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

Utah Supreme Court

Richard I. Ashton; Attorneys for Appellant;
David L. Wilkinson; Leon A. Halgren; Attorneys for Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, by and through Utah State Department of Social Services, Plaintiff & Respondent, vs. D. JOHN MUSSELMAN and LINDA ANN CORAM, Defendants & Appellant.	Case No. 18161

REPLY BRIEF OF APPELLANT

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

Richard I. Ashton
FOX, EDWARDS & GARDINER
American Plaza II, Suite 400
57 West 200 South
Salt Lake City, Utah 84101

Attorneys for Appellant

David L. Wilkinson
Attorney General

Leon A. Halgren
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Respondent

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American Plaza II, Suite 400
57 West 200 South
Salt Lake City, Utah 84101

Attorneys for Appellant

David L. Wilkinson
Attorney General

Leon A. Halgren
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Respondent

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the denial by the lower court of Defendant's Motion to Set Aside Default and Default Judgment 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 Court below entered its order denying the Defendant's Motion to Set Aside Default and Default Judgment.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal as a matter of law of the denial of the Defendant's Motion to Set Aside Default and Default Judgment and a remand to the lower court for a trial on the merits.

STATEMENT OF THE FACTS

In the Brief of Respondent, certain factual matters are in error. Respondent erroneously asserts that the Defendant/Appellant Musselman was retained in 1979 to represent Mrs. Coram. In fact, Mr. Musselman was retained in 1978 to represent Mrs. Coram and the lawsuit for and on behalf of Mrs. Coram was filed in the United States District Court for

the District of Utah in 1978. These dates precede the date of enactment of the statute upon which the State predicated its action in the court below.

The Respondent also asserts that the Defendant/Appellant Musselman agreed to collect the asserted lien on behalf of the State and to collect for his services "the statutory 25% contingency fee." Brief of Respondent p. 2. It is clear from a reading of the statute referred to by the State that Mr. Musselman does not, by the statute's terms, become the attorney for the State.

It is most incredible, however, that the State now acknowledges the obligation to reduce its alleged lien by 25% and yet, nevertheless, maintains that the default judgment, unreduced and in the amount of the total alleged lien, should be permitted to stand. It is equally incredible that the State, notwithstanding its acknowledgement of the 25% statutory reduction, asserts that Mr. Musselman failed to assert a meritorious defense in his tendered answer when on the face of the answer Mr. Musselman has alleged the required 25% statutory reduction. See Brief of Appellant at p. 11, and see Third Defense of tendered Answer; Record on Appeal p. 30.

The Respondent asserts at page 5 and 12 of its Brief that no communication was ever received from Defendant/Appellant following a July 6, 1981 telephone conversation between Mr. Musselman and Mr. George Martindale. In fact, Defendant/Appellant did communicate with the office of Mr. Leon A. Halgren between July 6, 1981 and July 14, 1981, and specifically during the afternoon of July 13, 1981 Defendant/Appellant's telephone records show he contacted the office of Mr. Halgren. Mr. Musselman waited on hold on the telephone for approximately 9 minutes for Mr. Halgren. The next morning, July 14, 1981, Mr. Halgren on behalf of the State entered the Default Judgment against Mr. Musselman, knowing that Mr. Musselman was attempting to reach him.

POINT I.

THE ONLY ISSUES PROPERLY BEFORE THIS COURT ARE THOSE OF EXCUSABLE NEGLECT AND A MERITORIOUS DEFENSE

The Respondent obliquely and directly references, in its Brief, to issues which are wholly irrelevant to this matter. The Respondent, State of Utah, in its Brief makes indirect and direct allegations of attorney misconduct and possible criminal violations. Before this Court is one issue and one issue alone; that being whether or not a Default and Default

Judgment should be set aside. To resolve this matter, there are two questions to which this Court must address itself; (1) Did Mr. Musselman come within the provisions of the excusable neglect section of Rule 60(b) of the Utah Rules of Civil procedure; and (2) Did Mr. Musselman in the court below tender a meritorious defense. Assuming that this Court answers both of those questions in the affirmative, then this Court has consistently held that a Default and Default Judgment must be set aside.

On the first issue, the Respondent at page 1 of its Brief appears to concede that excusable neglect was shown in the trial court. At the very least, the Respondent concedes that the District Court in its ruling made no mention of the issue of excusable neglect, but rather, based its ruling soley on the issue as to whether a meritorious defense was tendered. The well recognized law in this State, as pointed out in the Brief of the Defendant/Appellant, is that absent a showing of excusable neglect, there is no reason to consider the issue of a meritorious defense. Board of Education of the Granite School District v. Cox, 384 P.2d 806, 14 U.2d 385 (1963). Therefore, from the record, it is clear that the District Court must have found the presence of excusable neglect in order to

predicate its ruling on the issue of a meritorious defense. See Brief of Appellant, pp. 6-7.

This reply need not reassert the numerous defenses tendered by Defendant/Appellant. Point II, pp. 9-14, of Defendant/Appellant's Brief outlines the several tendered defenses, which if established, would substantially reduce or totally bar the State's underlying claims.

In light of the foregoing and taking the record as a whole, it is ludicrous to claim that the Defendant/Appellant failed to tender a meritorious defense.

