

1956

## James A. Chrysler v. Grace Chrysler : Brief of Defendant and Respondent

Utah Supreme Court

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Hanson & Ruggeri; Attorneys for Defendant and Respondent;

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### Recommended Citation

Brief of Respondent, *Chrysler v. Chrysler*, No. 8515 (Utah Supreme Court, 1956).  
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IN THE SUPREME COURT

UNIVERSITY UTAH

OF THE

JAN 28 1957

STATE OF UTAH

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JAMES A. CHRYSLER,

Plaintiff &  
Appellant

vs

GRACE CHRYSLER,

Defendant &  
Respondent

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BRIEF OF DEFENDANT AND RESPONDENT

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**FILED**

OCT 10 1956

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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JAMES A. CHRYSLER,

Plaintiff &  
Appellant

vs

GRACE CHRYSLER,

Defendant &  
Respondent

Case No. 8515

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BRIEF OF DEFENDANT AND RESPONDENT

HANSON & RUGGERI  
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Respondent.

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In conformity with the appellant's brief,  
the parties will be referred to as they appeared  
below, the appellant being the plaintiff, and the  
respondent being the defendant.

## STATEMENT OF FACTS

Insofar as the plaintiff has correctly stated the material facts of this case, the defendant agrees therewith. However, in view of the fact that the plaintiff's statement contains certain facts not in the record, and omits facts upon which the court below rendered it's Order, defendant finds it necessary to make a brief additional statement.

Plaintiff commenced this action by the service of Summons upon the defendant on April 11, 1955. Complaint and Return of Summons was filed April 21, 1955. Defendant's Answer and Counterclaim was filed April 27, 1955. Plaintiff's Reply was filed May 12, 1955. Subsequently, plaintiff filed a Motion For Leave to amend his Complaint, but withdrew the same prior to any action by the Court below. An Order To Show Cause was served upon the plaintiff but he failed to appear (Tr. 57, Lines 25-26). Trial setting for November 28, 1955, at 10 o'clock a.m. was made by the Court on November 7, 1955 and plaintiff's attorney had notice of the same (Tr. 2, Lines 26-27-28).

On the day appointed for trial defendant and her counsel were present and announced ready. Neither plaintiff, nor his attorney, nor anyone in their behalf appeared. The Court proceeded with trial.

In the meantime, and after defendant filed her Counterclaim, the plaintiff who commenced this action in the Court below, proceeded to the State of Nevada and commenced proceedings for divorce against the same defendant, filing his Complaint therein on November 1, 1955. On November 28, 1955, the plaintiff and his Nevada attorney, Joseph C. Heller, knew that the Utah Court had on that day granted a Decree of Divorce to the defendant and despite that knowledge proceeded to secure a divorce in Nevada, based upon the questionable service upon the defendant, on November 30, 1955 (See Tr. Page 49, Lines 13 to 17, Tr. page 48, Lines 16 to 20).

The Findings of Fact, Conclusions of Law and Decree of Divorce by the Court below were filed on January 4, 1956. No Appeal or other proceeding for review was taken.

On February 9, 1956, plaintiff, through his



attorney, filed a Motion to Set Aside such Findings of Fact, Conclusions of Law, and Decree of Divorce.

This Motion was filed and based upon Rule 60 (b), Subdivision 1, Utah Rules of Civil Procedure, and was denied and overruled (See Tr. on App., Page 55, Lines 9 to 30; Tr. on App., Page 56; Tr. on App., Page 57, Lines 1 to 2).

The Court modified the original Order denying and overruling the said Motion, making his denial without prejudice in order to give the plaintiff an opportunity to re-submit his Motion and testify personally in behalf thereof, the plaintiff having failed to appear or testify at the time his Motion was heard and considered.

In the plaintiff's Statement of Facts, many of the alleged assumptions have no material bearing on the issue, and while defendant does not agree with many of the assumptions therein stated, any answer thereto would be controversial, especially in view of the fact that neither the plaintiff nor the defendant testified at the hearing, and the showing as pointed out by the lower Court was mainly upon

affidavits not supported by testimony.

### STATEMENT OF POINTS

#### POINT I

THE COURT BELOW PROPERLY AWARDED THE DECREE OF DIVORCE HEREIN UPON THE DEFENDANT'S COUNTERCLAIM.

#### POINT II

THE COURT BELOW PROPERLY DENIED PLAINTIFF'S MOTION TO SET ASIDE DIVORCE DECREE, AND DID NOT, IN SO DOING, ABUSE IT'S JUDICIAL DISGRESSION.

