

1982

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Richard I. Ashton; Attorneys for Appellant;

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

Recommended Citation

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

https://digitalcommons.law.byu.edu/uofu_sc2/2810

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH, by and through	:	
Utah State Department of	:	
Social Services,	:	
	:	
Plaintiff-Respondent,	:	Case No. 18161
	:	
v.	:	
	:	
D. JOHN MUSSELMAN and	:	
LINDA ANN CORAM,	:	
	:	
Defendant-Appellants	:	

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

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

Attorney 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

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION	1
RELIEF SOUGHT ON APPEAL	1
PRELIMINARY STATEMENT	2
POINT I - THIS COURT ERRED IN ASSUMING CONTROLLING FACTS WHICH ARE NEITHER CONCEDED, ADMITTED, NOR SUPPORTED BY THE PLEADINGS	4
POINT II - COUNT ONE OF THE PLAINTIFF'S COMPLAINT UPON WHICH PLAINTIFF'S DEFAULT JUDGMENT WAS ENTERED FAILED TO STATE A CLAIM AGAINST THE DEFENDANT D. JOHN MUSSELMAN .	7
POINT III - A MERITORIOUS DEFENSE WAS TENDERED IN PLAINTIFF'S FIRST CAUSE OF ACTION BASED SOLELY UPON THE MEDICAL BENEFITS RECOVERY ACT	11
POINT IV - THE PLAINTIFF MADE NO CLAIM IN ITS COMPLAINT BASED UPON ANY WRITTEN ASSIGNMENT	12
POINT V - NO CLAIM FOR RELIEF ON AN ALLEGED WRITTEN ASSIGNMENT EXECUTED BY DEFENDANT CORAM CAN BE MADE AGAINST DEFENDANT MUSSELMAN AND A MERITORIOUS DEFENSE TO A CLAIM BASED UPON AN ALLEGED WRITTEN ASSIGNMENT WAS SET FORTH IN MR. MUSSELMAN'S TENDERED ANSWER	13
CONCLUSION	15

CASES CITED

	<u>Page</u>
<u>Allstate Insurance Company v. Ivie</u> , 606 P.2d 1197 (Utah, 1980).....	15
<u>Lyon v. Hartford Accident and Indemnity Company</u> , 25 U.2d 311, 480 P.2d 739, (1971).....	15
<u>Security Adjustment Bureau, Inc. v. West</u> , 20 U.2d 292 437 P.2d (1968).....	8
<u>Transamerica Insurance Company v. Barnes</u> , 29 U.2d 101, 505 P.2d 783, (1972).....	14, 15

AUTHORITIES CITED

Section 55-15(d)-1 through 55-15(d)-17, Utah Code Annotated (1953, as amended)	11
---	----

BRIEF IN SUPPORT OF PETITION FOR
REHEARING

STATEMENT OF THE NATURE OF THE CASE

This is a rehearing on 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

The Court below entered its order denying the Defendant's Motion to Set Aside Default and Default Judgment. This Court affirmed the Lower Court in a per curiam opinion dated July 26, 1982.

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.

PRELIMINARY STATEMENT

The plaintiff State of Utah filed a two-count Complaint in the lower court against the defendant Coram and the defendant Musselman. Count I alleges a claim against the defendant Coram under the Medical Benefits Recovery Act. Count I alleges a right to certain settlement proceeds received by the defendant Coram from a medical malpractice action prosecuted by the defendant Musselman as defendant Coram's attorney. Count II alleges an alternative claim against the defendant Musselman on the basis of an existing attorney-client relationship between the defendant Musselman and the State of Utah.

The defendant Coram was never served with process and is not a party to these proceedings. Default judgment was entered against the defendant Musselman on Count I of the Complaint only. Count II of the Complaint was abandoned by the State of Utah and does not form a part of the Default Judgment.

The defendant Musselman timely filed a Motion to Set Aside the Default and Default Judgment entered against him. This motion was denied by the lower court, the Honorable G. Hal Taylor presiding.

There are two issues to resolve in determining whether or not the default judgment against Defendant Musselman

should be set aside. Those issues are: (1) was the conduct of the defendant Musselman in failing to timely answer excusable; and (2) did the defendant Musselman tender a meritorious defense to the Complaint?

