

1981

State of Utah v. D. John Musselman and Linda Ann Coram : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through :
Utah State Department of Social :
Services, :

Plaintiff-Respondent, :

-v- :

D. JOHN MUSSELMAN and :
LINDA ANN CORAM, :

Defendants-Appellant. :

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third
District Court for Salt Lake County
Honorable G. Gal Taylor, Judge

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Clerk, Supreme Court, Utah

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Plaintiff-Respondent, :

-v- :

Case No. 18161

D. JOHN MUSSELMAN and :
LINDA ANN CORAM, :

Defendants-Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Defendant has appealed from a denial of a motion to set aside a judgment by default in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable G. Hal Taylor presiding.

DISPOSITION IN THE LOWER COURT

The lower court denied the motion of the defendant-appellant to set aside the default judgment on the grounds that the defendant-appellant's proposed answer failed to state a defense and thereafter entered its order accordingly. The lower court made no finding or ruling on the issue of excusable neglect.

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent seeks a judgment and order affirming the denial of defendant-appellant's motion to set aside the default judgment.

STATEMENT OF FACTS

Linda Ann Coram obtained a Medicaid grant from the State of Utah, Department of Social Services, whereby she received the benefit of a total sum of \$82,522.22 paid by the State of Utah to her medical providers all of which payments allegedly resulted from improper treatment by her doctor. She assigned to the State the right to recover as against any liable third party these medical expenses and in 1979 the Utah Legislature enacted the Medical Benefits Recovery Act, Section 55-15d-1 through 17 (re-enacted in 1981 as Section 26-19-1 through 17), Utah Code Annotated 1953, as amended. (Complaint and proposed answer.)

Defendant-appellant was retained in 1979 to represent Linda Ann Coram in a malpractice action against the doctor who allegedly caused the need for the Medicaid grant which resulted in a pre-trial settlement of \$150,000.00. Prior to proceeding with the case, defendant-appellant contacted the State of Utah, Office of Recovery Services and inquired as to the State's Medicaid claim of \$82,522.22 and thereafter agreed to collect said sum out of any recovery, taking for his services the statutory 25% contingency fee.

When the case was settled, the insurance carrier issued two settlement drafts; one was in the sum of \$67,477.78; payable to Linda Ann Coram, her husband and D. John Musselman (defendant-appellant); the other was in the sum of \$82,522.22 (the exact amount of the State's Medicaid claim), and was payable to Linda Ann Coram, her husband, D. John Musselman and the State of Utah Office of Recovery Services (emphasis added). Both drafts were issued on February 5, 1981. The draft in the sum of \$82,522.22 shows endorsements as follows: "Linda Ann Corma," "William Dyerl Coram," "D. John Musselman" and "State of Utah Office of Recovery Services by: D. John Musselman its Attorney at Law and in Fact." (Emphasis added). (Affidavit in Opposition of Motion to Set Aside Judgment and Transcript of Hearing of August 18, 1981).

The draft of \$82,522.22, hereinafter called "settlement draft," was deposited by defendant-appellant in Bank Account No. 71-31544-3 in the name of D. John Musselman and Associates at the Central Bank and Trust Company, Riverside Plaza Office, Provo, Utah, on or about March 10, 1981, from which account funds were taken by D. John Musselman and loaned or otherwise used by him. The sum of \$50,000.00 was loaned out of this same bank account to Vernon Herbst of Blackfoot, Idaho, on April 14, 1981, by means of check no. 160, drawn on said Account No. 71-31554-3, whereby said Vernon Herbst executed a promissory note which carried interest at

the rate of 180% per annum (15% per month) and secured the promissory note with a deed of trust in which D. John Musselman was the named beneficiary. The state did not authorize the diverting of its funds obtained from the said settlement draft of \$82,522.22. (Affidavit in Opposition of Motion to Set Aside Judgment and Affidavit on Order to Show Cause).

Numerous letters were written to defendant-appellant, demanding payment to the state of the money recovered in the settlement draft and after many promises to account were not kept, the plaintiff-respondent filed a lawsuit, No. C-81-4425, in the District Court of the Third Judicial District, County of Salt Lake, State of Utah. (Affidavit in Opposition of Motion to Set Aside Judgment).