### ARGUMENT

#### POINT I

THE COURT BELOW PROPERLY AWARDED THE DECREE OF DIVORCE HEREIN UPON THE DEFENDANT'S COUNTERCLAIM.

#### PART I

Plaintiff, in his first point, argues that there is a lack of jurisdictional facts to award a Decree of Divorce to the defendant under Section 30-3-1, Utah Code Annotated, 1953, as amended. It is to be noted that this claim was not made a part of the plaintiff's Motion to Set Aside the Findings of Fact and Conclusions of Law, and Decree of Divorce. The Court below expressly found and set forth the juris-

dictional data. This in effect is an Appeal from the Decree of Divorce itself, and under Rule 73 (a), Utah Rules of Civil Procedure, the time for appeal from said Decree of Divorce has expired. If the motion to vacate the judgment is filed after the expiration of the time for appeal from the judgment, an appeal from the Order denying the motion brings up for review only the Order and not the judgment (Saenz vs. Kenedy, CA5th; 178 Fed. 417).

## PART II

Plaintiff argues that the Court could not grant the Decree of Divorce which it did because of lack of jurisdictional facts, and sets out in his brief portions of the transcript touching upon residence. Dating back to the time before Utah became a State, the law has always been that the residence of the plaintiff and not that of the defendant gives jurisdiction in divorce cases. Section 30-3-1, Utah Code Annotated, 1953, as amended, expressly incorporates that principle of law:".....where the plaintiff shall have been an actual and bona fide resident of this state and the county where the action is brought.....".

In the instant case, the plaintiff first invoked the jurisdiction of the Court by the service of Summons and filing his Complaint, wherein he set forth the requisites for jurisdiction based upon residence in divorce cases. The defendant was brought into Court, involuntarily, to answer the plaintiff's charges made against her and sought the protection of her rights by way of counterclaim. In so doing, she submitted herself to the court selected by the plaintiff. Now that the court of plaintiff's choice has decreed against him, the plaintiff asserts that that Court was without jurisdiction so to do. Thus, the plaintiff, while claiming all of his rights against the defendant, denies the right of the court to do justice to the defendant and asks this Court to withhold the justice that was found due the defendant in a proceeding instituted by himself. He is demanding justice himself, but seeks to deny justice to his adversary (Fisk vs. Fisk, 24 Utah 333; 67 P. 1064). To further argue this point, the holding of the court in the case of Charlton vs. Charlton, (Tex. Civ. App.

141 SW. 290) is respectfully submitted.

".....looking to the terms of the statute and construing the language used in the light of the reason and general purpose of it's enactment, we would be prepared to hold, in the absence of authority, that the requirements of the statute as to residence were only intended to apply to the plaintiff-  
- - - - in the language of the statute 'the petitioner for divorce', the person who puts the machinery of the Courts in motion in a divorce proceeding. The purpose of the statute was to protect, not only the defendant in divorce proceedings, but also the interest of society, against fly-by-night divorce suits instituted by birds of passage, who, with no stability of residence, might use the Courts to procure divorce upon false grounds, and sometimes by collusion with the opposite party.....

"We do not think that it was thought necessary, in order to effectuate this purpose, to make the same requirements, as to residence of a defendant in a divorce proceeding, unwillingly brought into Court, as is made of a plaintiff instituting the suit. The

general rules deduced from the authorities on this question is thus stated in 14 Cyc. p. 589: 'A statute making residence of plaintiff a prerequisite to the exercise of divorce jurisdiction does not preclude a non-resident defendant from filing a cross-bill and obtaining a Decree of Divorce against plaintiff.....'

"The statement in the text is supported by the following authorities: Sterl vs. Sterl 2 Ill. app. 223-226; Jenness vs. Jenness 24 Ind. 355; 87 Am. Dec. 335; Clutton vs. Clutton 108 Mich. 267; 66 NW. 52; Fisk vs. Fisk 24 Ut. 333; 67 P. 1064; Abele vs. Abele, 62 N.J. Eq. 644; 50 A. 686; Pine vs. Pine 72 Neb. 463; 100 NW. 938; Duke vs. Duke 70 N.J. Eq. 149; 62 A. 471, 472....."