In the first paragraph of the opinion, this Honorable Court set forth the defendant Musselman's basic contention with respect to his right to have the default judgment set aside due to excusable neglect. Mr. Musselman, at the time of the entry of default, had only a few days before been released as an inpatient from the Utah Valley Hospital, and was at home convalescing pursuant to the direction of his treating physician. This Court implicitly held Mr. Musselman's conduct to be excusable. The lower court likewise implicitly held Mr. Musselman's conduct to be excusable.

The only issue remaining before this Court for decision is whether or not Mr. Musselman in his tendered answer proffered a meritorious defense to Count I of Plaintiff's Complaint.

This Honorable Court affirmed the lower court's denial of defendant Musselman's Motion to Set Aside on the basis of two controlling facts set forth in paragraph 2 of the Court's opinion. First, this Honorable Court assumed that the defendant Musselman admitted a right of subrogation to the settlement proceeds of the defendant Coram pursuant to

the Medical Benefits Recovery Act. Second, the Court assumed that an assignment and therefore right of subrogation was admitted by the defendant Musselman.

Neither of these two controlling facts are admitted or conceded by the defendant Musselman.

Given that the two controlling facts assumed by this Honorable Court are disputed and at issue, it is clear that the tendered answer of the defendant Musselman sets forth several meritorious defenses to the plaintiff's Complaint. The defendant Musselman's Motion to Set Aside is well taken and he must be given his day in Court.

POINT I

THIS COURT ERRED IN ASSUMING CONTROLLING FACTS WHICH ARE NEITHER CONCEDED, ADMITTED NOR SUPPORTED BY THE PLEADINGS

A. The Defendant Musselman Did Not Admit or Concede to a Right of Subrogation

Paragraph 2 of the Court's opinion states that the defendant Musselman conceded a right of subrogation. The defendant Musselman in his tendered answer (R. 30) asserted that the plaintiff failed to comply with the statutory requirement set forth in the Medical Benefits Recovery Act. Those requirements include the filing of a verified lien statement. The Affidavit of Paul Badger, Clerk of the United States District Court for the District of Utah,

appended to defendant Musselman's principal brief, established that no verified lien statement as required by the Medical Benefits Recovery Act was ever filed by the State of Utah.

The defendant Musselman in his tendered answer alleged that the defendant Coram had not been made whole in her medical malpractice claim. It is a well-established principle of law in the State of Utah that there is no right of subrogation until an injured party is first made whole. This is more fully discussed in Point V below.

B. The Defendant Musselman has Never Conceded or Admitted an Assignment of Benefits to the State of Utah

Paragraph 2 of the First Count of Plaintiff's Complaint alleges that the defendant Coram made a written assignment of benefits to the State of Utah. There is no allegation that the defendant Musselman made any such written assignment.

In the answer tendered by Mr. Musselman, it was initially admitted that such an assignment by Coram was made. However, such admission was made in reliance upon the assertion by counsel for the State that an assignment had been given by defendant Coram and would be provided to the defendant Musselman. No assignment has ever been provided to the defendant Musselman, the defendant Coram, or to counsel for defendant Musselman. A request has been made

upon the State on several occasions for a copy of such assignment.

It is quite obvious that no judgment against Mr. Musselman can be supported by an assignment made by the defendant Coram. Moreover, the plaintiff did not plead any cause of action pursuant to the alleged written assignment even against the defendant Coram who was never served.

Moreover, even assuming a cause of action could be made out against the defendant Coram on the basis of a written assignment, the Sixth Affirmative Defense in the tendered answer of the defendant Musselman states a meritorious defense to that claim. The defendant Musselman alleged that the defendant Coram had not been made whole by the settlement proceeds she received in her medical malpractice claim. Subrogation is a matter of equity, and no right of subrogation exists until an injured party is made whole. See Point V.

The First Cause of Action of Plaintiff's Complaint is completely and solely based upon the alleged right of the plaintiff to recover pursuant to the Medical Benefits Recovery Act. The allegation of the existence of a written assignment by the defendant Coram is superfluous to Count I of Plaintiff's Complaint, and forms no part of the default judgment taken by the plaintiff against the defendant Musselman. This Court cannot uphold the default judgment

against the defendant Musselman upon the basis of a potential claim against the defendant Coram that was never pled.

