual setting and thus mistake is shown. Mr. Kent clearly misunderstood the import of Mr. Hasenyager's, plaintiff's counsel, letter; for the court then to make a finding that Mr. Kent's Affidavit was not sufficient to constitute mistake is clearly erroneous and an abuse of discretion. The dicta of this court in the case of Olsen v. Cummings, supra, is applicable in the instant case, quoting once again:

. . . It is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment when there is reasonable justification or excuse for the defendant's failure to appear and timely application is made to set it aside. 565 P.2d at 1124.

The record will disclose that timely application was made by the defendant to have the entry of judgment set aside. There is no dispute that application for the relief sought was timely made.

The second major issue for focus is whether the defendant has offered a meritorious defense to the claims made by the plaintiff in this action. It is recognized that the general rule of law in this state is that a party seeking to vacate a Default Judgment:

. . . must proffer some defense of at least sufficient ostensible merit as would justify a trial of the issue thus raised. Downey State Bank v. Major-Blakeney Corporation, 545 P.2d 507, (1976).

It is defendant-appellant's contention that the court abused its discretion in refusing to set aside the Default Judgment on the basis that the court had not been presented with any substantial issue on the question of liability. The affidavit offered by defendant, Mr. Inyangumia, along with the Answer, including affirmative defenses contained therein, would have to be completely disregarded in order for the court to find that they had not been presented with any substantial issue on the question of liability. In the Downey State Bank case the trial court appropriately found that the defendant had failed to proffer any meritorious defense, or in fact any defense at all. Clearly, the Downey State Bank case is distinguishable from the instant action. A close review of Mr. Inyangumia's Affidavit will show that defendant contests plaintiff's claim on the question of liability and in fact asserts that the plaintiff himself was responsible for the collision in

question and the resulting injuries. Clearly the court below has misapprehended the controlling rule of law. Under this state's Comparative Negligence Statute, Mr. Inyangumia's defense need not be a complete defense but need only rise to the level of a partial defense for which the trier could attribute a portion of the negligence to the plaintiff and a portion to the defendant. To completely disregard the Affidavit of Mr. Inyangumia, given to support the Answer and affirmative defenses proffered, is certainly an abuse of discretion of the court requiring that the Order of the trial court be reversed.

Additionally, defendant-appellant has answered denying that the damages plaintiff alleges in his Complaint, if any, were proximately caused by the accident complained of in the instant case. Arguments presented by defendant pointed out to the court below that plaintiff had, prior to commencement of the action, been involved in a separate accident for which similar claims were being made for injuries. In spite of these definite issues as to damages the court refused to recognize defendant's proffer of meritorious defenses.

In balancing the equities in this matter it is imperative that some consideration be given as to the prejudice either party shall sustain should the Order of the trial court be reversed. It can be contemplated that the plaintiff-respondent will argue that the reopening of this

matter will greatly prejudice him inasmuch as he will now be obligated to go forward with his case and prove both the liability and damage aspects of his claim. The fallacy with this argument is that in each case where there has been a Default Judgment, the prejudice will always be the same, i.e., the non-defaulting party will then be required to litigate his claims on the merits. No party has contended that either the defendant or his insurer has willfully acted to cause or create the circumstances as they now exist. In balancing the equities then, the extreme hardship will be placed upon the defendant-appellant in this matter due to the fact that he is now foreclosed from trying his case on the merits.

This court has recognized the extreme hardship that a substantial Default Judgment can involve and has stressed the liberality with which Rule 60(b) Utah Rules of Civil Procedure should be applied in such cases. Utah Sand and Gravel Products Corp. v. Tolbert, 16 Ut.2d 407, 402 P.2d 703 (1965). In the Utah Sand case, plaintiff brought an action alleging in excess of \$20,000.00 owing in Third District Court but served defendant with a Summons marked "City Court" whose jurisdictional limit was \$1,000.00. Soon thereafter, on plaintiff's Motion, the Summons was amended to show the Third District Court and defendant was advised of the amendment by mail. No Answer was filed and Default Judgment was taken. Defendant's Motion to have the judgment

(b) Judgment. Judgment by default may be entered as follows:

. . . (2) By the court: In all other cases the party entitled to a judgment by default shall apply to the court therefore. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take into account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or orders such references as it deems necessary and proper.

It is clear from plaintiff's Complaint that in order to enable the court to enter judgment, it was necessary in order to determine the amount of damages to make an investigation, and receive appropriate and competent evidence. As is demonstrated in the transcription of the default hearing, the evidence offered was offered solely by the plaintiff himself, and no competent or admissible evidence was introduced as to the medical condition of the plaintiff. In addition, all testimony given by the plaintiff concerning his loss of earnings was totally conjectural and speculative based upon no supporting documentation or admissible testimony. The evidence offered as to loss of earnings was as follows:

Q Now, you have stated in your Complaint that the best estimate of the time lost and the wages lost for that time would be \$800.00 a month.

A Right.

Q For two months, is that correct?

A Yeah, that's right.



Q Now. . .

A That's hard to judge because building houses for sale, speculation, and selling real estate are really. . . I don't have much to judge as a salary.

The transcript of the default hearing held in this matter is demonstrative of the fact that the evidence proffered was not sufficient "to determine the amount of damages or to establish the truth of any averment by evidence." Rule 55(b)(2).