Included in the above enumerated authorities is the case of Fisk vs. Fisk, which recites the holding of this Court, and which remains the law of this State. After the plaintiff had filed his Complaint and returned his Summons against defendant for divorce, thus invoking the Court's jurisdiction, the District Court had jurisdiction of the matters set

forth in the defendant's Counterclaim (Const. Ut. Art. 1, Sec. 11; Fisk vs. Fisk 24 Ut. 333, 67 P. 1064; Mott vs. Mott 82 Col. 413, 22 P. 1040; Howe vs. Moran 37 Nev., 414; 142 P. 535).

The jurisdictional facts are set out by the plaintiff in his Complaint; they are admitted by the defendant in her Answer, and the testimony of the defendant is an affirmation of the residence of plaintiff and defendant for a two year period before the Complaint was filed (Tr. page 4). To give any other interpretation to the testimony of the defendant in this regard would be but a play on words. It certainly is not claimed by the plaintiff that in fact the plaintiff, or the defendant, was not an actual and bona fide resident as required by statute. Plaintiff claims the proof of the defendant is insufficient. It is respectfully submitted that the proof of the defendant is sufficient to sustain the allegations of plaintiff's Complaint as to residence.

In answer to the question of how long defendant and her husband have been residents of Grand County, State of Utah, prior to the time the Complaint was

filed, the defendant answered, "We first came out two years ago." (Tr. page 4). Further, in answer to the following question: "And you have been a resident of Grand County, State of Utah, three months before the commencement of this action against you, is that right?" the defendant answered: "Yes." (Tr. page 4). Is not the defendant's testimony, giving the common accepted meaning to the choice of words, proof that she and her husband resided in Grand County, Utah, for a period of two years, and that such residence included the three months time before the Complaint was filed? Must the witness be required to recite the exact wording of the statute - - - - 'an actual and bona fide resident of this State of the County.....three months next prior to the commencement of the action' - - - - in order to supply the jurisdictional facts. Must she be made to recite the statute in parrot fashion, or can she express herself in words of her own vocabulary and of equal import and meaning? In considering the testimony as a whole, there can be no question that the proof of the defendant is sufficient to meet jurisdictional



data requirements set forth in plaintiff's Complaint. The Court having made specific findings with reference to residence sufficient to meet jurisdictional requirements the controlling question is whether such find support in the evidence. We respectfully submit that it does, for this Court has already ruled that if there is any competent evidence in the record to support the court's findings, the judgment should not be disturbed (Buckley vs. Cox 247 P. 227).

## POINT II

THE COURT DID NOT ERR NOR ABUSE IT'S JUDICIAL DISCRETION IN DENYING PLAINTIFF'S MOTION TO SET ASIDE DIVORCE DECREE UNDER THE CIRCUMSTANCES OF THESE PROCEEDINGS.

The plaintiff argues that the Court erred and abused it's Judicial Discretion in not giving him a chance to be heard, yet the plaintiff continues to remain away from Court. Plaintiff sought to set aside the Decree of Divorce on the grounds that through no fault of his own, he could not be present for the trial of his own cause, this because he did not have timely notice of the same. At the outset,

it is to be noted that under Rule 60 (b), Utah Rules of Civil Procedure, ".....the Court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding....." Material to this appeal is the legislative limitation upon the court's discretion, namely ".....in the furtherance of justice....."

Here is a plaintiff who starts an action for divorce in the Court below. The defendant timely Counterclaims against him. The plaintiff replies, then flees the jurisdiction of the court and starts another action for divorce in the court of a sister state. He turns his back on the Utah Court; fails to see his action through, then complains because he was not here to prosecute his own action. Rather, even after notice that the Utah Court had decreed, he defies it and secures, in his own behalf, a decree against the defendant by default. Armed with a Nevada decree adjudicated to plaintiff's liking in the absence of the defendant, and at some two months interval, the plaintiff moves the Utah court to set aside it's Decree, claiming such relief is due him

by Rule 60 (b), Utah Rules of Civil Procedure, and based upon a question of fact, namely that plaintiff did not have notice of the trial of his cause, and thusly did not have his opportunity of being heard by the court. And to prove his good faith and intentions, and to plead for a chance to be heard based upon that fact, plaintiff remained away from court and offered self-serving affidavits as proof of the same. The lower Court, mindful of it's duty to act in the furtherance of justice, was not satisfied with the showing of the plaintiff. The proof did not meet the standard requirements of evidence. At best it left the Court to resolve material matters through conjecture, surmise and partial disclosure. Is it not the exercise of sound discretion to require the plaintiff to support his motion with competent proof? Must the Court surrender without cause? The trial judge was honestly troubled with the character and nature of the proof presented. He begged for a sufficient showing, but received none. This is borne out in the last words of the Court: "I will make this modification to my Order: I deny it without

prejudice to your right to file another one. I will see what you are willing to show" (Tr. Page 57-58).