POINT II

COUNT ONE OF THE PLAINTIFF'S COMPLAINT FAILED TO STATE A CLAIM AGAINST THE DEFENDANT D. JOHN MUSSELMAN.

A. Default Judgment was Based on Count I Only

It is clear from the District Court record that the default judgment in favor of the plaintiff was taken only on the First Cause of Action and not upon the Second Cause of Action. The First Cause of Action alleges an obligation of \$82,522.22 and contains a prayer for \$82,522.22. The Second Cause of Action, on the other hand, contains a prayer for damages of \$61,891.66 plus punitive damages in the amount of \$25,000.00. The default judgment makes no reference to any of the specific sums prayed for in the Second Cause of Action. On its face, it is clear the default judgment was entered on the First Cause of Action for the exact amount prayed in the sum of \$82,522.22.

B. Entry of Default on Count II Would Mandate Summary Reversal

In the case of Security Adjustment Bureau, Inc. v. West, 437 P.2d 214, 20 U.2d 292 (1968), this Court ruled and held that it was error for the District Court to award punitive damages without proof. This error in and of itself justified vacating Mr. West's default. In this case, the record reveals no evidentiary hearing or findings of fact. To find that the default judgment was entered on the Second Cause of Action would require the default to be set aside based upon Security Adjustment Bureau, supra.

C. Count I Fails to State a Claim for Relief Against Defendant Musselman

The essential factual allegations, paragraph by paragraph, in the plaintiff's First Cause are as follows: (1) the defendant Coram received Medicaid assistance from the State; (2) the defendant Coram made a written assignment of benefits to the State; (3) subrogation rights are provided in the Medical Benefits Recovery Act; (4) the defendant Musselman was retained by the defendant Coram as her attorney; (5) the defendants failed to comply with the notice provisions of the Medical Benefits Recovery Act; (6) the State gave written notice to the defendants of its alleged lien rights; (7) the defendant Coram settled her case in chief without the approval or consent of the State; (8) the defendant Musselman placed \$60,000.00 of said

settlement into a separate account and disbursed the balance of the settlement; and (9) there exists no attorney-client contract between the State and the defendant Musselman. (R. 2-5).

A review of the factual assertions stated in the plaintiff's First Cause of Action may suggest a claim against the defendant Linda Ann Coram, but certainly do not allege a claim against the defendant Musselman.

Paragraphs 5, 6 and 7 of the Plaintiff's First Claim allege that the defendant Coram, through her attorney, the defendant Musselman, failed to comply with the notice provisions set forth in the Medical Benefits Recovery Act. Mr. Musselman's tendered Answer denies these allegations. However, even assuming that the State could establish such disputed facts, the allegations of paragraphs 5, 6 and 7 do not state a claim against Mr. Musselman.

Paragraph 9 alleges that no contract of representation existed between the State of Utah and the defendant D. John Musselman. Such an allegation certainly does not form the basis of any claim for relief that could be granted by the Court against Mr. Musselman.

The only other paragraph that makes any reference to the defendant D. John Musselman is paragraph 8. Paragraph 8 alleges that Mr. Musselman gave "notice by telephone to the department that he had placed Sixty Thousand Dollars

(\$60,000.00) of said settlement funds in his trust account". The defendant Musselman admits giving such notice. The defendant Musselman, indeed, did place such funds in trust for his client, the defendant Coram.

The tendered Answer denies the existence of any valid lien of the plaintiff. The fact that Mr. Musselman placed funds in trust for his client does not form the basis of any claim for relief against the defendant Musselman.

D. The Defendant Musselman was an Attorney - Trustee Only for Defendant Coram, and No Judgment can be had Against Mr. Musselman Personally

The First Cause of Action of Plaintiff's Complaint pleads essentially that the defendant Musselman was counsel for the defendant Coram in a medical malpractice suit. The defendant Musselman for and on behalf of his client effected and obtained a \$150,000.00 settlement for the injuries the defendant Coram sustained. The Complaint further alleges that Mr. Musselman held \$60,000.00 of the defendant Coram's settlement funds in trust. The State finally alleges a lien on the defendant Coram's settlement funds.