After defendant-appellant was served summons and copy of said complaint, on June 4, 1981, he promised to account to plaintiff-respondent for said settlement draft funds which promises he failed to keep. On July 6, 1981, defendant-appellant talked on the telephone to a Mr. George Martindale, Investigator for the Office of Recovery Services, and was advised by Mr. Martindale that unless he made an immediate accounting to the State of Utah for the settlement draft funds or file a responsive pleading, the attorney for the State of Utah in Case No. C-81-4425 would have to default him. (Affidavit in Opposition of Motion to Set Aside Judgment).

No communication was ever received from defendant-appellant thereafter and a default certificate was entered on the 9th day of July, 1981, and judgment by default was granted and docketed on July 14, 1981. (Affidavit in Opposition of Motion to Set Aside Judgment, Default Certificate and Judgment by Default).

On August 13, 1981, defendant-appellant filed a motion to set aside the judgment and noticed said motion for argument on the 18th day of August, 1981, at 2:00 o'clock p.m. The court ruled that notice of the motion did not comply with the rules as to time and, therefore, ruled that defendant-appellant would have renote of his motion to set aside the judgment. (Transcript of August 18, 1981, p. 7, lines 7 through 11).

A hearing on a supplementary order was set for the same day before the Honorable G. Hal Taylor and defendant-appellant was then and there sworn under oath to answer questions concerning the disposition of the settlement funds. He admitted under oath the fee arrangement and acknowledged his endorsement of the settlement draft as the "Attorney in Law and in Fact" of the State of Utah Office of Recovery Services but thereafter took the Fifth Amendment on all other questions regarding the funds obtained from the settlement draft. (Transcript of Hearing on August 18, 1981).

Defendant-appellant was ordered to appear on the 3rd day of November, 1981, at 2:00 o'clock p.m. before the court of the Third Judicial District, Salt Lake County, Utah, in Civil Case No. C-81-4425, to then and there show cause, which order to show cause was supported by an affidavit. Defendant-appellant did not file a counter-affidavit, nor did he offer to counter any of the statements in the supporting affidavit by sworn testimony. (Motion, Affidavit and Order to Show Cause).

The motion of defendant-appellant to set aside the default judgment was not noticed up on November 3, 1981, when the order to show cause was heard by the Honorable G. Hal Taylor; however, counsel for plaintiff-respondent agreed to waive the notice requirement and the court thereafter heard oral argument on the motion to set aside the judgment from both counsel. Upon conclusion of the oral argument, the court denied the motion of defendant-appellant to set aside the default judgment on the grounds that the purported answer did not state a defense and entered its order accordingly, from which order defendant-appellant appeals. (Transcript of Hearing of November 3, 1981).

ARGUMENT

POINT I

REFUSAL OF LOWER COURT TO SET ASIDE THE
DEFAULT JUDGMENT DID NOT CONSTITUTE ABUSE
OF DISCRETION IN VIEW OF DEFENDANT-
APPELLANT'S FAILURE TO PROFFER ANY
MERITORIOUS DEFENSE.

One of the prerequisites for grounds to set aside a judgment by default is the showing by the defendant that he has a valid and meritorious defense to the claims of the plaintiff.

While the defendant-appellant in the instant case directed his argument in the lower court, for the most part, on the "excusable neglect" provisions of Rule 60(b)(1), Utah Rules of Civil Procedure, the court in its ruling addressed itself only to the requirement that the defendant must proffer a meritorious defense to the plaintiff's complaint, a question of law.

This principle of law was recently stated by this court in the case of Downey State Bank v. Major-Blakeney Corporation, 545 P.2d 507 (1976), wherein this court ruled in referring to the defendant-appellant in that case:

A primary difficulty he confronts is that, as a general proposition one who seeks to vacate a default judgment must proffer some defense of at least ostensible merit as would justify a trial of the issue thus raised. As the trial court appropriately remarked on this point: the defendant failed to proffer any meritorious defense, or in fact any defense at all.