As stated in Thomas vs. Stevens (300 P2 811 (Ida).) "The facts constituting the mistake, inadvertance, surprise or excusable neglect, upon which the moving party relies, must be detailed and made to appear; the conclusion of the party or his attorney is not sufficient. The question is one of fact for determination, in the first instance, by the trial court."

The trial judge was not satisfied that the plaintiff was coming into court with clean hands and in good faith, was not satisfied he had no notice. All that plaintiff seeks - - - a chance to be heard - - - is still open to him under the Court's Order appealed from. All he need do is sustain his claimed position by proof and make manifest his intentions of letting justice make it's course. Could the Court below have acted with more judicial discretion than that? We think not.

It is common understanding that a motion to

vacate a judgment is addressed to the sound discretion of the trial court, and that it's exercise of such discretion will not be disturbed on appeal except for abuse (Aaron vs. Holmes, 35 Utah 49; 99 P. 450). The fact that the movant has a meritorious claim does not justify setting the judgment aside, if no good excuse for the default is shown, (Jackson vs. Hieser, 1940 111 Fed. 2 310) and the merits of the controversy will not be considered unless an adequate reason for the default is shown (U.S. vs. Knox 79 Fed. Sup. 714). These pronouncements are further jelled toward requiring sufficient and adequate showings on the part of the movant if there are intervening equities, such as the intervening Nevada divorce in the instant case.

This Court in Warren vs. Dixon Ranch Co. (260 P2 711) made the following enunciation:

"The allowance of a vacation of judgment is a creature of equity **designed** to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the

presentation of a claim or defense. Rule 60 (b) of the Utah Rules of Civil Procedure outlines the situations wherein a party may be relieved from a final judgment, among which is mistake, inadvertence, surprise, or excusable neglect claimed here by the appellant. Equity considers factors which may be irrelevant in actions at law, such as the unfairness of a party's conduct, his delay in bringing or continuing the action, the hardship in granting or denying relief. Although an equity court no longer has complete discretion in granting or denying relief, it may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and this Court on appeal will reverse the trial court only where an abuse of this discretion is clearly shown (Salt Lake Hardware Co. vs. Nielson Land & Water Co., 43 Utah 406, 134 P. 911; McWhirter vs. Donaldson, 36 Utah 293, 104 P. 731).

In Peterson vs. Crosier, (29 U. 235; 81 P. 860), this Court held: ".....the movant must show that he used due diligence and that he was prevented from appearing by circumstances over which he had no

control." In the instant case, the circumstances attendant to plaintiff's non appearance were of his own making and under his complete control. Nevertheless, in attempting to meet the requirements of Peterson vs. Crosier, supra, plaintiff submits the affidavit of his Nevada attorney and his own affidavit. These constitute his showing. It would appear that in the case of Warren vs. Dixon Ranch Co. (260 P2 711) the showing was by affidavit of a former attorney and that of one of the parties. In deciding the Warren vs. Dixon case (supra) this Court held:

"In order 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."

Here, plaintiff's own departure, his filing anew for

divorce in Nevada, his choice to see the Nevada action through even after notice that the Utah Court had rendered judgment, his indifference to the Utah decree for more than two months, would all indicate positive performance on the part of the plaintiff toward an abandonment of the Utah court, rather than acts constituting excusable neglect. Under such circumstances could not the trial court be justified in believing that the plaintiff had abandoned his action? "This Court will not reverse the trial Court where it appears that all elements were considered, merely because the motion could have been granted. This Court will not substitute it's discretion for that of the trial Court in a case such as this." (Warren vs. Dixon Ranch Co. 260 P<sub>2</sub> 711).

In the instant case the record reveals that the trial court considered all of the elements involved, and that in so doing was constrained to deny the Motion of the plaintiff. We respectfully submit that the Court below did not abuse it's discretion in so doing.



## CONCLUSION

We respectfully submit that the facts and the applicable law relating to both procedure and the conduct of the plaintiff controlling his equitable entitlement, fully sustain and uphold the Order of the trial court, and that the same should be affirmed.

Respectfully submitted,

HANSON & RUGGERI