From the Complaint, it is clear that the relationship of the defendant Musselman to the defendant Coram was one of attorney-client and trustee-beneficiary. It is elementary law requiring no citation that an attorney or trustee has no primary obligation for the debts of the client or beneficiary.

With respect to any debts of the defendant Coram, the liability of the defendant Musselman is limited to those assets held by him in trust for the defendant Coram. Moreover, his liability is not primary and a judgment cannot be had against him personally. In the event of a judgment against the defendant Coram, the assets of Coram held by Musselman could be garnished or attached under proper procedure.

The plaintiff's First Cause of Action, upon which the State's default is predicated, states no claim against Mr. Musselman and the default against Mr. Musselman must be set aside.

POINT III

A MERITORIOUS DEFENSE WAS TENDERED TO PLAINTIFF'S FIRST CAUSE OF ACTION.

The First Cause of Action is clearly based solely on the provisions of the Medical Benefits Recovery Act which was codified at §55-15(d)-1 through 55-15(d)-17, inclusive, Utah Code Ann. (1953, as amended). The defendant Musselman tendered an answer which alleged the failure by the plaintiff to comply with the statute. The tendered answer affirmatively alleged in the Third Defense that the statute sued upon by the State required a 25% reduction. The Fourth

Defense affirmatively alleges that the plaintiff had failed to comply with the statute and was entitled to no recovery whatsoever. The answer further alleged in the Fifth Defense that the plaintiff failed to comply with the statutory notice and filing requirements. The Sixth Defense alleged that the plaintiff is not entitled to recover the amount prayed for, for equitable reasons, in that the defendant Coram was not made whole in the settlement of her medical malpractice claim. These issues as to whether the plaintiff complied with the statutory requirements of the Medical Benefits Recovery Act are issues of fact properly raised in the defendant Musselman's tendered Answer and raise a meritorious defense.

POINT IV

THE PLAINTIFF MADE NO CLAIM IN ITS
COMPLAINT BASED UPON ANY WRITTEN ASSIGNMENT

The Plaintiff's Complaint states no claim whatsoever based upon any assignment of benefits by the defendant Coram. The only mention of any assignment is in paragraph 2 of the Plaintiff's Complaint. The defendant Musselman in his tendered Answer initially admitted paragraph 2 of the Plaintiff's Complaint only because of the positive assurance by plaintiff's counsel that such an assignment existed and

the promise by counsel to provide a copy thereof to the defendant Musselman. No such assignment was ever provided to defendant Musselman, and no such assignment has ever been provided to counsel for Mr. Musselman, although a copy has been requested on several occasions by counsel. It is now believed on information that such a written assignment does not exist and never has existed.

The Complaint does not state any claim based upon an assignment by defendant Coram of benefits. The First Cause of Action is completely and solely based upon the alleged right of the plaintiff to recover pursuant to the Medical Benefits Recovery Act.

The allegation of the existence of an assignment by defendant Coram is superfluous to Count I of Plaintiff's Complaint. This Court cannot uphold the default judgment upon the basis of a potential claim that was never pled.

POINT V

NO CLAIM FOR RELIEF ON AN ALLEGED WRITTEN ASSIGNMENT EXECUTED BY DEFENDANT CORAM CAN BE MADE AGAINST DEFENDANT MUSSELMAN AND A MERITORIOUS DEFENSE TO A CLAIM BASED UPON AN ALLEGED WRITTEN ASSIGNMENT WAS SET FORTH IN MR. MUSSELMAN'S TENDERED ANSWER

Even if the Plaintiff's Complaint were construed to contain a cause of action based upon a written assignment by

defendant Coram, that cause is obviously not against the defendant Musselman but could only be asserted against the defendant Coram. No claim for relief is stated or can be stated against the defendant Musselman by virtue of an alleged assignment of benefits executed by the defendant Coram.

Furthermore, an affirmative defense to any possible claim against defendant Coram based upon a written assignment of benefits is contained in the defendant Musselman's Sixth Affirmative Defense in his tendered Answer. The Sixth Defense provides that the plaintiff is not entitled to a recovery as prayed for by reason that the defendant Coram was not made whole or fully compensated for her personal injuries.