In a recent case entitled Pitts v. Pine Meadows Ranch, 589 P.2d 767 (Ut. 1978), this court dealt with a similar question concerning the damage issue. In the Pitts case, plaintiff sought recovery for trespass to real property. At the time of granting the default, the trial court took evidence on damages but the record shows that the evidence of diminution of value in the value of the trees involved on the property was not sufficient and the court entered the large judgment only because the defendant had been dilatory in not responding to a lawsuit. This court upheld the validity of the default taken in the case but remanded pursuant to Rule 55(b)(2) Utah Rules of Civil Procedure for a hearing to establish damages.

In the instant case, not only is the record devoid of any competent evidence or findings regarding damages but the Complaint, on its face, shows at a minimum the double recovery on the medical expenses incurred by the plaintiff. The same relief sought by appellant has been granted in other

cases by this court. See J.P.W. Enterprises, Inc. v. Daniel W. Naef, 604 P.2d 486 (1979).

### CONCLUSION

Principles of fundamental fairness and equity have been violated when a party to an action, in good faith, mistakenly comprehends the intentions of an adverse party, which mistake ends in a Default Judgment in a sum in excess of \$16,000.00. It was an abuse of discretion for the court below to deny the relief from the Default Judgment entered in this matter.

The mistake in this matter is evidenced by the fact that plaintiff-respondent moved forward to default on the instant matter but took no action against the other Allstate insured, Wendy Meenderink, though that case was also in default. This case stands as a perfect example of a windfall where plaintiff-respondent has used the Rules of Procedure to obtain a judgment which would not have been granted by a jury sitting in this state. Plaintiff's counsel knew where to contact persons responsible to answer on behalf of the defendant, and though there was no legal obligation for him to do so, the fact that he had been negotiating with Mr. Charles Kent for some months prior to the actual filing of the Complaint placed upon plaintiff's counsel some degree of responsibility to equitably conclude the matter short of a windfall judgment. Plaintiff's counsel's offer of settlement which accompanied the courtesy copy of the Summons and



Complaint, now estoppes plaintiff from relying on the procedural exactitudes of the rule. Again turning the court's attention to the record in this matter, it is shown that the court made inquiry of plaintiff's counsel why the defendant, or its insurer, had not responded. The following is taken from the transcript of the record:

The Court: I'm curious about why they did not appear. Was there some denial of coverage or something of this sort?

Mr. Hasenyager: There has not been, your Honor. As a matter of fact, if I. . .

Q. Mr. Helgesen, on August 3 of 1979, did you also go to Dr. Brewer for a second opinion at the request of Allstate Insurance Company?

A. Yes, I was requested by Allstate.

Mr. Hasenyager: I frankly don't know, and there is a bill being sent to Mr. Helgesen for \$100.00 for Dr. Brewer's examination which was done at the request of Allstate Insurance Company. I do not know why they have not responded to this complaint. We filed it and they were sent. . . And I have a copy of my letter which I could submit to the court, which was sent to Allstate Insurance Company which included a copy of the complaint itself. We told them we were filing it and we had Mr. Inyangumia served on the 24th of November. There has been no . . . absolutely no response from either Mr. Inyangumia or the insurance company.

The Court: Did you send them a copy of the memorandum which you filed?

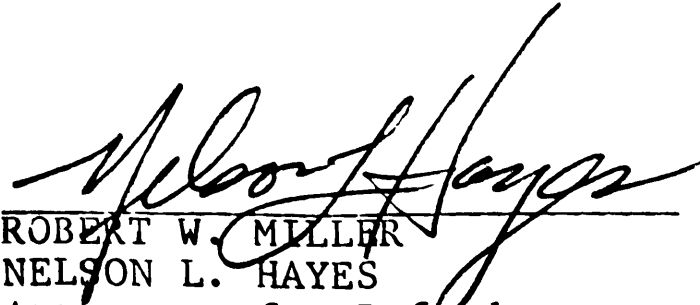
Mr. Hasenyager: I did not, your Honor. That was filed with the court I think about two days or so before Christmas. . . . Well, it would have last Thursday or Friday.

According to plaintiff's counsel's own admission, he did not know make any effort to contact Allstate. Appellant recognizes that plaintiff had no legal obligation to do so but did have some equitable obligation because of the lengthy months of negotiation that had been undertaken to conclude this matter. Additionally, by plaintiff's counsel's own statement in the record, he indicates that the Memorandum was filed several days before Christmas, 1979. This means that the Memorandum would have necessarily been prepared sometime prior to that or in other words, shortly after the time had run for answering.

It is also perfectly clear that if the default were vacated, plaintiff would only suffer the inconvenience of a delay in having the matter resolved by a trier of fact. In view of the large sum and the injustice involved in this case, Rule 60(b) should be applied with great liberality. Defendant has met the standards for relief under such a liberal application and should be granted a vacation of the judgment. If this court were to hold otherwise, plaintiff will be in a windfall position while defendant will be denied a just hearing on the merits.

Respectfully submitted this 18 day of July, 1980.

RICHARDS, BRANDT, MILLER  
& NELSON



ROBERT W. MILLER  
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Attorneys for Defendant-  
Appellant

CERTIFICATE OF MAILING

MAILED, a true and correct copy of the foregoing Appellant's Brief by first-class mail, postage prepaid this \_\_\_\_ day of July, 1980 to Mr James R. Hasenyager, Attorney for Plaintiff-Respondent, 543 Twenty-Fifth Street, Ogden, Utah 84401.

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