The theory of law as pronounced by this court in the Downey State Bank case, supra, was followed by this court in the recent case of Bawden and Associates, et al. v. Alvin R. Smith, et al., 624 P.2d 676 (1981).

In the instant case there is no dispute on the basic facts as alleged in the complaint. The plaintiff paid under a Medicaid grant the total sum of \$82,522.22 to medical providers who had rendered medical care to Linda Ann Coram as a direct result of allegedly being improperly treated for allergy. Linda Ann Coram retained D. John Musselman to represent her in a malpractice claim for her injuries and prior to filing the lawsuit D. John Musselman by letter inquired of the State's right of recovery and thereafter recognized the State's right to recover the said sum of \$82,522.22 and claimed a fee of 25% of said sum as attorney's fees.

Prior to trial, a settlement of \$150,000.00 was effected and two separate drafts were issued by the insurance company. The draft for \$82,522.22 which carried the name of the "State of Utah Office of Recovery Services," as one of the payees was personally endorsed by all the named payees except as to the State of Utah and, as to that payee, D. John Musselman himself endorsed that payee's name and signed it as "its attorney in law and in fact." He, thereafter, deposited said draft in his trust account and failed to account to the State of Utah for any such funds.

In his proposed "answer" the defendant-appellant admits to all the material allegations in the complaint. He admits the amount of the Medicaid assistance; he admits the written assignment by Linda Ann Coram to the State of Utah of the right to recover the said Medicaid payments as against a third party; he admits that in 1979 the Medical Benefits Recovery Act took effect, and, finally, he admits knowing of the right of the plaintiff-respondent to recover the said Medicaid payments.

In the supplemental order hearing before Judge G. Hal Taylor the defendant-appellant was examined under oath and admitted the genuineness of the \$82,522.22 settlement draft and his endorsement on the draft as the attorney for the State of Utah Office of Recovery Services and in his proposed "answer" he admits receiving the settlement, as alleged in the complaint, and that he notified the Department "that he had withheld the sum of \$60,000.00 pending settlement with the Department.....," thereby admitting that he had negotiated the settlement draft on which the state was named as a payee and which draft he endorsed as the attorney for the State of Utah.

The second defense as pleaded in the proposed "answer," wherein are set forth the admissions and denials to the allegations of the complaint, certainly does not set forth a meritorious defense to the plaintiff's complaint as shown by the entire record before this Honorable Court.

POINT II

DEFENDANT-APPELLANT IS ESTOPPED FROM RAISING ANY OF HIS ALLEGED DEFENSES AS SET FORTH IN HIS PROPOSED ANSWER TO THE COMPLAINT.

The proposed answer of defendant-appellant sets forth a third, fourth, fifth and sixth defense. Each of these defenses is asserted from the position that defendant-appellant owes no fiduciary duty to plaintiff-respondent on the facts in the record of the instant case.

Once defendant-appellant signed the settlement draft as "attorney at law and in fact" for the State of Utah Office of Recovery Services, he is estopped from asserting any defense which would be inimical and repugnant to his duty to the client (State of Utah) whom he purports to represent in such endorsing act. It would violate all principles of equity to allow an attorney by an overt act, such as endorsing a draft as the attorney for the payee, to obtain control of the payee's funds and thereafter be heard to say that he was not the payee's attorney, particularly after he had loaned out the major portion of the funds to a third party in his (the attorney's) own name, expecting to reap an unconscionable return thereon for his own benefit. Furthermore, the sixth defense which is raised by defendant-appellant is available only to the Medicaid recipient, Linda Coram, who is not a party to this action and whom defendant-appellant does not purport to be representing in the instant case.

The position of defendant-appellant is incongruous. Once he endorsed the settlement draft as the "attorney at law and in fact" of the plaintiff-respondent he obtained control of the funds as a fiduciary of that named payee and should, therefore, be held to the strict rules of accounting to his principal for the funds thus collected and held.

POINT III

THE DENIAL OF THE MOTION TO SET ASIDE THE
DEFAULT JUDGMENT WAS NOT AN ABUSE OF
DISCRETION AND SHOULD BE AFFIRMED.