The argument of Respondent in Point II of its Brief that the Defendant/Appellant is somehow barred from asserting the defenses contained in his tendered answer is a unique argument and one which is without merit. Any assertion by the State that the doctrine of estoppel somehow pertains to this case, of necessity, raises factual issues requiring an evidentiary hearing. The State's attempt to invoke the doctrine of estoppel is but an additional indication of the need to resolve this matter on the merits by way of litigation and trial rather than by way of misfortune and default.

Point II of the Respondent's Brief which raises the estoppel argument contains absolutely no cases or authorities

to support that position. The practical effect of the argument contained in Point II of the Respondent's Brief is to literally prevent Defendant/Appellant from answering the Plaintiff's Complaint at all, a theory, which if adopted by this Court, would establish a revolutionary new approach to the Anglo-American system of resolving disputes by denying one party the right to plead.

POINT II.

THE AUTHORITIES CITED BY RESPONDENT FURTHER ESTABLISH THAT THE JUDGMENT OF THE LOWER COURT MUST BE REVERSED

In the State's Brief there are six cases cited in support of its position that the default judgment should be permitted to stand.

Two of the cited cases on their face are inapplicable to the issue presently before the Court. Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah 1976) and Bawden & Associates, et al. v. Alvin R. Smith, et al., 624 P.2d 676 (Utah 1981) were cases before this Court on the issue of default and default judgments but were before the Court on the issue as to whether or not the lower court lacked jurisdiction. The present case involves the issue of whether or not a default

should be set aside for excusable neglect. Thus, these cases are distinguishable as to the relief sought.

The other four cases cited by the State of Utah set forth some of the general principles which have guided this Court in cases of the nature presently before it. Mr. Musselman does not dispute the principles annunciated by these cases. However, each of these cases are factually distinguishable from Mr. Musselman's, and, while the appellants in each of the cases cited by the State were unsuccessful, the facts of the present case clearly fall within the established principles, and justice demands that this Court set aside the Default and Default Judgment of the court below.

Pacer Sports & Cycle, Inc. v. Myers, 534 P.2d 616 (Utah 1975) involved a case where the defendant completely ignored all of the proceedings below. His only excuse for failing to respond to the Complaint was a conversation with plaintiff's attorney whereby defendant indicated he did not intend to pay for a debt since he was simply a cosigner for his son to obtain credit. Defendant was advised by plaintiff's counsel that he should obtain a lawyer. He did not do so. The plaintiff deferred for a year before entering a default. Under these facts, this Court did not overturn the default judgment. Clearly, the neglect was nonexcusable.

Airkem Intermountain, Inc. et al. v. Parker, 513 P.2d 429, 30 U.2d 65 (1973) involved a case whereby the defendant failed to stay in contact with his attorney and did not appear at a scheduled trial. This Court concluded that the defendant did not show any excusable reason for failure to appear at the scheduled trial date.

American Savings & Loan Association v. Pierce, et al., 498 P.2d 648, 28 U.2d 76 (1972) involved a case where the defendant had filed an answer, discovery had been entered upon, and at least three attorneys in succession had undertaken to represent the defendant. The Court stated the defendant had flouted the rules of procedure and had shown no excusable neglect.

The final case cited by the State, that of Board of Education of Granite School District v. Cox, 384 P. 2d 806, 14 U.2d 385 (1963) involved a case where the defendant's only allegation of excusable neglect was that he believed the summons served upon him had to be signed by a judge. This Court held that Mr. Cox failed to show any excusable neglect. It is noteworthy, as cited in Appellant, Mr. Musselman's, Brief at p. 5 that the trial court did set aside the default as to Mrs. Cox on the basis that Mrs. Cox had shown excusable neglect by virtue of illness.

Serious illness involving hospitalization care is the basis of excusable neglect in the instant case. The Defendant/Appellant's Affidavit clearly demonstrates that he was hospitalized and was ill to the point that he was unable to handle his personal affairs. Mr. Musselman's illness and hospitalization are uncontradicted and undisputed. It is for this reason that the State and Respondent herein has made no argument at all concerning the Defendant/Appellant, Mr. Musselman's, showing of excusable neglect.

The State's main thrust is that Mr. Musselman, the Defendant/Appellant herein, failed to tender a meritorious defense. This has been discussed above and is a contention that is clearly without merit.

CONCLUSION

In conclusion, the Defendant/Appellant respectfully submits that the record before the Court in this case clearly establishes that the Defendant/Apellant's failure to answer was due to excusable neglect and the Defendant/Appellant tendered a meritorious defense to the lower court within the meaning of the law. The Respondent in its Brief attempts to

skirt and gloss over the real issues in this case and concentrate on other matters which will be litigated at the proper times and in the proper places but are not issues before this Court at this time. The record in this case clearly shows that the lower court abused its discretion in failing to set aside the Default Judgment in this case, and therefore the Defendant/Appellant's Appeal is well taken. The judgment of the lower court must be reversed to avoid continuing clear and manifest injustice.

DATED this 29th day of April, 1982.

Respectfully submitted.

FOX, EDWARDS & GARDINER

By
Richard I. Ashton

MAILING CERTIFICATE

This is to certify that a true and correct copy of the foregoing Appellant's Reply Brief was mailed to Leon A. Halgren, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, UT 84114 postage prepaid, this 29th day of April, 1982.