

1982

# State of Utah v. D. John Musselman and Linda Ann Coram : Brief in Support of Petition for Rehearing

Utah Supreme Court

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Richard I. Ashton; Attorneys for Appellant;

David L. Wilkinson; Leon A. Halgren; Attorneys for Respondent;

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Petition for Rehearing, *State v. Musselman*, No. 18161 (Utah Supreme Court, 1982).

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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

Plaintiff-Respondent, :

v. :

D. JOHN MUSSELMAN and :  
LINDA ANN CORAM, :

Defendant-Appellants :

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Case No. 18161

BRIEF IN SUPPORT OF PETITION FOR REHEARING

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

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FILED

SEP - 9 1982

Clerk, Supreme Court, Utah

AUG 30 1982

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
FOR 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-Appellants.

PETITION FOR  
REHEARING

Case No. 18161

Defendant-Appellant D. John Musselman by and through his counsel and attorneys of record pursuant to and in accordance with Rule 76 of the Utah Rules of Civil Procedure herewith petitions this Honorable Court for a rehearing on the above-referenced case.

The Court's opinion was filed bearing date of July 26, 1982. This Petition is timely made in accordance with rules.

Defendant-Appellant's Petition is predicated upon the following bases:

1. Defendant-Appellant was entitled to the relief sought inasmuch as excusable neglect was clearly shown. The trial court below implicitly conceded that excusable neglect was shown and this Honorable Court has, in its opinion, implicitly

found Mr. Musselman's conduct to have been excusable by virtue of his admittance to the hospital and his subsequent convalescence all of which was supported by the evidence and the record.

2. This Honorable Court's decision appears to have been primarily based upon the failure of the Defendant-Appellant to tender a meritorious defense. The Defendant-Appellant submitted his answer at the time of the original hearing in the court below, and tendered several meritorious defenses all of which were outlined specifically in Defendant-Appellant's Brief submitted previously to this Honorable Court. Under the law of the State of Utah as stated in numerous decisions, it is not necessary that a defense proved but only that a meritorious defense be tendered. This Honorable Court in its opinion has stated that the defendant must show facts in support of a meritorious defense. It is submitted that this Court has never held that a party must prove the facts of a defense in a motion to set aside a default judgment, but rather a party need only tender or assert facts, which if a proven, would be a meritorious defense.

3. In the Court's opinion, it is stated that the Defendant-Appellant concedes that an assignment was granted to the State of Utah for medical services payments. The Defendant-Appellant has at no time ever conceded that there was

such a written assignment and the Defendant-Appellant has never seen or been provided a copy of any such assignment.

4. The opinion of the Court states the Defendant-Appellant concedes a right of subrogation. The Defendant-Appellant in his tendered answer does not concede a right of the State for subrogation and, in fact, denies that the State has complied with statutory requirements which would entitle the State to a right of subrogation.

5. The Court in its opinion implies that the Defendant-Appellant improperly endorsed a certain draft payable to the Defendant-Appellant and the State of Utah in the sum of \$82,222.00. Never at any time has the State denied the right of the Defendant-Appellant to have endorsed the draft. There exists a controversy over the rights to the proceeds. That controversy is the subject of this litigation.

6. The Court in its opinion implies attorney misconduct on the part of Defendant-Appellant. Even assuming that such were the case, and such misconduct is emphatically denied, these proceedings are not the forum for determination of any appropriate relief. This Court has before it the single and sole matter as to whether or not the Defendant-Appellant will be denied his day in court on a substantive issue of facts and law.

7. There are only two issues presently and properly before this Court for appropriate disposition; (1) Is the Defendant-Appellant entitled to relief on the basis of excusable neglect? and (2) Did the Defendant-Appellant tender a meritorious defense?

It is respectfully submitted that the trial court and this Honorable Court have determined that the Defendant-Appellant is entitled to relief from a judgment by default in that his neglect to file an answer within the time prescribed by the Utah Rules of Civil Procedure was excusable. Moreover, the Defendant-Appellant has clearly tendered a meritorious defense. It is not encumbant upon the Defendant-Appellant to prove his tendered defense at this stage of the proceedings. He need only establish that he tendered facts, which if proven, would be a meritorious defense.

Respectfully Submitted this 30<sup>th</sup> day of August, 1982.

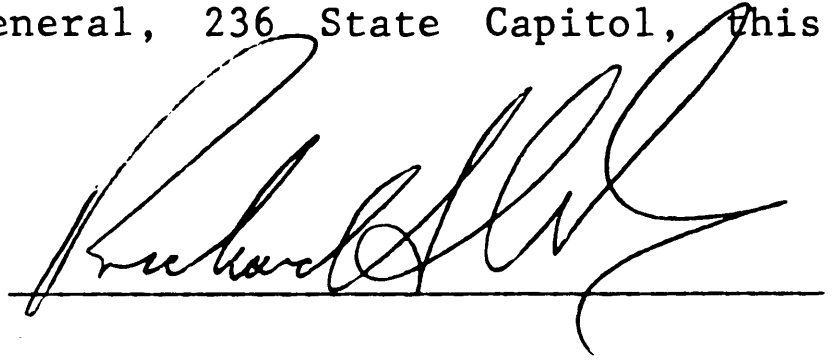
FOX, EDWARDS & GARDINER

By 

Richard I. Ashton

HAND-DELIVERY CERTIFICATE

This is to certify that a true and correct copy of the foregoing Petition For Rehearing was hand-delivered to Leon Halgren, Assistant Attorney General, 236 State Capitol, this 5<sup>th</sup> day of August, 1982.

A handwritten signature in black ink, appearing to read "Richard A. Hall", is written over a horizontal line. The signature is stylized and cursive.