The lower court in denying the motion to set aside the default judgment did so on an issue of law. It had before it the uncontroverted affidavits of the plaintiff-respondent, setting forth the right of plaintiff-respondent to the funds and of defendant-appellant's conduct in obtaining control of the funds as a fiduciary and his subsequent misuse of these funds. The court in its ruling made no mention of the issue of excusable neglect. However, since the brief of defendant-appellant addresses this issue it will be discussed briefly.

This court, many times, has stated that the trial court has a discretion in determining whether to set aside a default judgment and the determination should only be reversed by this court for an abuse of discretion that is arbitrary, capricious and not based on adequate findings of fact or on law.

Pacer Sports and Cycle, Inc. v. Frank Myers,
534 P.2d 616 (1975)

Airkem Intermountain, Inc., et al. v. Parker,
513 P.2d 429 (1973)

American Savings and Loan Ass'n v. Pierce, et al.,
498 P.2d 648 (1972)

Board of Education of Granite School District v.
Cox, 384 P.2d 806 (1963)

In defendant-appellant's motion and argument to set aside the judgment, he asserted that he was in the hospital for a stomach disorder from June 29, 1981 to July 4, 1981, a period of five days. He did not support this statement with any documentation nor did he counter the affidavit which stated that on the 6th day of July, 1981, he was contacted on the telephone by George Martindale, Investigator for the Office of Recovery Services, and told that unless he immediately contact the attorney for the State and ask for more time or account and settle, a default would be entered and judgment by default taken. Nor did he counter the affidavit which stated that numerous times after the filing of the law suit defendant-appellant asserted that he would account to the State and pay the State its money recovered in the settlement, which promises he never kept.

It appears obvious from the history of this case and the record before this court that the defendant-appellant, having loaned fifty thousand dollars (\$50,000.00) of the settlement funds to a farmer in Idaho at an interest rate of

180% per annum (15% per month), was stalling for sufficient time in order to realize a return of approximately thirty thousand dollars (\$30,000.00) for four months of accrued interest upon the repayment of the said loan, thus providing ample funds back in the trust account to fully account to the State on the settlement funds.

The default judgment and subsequent proceedings before this court frustrated the scheme and brought to light the actions and conduct of defendant-appellant, thereby preventing the usage of the recovery funds to cover the shortage in the trust account. Although all of these facts came to light subsequent to the entry of the default judgment, they were all in the record at the time the court heard argument on the motion and ruled that the proposed answer did not state a valid defense to the State's right to recover as against the defendant-appellant.

CONCLUSION

Most of the record on appeal in the instant case was made before the lower court, Judge G. Hal Taylor, presiding, after the default judgment was entered by Judge Homer F. Wilkinson. The uncontroverted facts in the record on appeal as shown by affidavits and the sworn testimony of defendant-appellant fail to clearly demonstrate excusable neglect but the record clearly shows that there is no meritorious defense which is or can be asserted by defendant-appellant to justify

a setting-aside of the default judgment and a trial on the issues raised by the defendant-appellant in his proffered "answer." The court should, on the basis of the foregoing facts and the law, affirm the decision of the lower court and enter judgment accordingly.

Dated this 29th day of March, 1982.

RESPECTFULLY SUBMITTED,

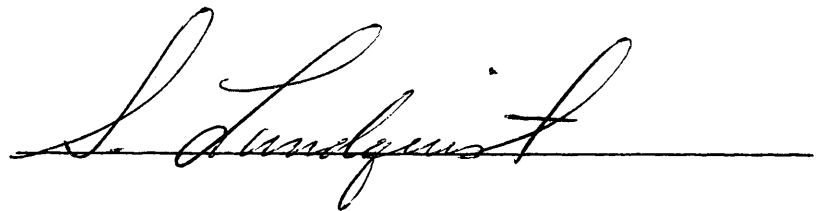
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Respondent, postage prepaid, to Richard I. Ashton, FOX, EDWARDS & GARDINER, Attorneys for Appellant, at American Plaza II, Suite 400, 57 West 200 South, Salt Lake City, Utah, 84101, on this the 31st day of March, 1982.

A handwritten signature in cursive script, appearing to read "S. Lundquist", is written over a horizontal line.