It is a well-established principle of law recognized by the State of Utah that an injured party is entitled to be made whole before any benefits received by the injured party are subject to subrogation. This principle of law was succinctly stated by this Honorable Court in Transamerica Insurance Co. v. Barnes, 29 U.2d 101, 505 P.2d 783, (1972):

Equitable principles apply to subrogation, and the insured is entitled to be made whole before the insurer may recover any portion of the recovery from the tortfeasor. If the one responsible has paid the full extent of the loss, the insured should not claim both sums, and the insurer may then assert its claim to subrogation. Subrogation is not a matter of right but may be invoked only in those circumstances where justice demands its

application, and the rights of the one seeking subrogation have a greater equity than the one who opposes him. Subrogation is not permitted where it will work any injustice to others. To entitle one to subrogation, the equities of one's case must be strong, as equity will, in general, relieve only those who could not have relieved themselves. The purpose of subrogation, as a creation of equity, is to effect an adjustment between parties so as to secure ultimately the payment or discharge of a debt by a person who in good conscience ought to pay for it. 505 P.2d at 786 (emphasis added)

The Court is referred to two other key cases setting forth the equitable principle of subrogation and the right of the injured party to first be made whole. Lyon v. Hartford Accident and Indemnity Co., 25 U.2d 311, 480 P.2d 739 (1971); Allstate Insurance Company v. Ivie, 606 P.2d 1197 (Utah, 1980).

The defendant Coram was not made whole in the settlement of her medical malpractice claim. A determination by a competent court is necessary to fix the proper amount, if any, to which the State may be entitled to recover pursuant to Utah law.

CONCLUSION

It is submitted and reiterated that there exists only two issues that are properly and appropriately before this Court. First, was the defendant Musselman's conduct and failure to answer excusable? The defendant Musselman at the

time of the entry of default had, only a few days before, been released as an inpatient from the Utah Valley Hospital, and was at home convalescing pursuant to the directives of his treating physician. Mr. Musselman's hospitalization and serious illness clearly constitutes excusable neglect. This Court and the lower court implicitly found the existence of excusable neglect.

There remains, therefore, only the second and final issue: did the defendant Musselman tender a meritorious defense? The defendant Musselman need not prove his tendered defense, rather the law of this State, as explicitly enunciated by this Honorable Court, provides that Mr. Musselman need only proffer facts which, if established, would be a meritorious defense.

This Court, in its earlier decision under date of July 26, 1982, based its affirmation of the Lower Court on certain admissions allegedly made by the defendant Musselman. Such admissions were not made by the defendant Musselman as explained in this brief. Mr. Musselman has clearly set forth facts which, if established, would be a meritorious defense to the plaintiff's claim. Indeed, as set forth herein, the defendant Musselman has proffered facts, which, if proven, would establish that the Complaint fails even to state a claim against him.

The most fundamental and basic premise of our judicial system is that every man is entitled to his day in court where he can present his case to an impartial tribunal. Mr. Musselman has been denied that fundamental constitutional right. This Court must right that wrong and set aside the default judgment against Mr. Musselman.

DATED this 9th day of September, 1982.

FOX, EDWARDS & GARDINER

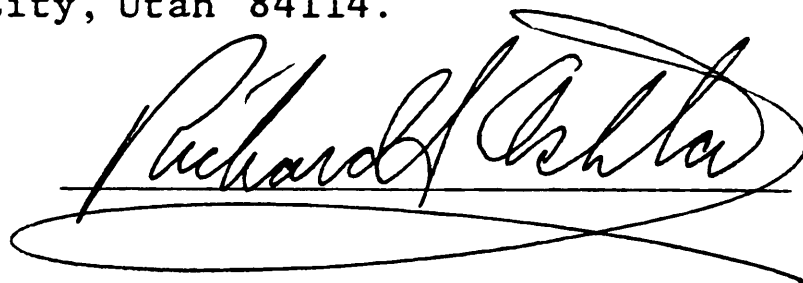
By


Richard I. Ashton

~~Attorneys for Appellant~~

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of September, 1982, I mailed a true and correct copy of the foregoing BRIEF IN SUPPORT OF PETITION FOR REHEARING, postage prepaid, to Leon A. Halgren, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114.

A handwritten signature in cursive script, reading "Richard H. Ashby", is written over a horizontal line. The signature is enclosed within a large, sweeping oval flourish.